



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 238 OF 2017

FORMERLY MERU ELC. 60 OF 2014

CHUKA UNIVERSITY.....PLAINTIFF

VERSUS

LUCIA NDURU & 2 OTHERS.....DEFENDANTS

RULING

1. This application is dated **30th November, 2017**. On **6th March, 2018**. I delivered a ruling which contains the pertinent issues. That ruling at paragraph 11 stated that further directions concerning the definitive disposal of the application would be given on **16th April, 2018** or on any other date convenient to the parties.

2. That Ruling is reproduced in full herebelow:

RULING

1. This application is dated **30th November, 2017** and the applicant has stated that it is predicated upon order 40 Rule 1, Order 51 Rule (1) of the Civil Procedure Rules 2010; Section 1A, 1B and 3A and Section 63(e) of the Civil Procedure Act and all other enabling provisions of law.

2. The application seeks the following orders:

a) That this application be certified urgent and be heard ex-parte.

b) That this honourable court be pleased to issue a conservatory order maintaining status quo to the effect that, there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Marembo/Rianthiga/293 by the defendants, their servants and/or agents pending the inter-partes hearing of this application.

c) That this honourable court be pleased to issue a conservatory order maintaining status quo to the effect that, there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Marembo/Rianthiga/293 by the defendants, their servants and/or agents pending the hearing and determination of this suit.

d) That an order of injunction do issue to restrain the defendants, their agents and/or servants from being or remaining or entering upon the suit property known as Land Reference No. Marembo/Rianthiga/293.

e) That costs of this application be provided for.

3. The application has the following grounds:

1. That the applicant is the registered owner/proprietor of Marembo/Rianthiga/293 the suit property measuring 500 acres having obtained the same through donations from the residents of Marembo and Rianthiga sub-location.

2. That the residents of Marembo and Rianthiga sub location donated 15% to become public land where schools, university, hospitals and an airstrip could be built, the applicant through the District Land Adjudication and Settlement Department of the Ministry of Lands facilitated the process and obtained a title number Marembo/Rianthiga/293 for the donated land.

3. That the residents who were living in the suit property were compensated by being given adjacent parcels of land bordering the University land through the District Land Adjudication and Settlement Department of the Ministry of Lands including the defendants herein.
4. That from the foregoing, the applicant is the registered owner and has absolute rights of ownership and their rights and interest are in terms of section 25(1) of the Land Registration Act No. 3 of 2010 are indefeasible.
5. That the applicant further asserts that being the legal registered owner, it has been in continuous possession of the same since the year 2011, when it was issued with a Title Deed in respect to the suit property.
6. That the parcels of land forming the suit property were not developed and not adjudicated, therefore had no land reference numbers prior to the acquisition by the applicant and that the applicant's Title is the first to be registered in Marembo and Rianthiga location.
7. That the defendants herein have illegally settled on a portion of the suit property approximately one (1) (sic), continue to suffer trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for production of charcoal.
8. That the defendants activities have a ripple effect on the adjacent land which includes a river that is facing an imminent dry up and not unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the applicant herein.
9. That the applicant is apprehensive that the defendants have no intention of taking care of the land because they possess no legal right over it and are merely taking advantage by wastefully using the suit property.
10. That the plaintiff/applicant is desirous of developing the suit property it has obtained the requisite blue prints for construction of the University but the same cannot be implemented due to the illegal encroachment by the defendants.
11. That the defendants were allocated parcel Nos. 88, 181, 242, 272, 286 and 316 as compensation for the 15% of land donated by their deceased father which they still occupy and at the same time encroach on the plaintiff's suit property.
12. That at the time of filing this suit there were no permanent structures on the suit property but the defendants without any colour of right have proceeded to construct semi-permanent structures on the said property.
13. That the defendants are benefiting out of the applicant's property against the equitable principle that "***Nemo Debet Locupletari ex aliena jactura***" (No one should be enriched by another's loss).
14. The applicant states that they engaged the services of surveyors to establish the beacons and boundaries of the parcels of land and after the surveyors confirmed the beacons for Land Reference No. Marembo/Rianthiga/293, the applicant fenced the same but the defendants interfered with the beacons and encroached into the suit land herein.
15. That the defendants never recorded any objection before the Land Adjudication Committee in respect of the adjudication register and therefore they cannot be heard to raise any complaint after the adjudication and the settlement was done procedurally. Equity aids the vigilant and (sic) the indolent.
16. That the parcel in dispute which the defendants adamantly claim to be theirs was part of the 15% which their deceased father gave up to form the suit property known as Land Reference Marembo/Rianthiga/293 for the purpose of Construction of Chuka University.
17. That the defendants insist that they are the rightful owners to the disputed parcel of land and (sic) have continued to further trespass and encroach on the applicant's Land Reference No. Marembo/Rianthiga/293 thereby erecting both permanent and semi-permanent structures.
18. That the defendants have denied the plaintiff/applicant access to the disputed parcel of land which is within the suit property thus the defendants unlawful actions have deprived the plaintiff/applicant of its Constitutional Right to property.
19. That the plaintiff/applicant has been deprived of the use and enjoyment of the suit property as a result of the said trespass by the defendants.
20. That the defendants have trespassed on the suit property by erecting structures thereon and that, notwithstanding the plaintiff/applicant's repeated demands, have refused to vacate or deliver possession of the suit property to the plaintiff/applicant.
21. That the applicant deserves to take over management and occupation of their property and develop the same and the failure by the defendants to give vacant possession of the said property is causing untold misery to the applicant as their projects are stalled and they cannot develop the disputed parcel of land within the suit property.
22. That it is in the public domain that illegal encroachment/land grabbing of school property has gained notoriety and/or is rampant and not unless the court moves in to arrest the situation the plaintiff/applicant will be illegally deprived of the use of the suit

property.

23. That the plaintiff/applicant has come to this court to protect its Constitutional right to protection of property and it is therefore in the interest of justice that the orders sought in the application herein be granted.

DATED AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2017

BRIAN OTIENO & COMPANY DVOCATES

ADVOCATES FOR THE PLAINTIFF/APPLICANT

4. The application is supported by the Supporting Affidavit of Prof. Stanley M. Kagwanja sworn on 30th November, 2017 which states:

I, PROF. STANLEY M. KAGWANJA a resident of Chuka of care of Post Office Box Number 109-60400 CHUKA in the Republic of Kenya do hereby make oath and state as follows:

1. That I am the Deputy Vic-Chancellor in charge of Administration, Finance, Planning and Development at the Applicant's Institution and well versed with the facts and the matters pertaining to this case with authority to swear this affidavit, and such I am competent to do so on behalf of Chuka University.

2. That I know for a fact that the applicant is the registered owner of Land Reference Number MAREMBO/RIANTHIGA 293 (herein after referred to as "the suit land") located in Tharaka Nithi County having obtained the same through donations from the residents of Marembo and Rianthiga sub location.

(Annexed hereto and marked as "SMK 1" is a true copy of the title deed to the suit land.

3. That I know from my own personal knowledge that the residents of Marembo and Rianthiga sub location donated 15% to become public land where schools, university, hospitals and an airstrip could be built. The plaintiff/applicant through the District Land Adjudication and Settlement Department of the Ministry of Land s facilitated the process and obtained a title number Marembo/Rianthiga/293 for the donated land.

4. That I know for a fact that the applicant acquired the suit land, which measures to 500 acres through unanimous donations from the residents of Marembo and Rianthiga sub-location after a community meeting.

(Annexed hereto and marked "SMK 2" are true copies of various minutes of meetings held between the residents of Marembo/Rianthiga sub location and the university with regards to donation and compensation of the land).

5. That I know from my own personal knowledge that the residents who were living in the suit property were compensated by being given adjacent parcels of land bordering the university land through the District Land Adjudication and Settlement Department of the Ministry of Lands including the defendants herein.

6. That I know for a fact and reasoning form the foregoing, the applicant being the registered owner of the suit property has absolute rights of ownership and their rights and interests are in terms of section 25(1) of the Land Registration Act No. 3 of 2012 are indefeasible.

7. That I know for a fact that the plaintiff/applicant being the legally registered owner of the suit land, has been in continuous possession of the same since the year 2011, when it was issued with a title deed in respect to the suit property.

8. That I know from my own personal knowledge that the parcels of land forming the suit property were not developed and not adjudicated, therefore had no land reference numbers prior to the acquisition by the plaintiff/applicant and that the applicant's title is the first to be registered in Marembo and Rianthiga location.

9. That I know from my own personal knowledge that the defendants herein have illegally settled on a portion of the suit property, continue to further trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for a production of charcoal.

10. That I know from my own personal knowledge that the defendants activities have had a ripple effect on the adjacent land which includes a river that is facing an imminent dry up and not unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the plaintiff/applicant herein.

11. That I know for a fact that the defendants have no intention of taking care of the suit property because they possesses no legal right over it and are merely taking advantage by wastefully using the suit property.

12. That I know from my own personal knowledge that the plaintiff/applicant is desirous of developing the suit property. It has obtained the requisite blue prints for construction of the University but the same cannot be implemented due to the illegal encroachment by the defendants.

13. That I know for a fact that the defendants were allocated parcel Nos.88, 181, 242, 272, 286 and 316 as compensation for the 15% of land donated by their deceased father which they still occupy and at the same time encroach on the plaintiff's suit property.
 14. That I know for fact that at the time of filing this suit there were no permanent structures on the suit property but the defendants without any colour of right have proceeded to construct semi-permanent structures on the said property.
 15. That I have been duly advised by the able advocates on record for the plaintiff/applicant whose advice I verily believe to be true that the defendants are benefiting out of the plaintiff/applicant's property against the equitable principle that "*Nemo Debet Locupletari ex aliena jactura*" (No one should be enriched by another's loss).
 16. That I know for a fact that the plaintiff/applicant engaged the services of surveyors to establish the beacons and boundaries of the parcels of land and after the surveyors confirmed the beacons for Land Reference No. Marembo/Rianthiga/293, the applicant fenced the same but the defendants interfered with the beacons and encroached into the suit land herein.
 17. That I have been duly advised by the able advocates on record for the plaintiff/applicant whose advise I verily believe to be true that the defendants as required by law, never recorded any objection before the Land Adjudication Committee in respect of the adjudication register and therefore they cannot be heard to raise any complaint after the adjudication and the settlement was done procedurally. Equity aids the vigilant and (sic) the indolent.
 18. That I know for a fact that the parcel of land in dispute which the defendants adamantly claim to be theirs was part of the 15% which their deceased father gave up to form the suit property known as Land Reference Marembo/Rianthiga/293 for purposes of construction of Chuka University.
 19. That I know from my own personal knowledge that the defendants who claim to be the rightful owners to the disputed parcel of land, continue to further trespass and encroach on the plaintiff/applicant's land Reference No. Marembo/Rianthiga/293 thereby erecting both permanent and semi-permanent structures.
 20. That I know for a fact that the defendants have denied the plaintiff/applicant access to the disputed parcel of land which is within the suit property thus the defendants unlawful actions have deprived the plaintiff/applicant of its Constitutional Right to property.
 21. That I know of my own knowledge the plaintiff/applicant has been deprived of the use and enjoyment of the suit property as a result of the said trespass by the defendants.
 22. That I know for a fact that the defendants have trespassed on the suit property by erecting structures thereon and that, notwithstanding the plaintiff/applicant's repeated demands, have refused to vacate or deliver possession of the suit property to the plaintiff/applicant.
- (Annexed herewith and marked as "SMK 3" are true copies of the vacation demands by the applicant and the Ministry of Lands).
23. That the plaintiff/applicant deserves to take over management and occupation of their property and develop the same and the failure by the defendants to give vacant possession of the said property is causing untold misery to the applicant as their projects are stalled and they cannot develop the disputed parcel of land within the suit property.
 24. That I know from my own personal knowledge that it is in the public domain that illegal encroachment/land grabbing of school property has gained notoriety and/or is rampant and not unless the court moves with speed to arrest the situation the plaintiff/applicant will be illegally deprived of the use of the suit property.
 25. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that on a balance of convenience the applicant being the registered owner of the parcel of land, the court can restrain the defendant from carrying out any act that would defeat the preservation of the suit property.
 26. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that a temporary injunction may be issued in a suit to preserve property in dispute in the suit or the rights of parties under determination in a suit pending the disposal of the suit in order to preserve the subject matter.
 27. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that where a person in this case the defendants having built some development on the suit plot, they should remain so with no further development therein.
 28. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that the purpose of an injunction is to conserve the subject property pending the determination of a suit concerning the property. It is usually granted to prevent disposal or alienation and/or to prevent wastage and/or damage of the suit property.
 29. That I have been duly advised by the advocate on record for the plaintiff/applicant whose advice I verily believe to be true that the general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided in a trial.
 30. That applicant prays for the relief sought in order to meet the ends of justice and safeguard the rule of law.

31. That what that is deponed to herein is true to the best of my knowledge, information and belief save where otherwise stated and sources thereof disclosed.

5. The application has been opposed vide the Replying Affidavit sworn by Mutembei Nduru, the 3rd defendant, who swears as follows:

1. That I am a male adult of sound mind, the 3rd defendant/respondent herein thus qualified and competent to make and swear this affidavit on my own behalf and on behalf of my co-defendants/respondents and whose authority I have so to do.
2. That I have read and understood the contents of the plaintiff/applicant's application dated 30.11.2017 together with the supporting affidavit thereto and it is in response thereto that I now make and swear this affidavit.
3. That the prayers being sought for by the plaintiff/applicant in the said application are unmerited and incapable of being granted at this stage of the proceedings as doing so would be against the law.
4. That the plaintiff/applicant is in actual fact seeking for an eviction order against the defendants/respondents but which in the said application is disguised as an order of injunction.
5. That I and my co-defendants/respondents are not trespassers upon the plaintiff/applicant's land parcel No. MAREMBO/RIANTHIGU/293 as being alleged or at all and neither have I and my co-defendants respondents illegally entered into or encroached into the plaintiff/applicant's land parcel as being alleged or at all.
6. That the contents of the supporting affidavit, sworn by one Prof. STANLEY M. KAGWANJA and filed alongside the said application is full of falsehood and distortion of facts aimed at misleading this honourable court and the same should be rejected.
7. That it is not true, as being alleged, that our deceased father donated land to the plaintiff/applicant as alleged or at all and neither is it true that our deceased father was offered and/or compensated with another land parcel for his land as alleged or at all and the said allegations are untruthful and intended to mislead the court.
8. That our deceased father, one SAVERIO NDURU MUGIRA (deceased), was and still is the bonafide and legitimate owner of that land parcel known and/or described as plot No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION which is ancestral land inherited by our father from our grandfather.
9. That I and my co-defendants/respondents were born and brought up on the said land parcel as was my deceased father who was similarly born and brought up on the said land parcel and upon demise his, remains were interred on the said land parcel.
10. That the family has been in actual ownership, possession and use of the said land parcel for ages, going through various generational inheritance and that I and my co-defendants/respondents are presently and legitimately in actual ownership, possession, occupation and use of the said land parcel having inherited the same from our deceased father.
11. That in the longevity of our possession and occupation, the said land parcel has over the years been extensively developed and improved by construction of several houses thereon and undertaking of various other projects and developments thereon over a period of time and it is not true, as being alleged by the plaintiff/applicant, that houses are being constructed on the said land parcel at the moment by myself or any of my co-defendants/respondents herein.
12. That some of the houses that are on the said land parcel were built by our forefathers, even before we were born and others have subsequently been built thereon during our time but no new construction is presently in progress on the said land parcel as being alleged by the plaintiff/applicant in his affidavit or at all.
13. That it should be clarified herein that, the said land parcel referenced as PLOT NO. 242 MEREMBO/RIANTHIGA ADJUDICATION SECTION exclusively belongs to our deceased father, one SAVERIO NDURU MUGIRA and the same has never been the property of the plaintiff/applicant and neither is it part of the plaintiff/applicant's land parcel No. MAREMBO/RIANTHIGA/293 as alleged or at all.
14. That as earlier stated, my deceased father was the bonafide and legitimate owner of the said land parcel No. 242 MAREMDO/RIANTHIGA ADJUDICATION SECTION, measuring approximately 30 acres and that the same was never part of the land donated by the community to the plaintiff/applicant as being alleged or at all.
15. That the plaintiff/applicant has just recently unlawfully and illegally caused our said land parcel No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION to be illegally merged and/or annexed into and/or as part of its land parcel No. Marembo/Rianthiga/293 and has been threatening to evict me and my co-defendants/respondents from the said land parcel while fully aware that our deceased father never donated land to the plaintiff/applicant herein and neither was he (our deceased father) compensation (sic) for any land as being alleged or at all.
16. That it is a known fact, and it has been pleaded in the suit herein, that the merging or annexing of our land parcel No. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION into and/ or as part of the plaintiff/applicant's land parcel No. MAREMBO/RIANTHIGA/293 was done fraudulently, illegally, unprocedurally and unlawfully as our deceased father's consent or permission was never sought for or obtained and neither was our deceased father compensated for the said land as per the requirements of the law that provides for compulsory acquisition of land or property.

17. That I and my co-plaintiffs/respondents have been in actual ownership, possession occupation and use of the said 30 acres of land referenced as PLOT NO. 242 MAREMBO/RIANTHIGA ADJUDICATION SECTION and the plaintiff/applicant has never at any given point in time been in actual possession, occupation or use of the said portion and the allegations contained in the supporting affidavit filed alongside the application dated 30.11.2017 are false, deceitful, dishonest and misleading.

18. That in view of the above, it follows that the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017 are incapable of being granted as doing so will be against the law and will occasion me and my co-defendant/respondent together with our families to undergo untold suffering and hardship and we stand to suffer irreparable damage.

19. That the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017 have an effect of evicting me and my co-defendant/respondent and our families from our ancestral land, and although the same have been disguised as injunctive orders, their effect, if granted, will go against the law and as such the same should not be granted.

20. That the facts, nature and circumstances of this case are not in favour of granting of the orders being sought for by the plaintiff/applicant vide the application dated 30.11.2017.

21. That I now make and swear this affidavit in opposition to the plaintiff/applicant's application dated 30.11.2017.

6. Parties canvassed this application by way of written submissions. The defendants have filed a defence denying the plaintiff's claim that they have encroached or trespassed into the plaintiff's land. They have also filed a counter-claim seeking cancellation of the plaintiff's/applicant's title for Land Parcel No. MAREMBO/RIANTHIGA/293 or for rectification of the records thereof so as to exclude land parcel No. 242 MAREMBO/RIANTHIGA/ADJUDICATION SECTION from the plaintiff/applicant's alleged land parcel and to reinstate it as a separate parcel of land.

7. The parties' submissions contain diametrically opposed assertions which are by and large in congruence with the affidavits they have filed in support of their positions.

8. When dealing with interlocutory applications we do not need to reinvent the wheel. The Court of Appeal in the classic case of *Mbuthia Versus Jimba Credit Corporation and Another [1988 KLRI]* eruditely opined as follows:

“The correct approach in dealing with an application for an injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

I do not wish to make such a mistake.

9. I opine that the cases cited by the plaintiff are good authorities in their circumstances. However, no one case can be congruent in facts and circumstances, to a mathematical certitude *vis-a-vis* another.

10. I find it necessary to issue the following orders:

1.The parties, their advocates, the District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/RIANTHIGA ADJUDICATION SECTION and this court's Chief Executive Officer to visit the site where the disputed parcel or parcels are situated **AND** to give a report to court within 30 days of today which report will highlight:

a) The present status of the suit land including occupation, natural features such as rivers, trees and cultivation.

b) For the DLASO, especially, he will give details concerning how the land came to be in the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of alternative land.

c) Any other material facts.

11. Further directions regarding the definitive disposal of this application will be given on 16th April, 2018 or on any other day convenient to the parties to be agreed upon on 6th March, 2018 but not beyond the 30th of April, 2018.

12. Interim orders are extended in terms of the provisions of section 63, CPA.

13. In the interim, costs of the visit, eventually to be in the cause, to be funded by the Plaintiff/Applicant.

14. It is so ordered.

Delivered in open court at Chuka this **6th day of March, 2018** in the presence of :

CA: Ndegwa

Brian Otieno for the Applicant

Lucia Nduru – 1st defendant

Mutembei Nduru – 3rd defendant

P. M. NJOROGE

JUDGE

3. At paragraph 10 of the ruling delivered on the **6th day of March, 2018**, I issued the following orders:

1.The parties, their advocates, the District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/RIANTHIGA ADJUDICATION SECTION and this court's Chief Executive Officer to visit the site where the disputed parcel or parcels are situated **AND** to give a report to court within 30 days of today which report will highlight:

- a) The present status of the suit land including occupation, natural features such as rivers, trees and cultivation.
- b) For the DLASO, especially, he will give details concerning how the land came to be in the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of alternative land.
- c) Any other material facts

4. The apposite reports were filed and presented to the court as directed. The two reports are reproduced in full herebelow:

A

LAND ADJUDICATION OFFICER'S REPORT

TO:

ENVIRONMENT & LAND COURT SUIT NO. 238 OF 2017 CHUKA UNIVERSITY VS LUCIA NDURU, KARIUKI NDURU AND MUTEMBEI NDURU

Reference is made to the above matter and a ruling made by Hon. P. M. Njoroge Judge delivered on **6th march, 2018**.

The report in accordance to the above order section (b) [the DLASO to give details concerning how the land came to be in the ownership of the litigants and clarity if and how the defendants were compensated by way of allocation of alternative land.

The plaintiff in this case Chuka University is the registered owner of Parcel No. 293 Marembo/Rianthiga registration unit.

The origin of this land which is totaling to 500 acres was as a result of several meetings held by the local leaders to award the University 500 acres and other public utilities 20 1.5 acres and through a percentage cut of 15% from all the land owners in Marembo and Rianthiga sub locations refer to the attached apx 1. (Committee meeting for all leaders from Marembo and Rianthiga sub locations held at Marembo Primary School on **22nd August, 2008**. In attendance was Mr. Severino Nduru Mungiria (now deceased), the husband of the 1st defendant Lucia Nduru, father to the 2nd and 3rd defendants. In this meeting, Min/3/8/2008: agreement was that individual plots shall be slightly pushed from the original position.

When Adjudication started all parties were involved and the land owners who were in the land that was demarcated for the University parcel No. 293 were requested to shift to their alternative land (the defendant in this case was included). As per the Community Resolution refer apx. 1 and Apx II.

The defendants were compensated and awarded parcel Nos. 88, 181, 242, 316 and 272 (which he transferred to Patrick Kirimi) (Refer to the attached copies of Adjudication Records Apx III).

Attached please are the copies of Apx I, II and III.

REEPOR COMPILED BY DIANA N. MBUGU

LAND ADJUDICATION OFFICER/INCHARGE

MERU SOUTH / MAARA SUB COUNTIES

B

TO:

CHUKA HIGH COURT,

ELC COURT,

P. O. BOX 73-60400,

CHUKA.

REPORT ON SITE VISIT ON 23RD MARCH, 2018

A. INTRODUCTION

This report is prepared pursuant to a court order issued on 6th March, 2018. Following the Ruling made by Hon. P. M. Njoroge. The details of the order of the court was "*inter alia*" as follows:-

1. The parties, their advocates, the District Land Adjudication and Settlement Officer (DLASO) IN CHARGE OF MAREMBO/RIANTHIGA adjudication section and this court's Chief Executive Officer to visit the site where the disputed parcel or parcels are situated AND to give the report to court within 30 days of today which report will highlight;
 - a) The present status of the suit land including occupation, natural features such as rivers, trees and cultivation.
 - b) For the DLASO, especially, she will give details concerning how the land came to the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of alternative land.
 - c) Any other material facts.
2. Further directions regarding the definitive disposal of this application will be given on 16th April, 2018 or any other day convenient to the parties to be agreed upon on 6th March, 2018 but not beyond the 30th of April, 2018.
3. Interim orders are extended in terms of the provisions of Section 63 Civil Procedure Act.
4. The interim costs of the visit eventually to be in the cause, to be funded by the Plaintiff/Applicant.
5. It is so ordered.

In pursuance of the order therefore, I visited the site where the disputed parcel of land is situated, together with the District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/RIANTHIGA ADJUDICATION SECTION, accompanied with two officers, parties and their advocates on **23rd March, 2013**.

On arrival we met the parties waiting for us. I assembled them and they introduced themselves. The meeting started with a word of prayers from one of volunteers at 11.30am. I read the contents of the order made on 6th March, 2018 to the parties and explained to them the purpose of our visit, was to get the facts on the ground, as concern the present status of the disputed land which included occupation, natural features such as rivers, trees and cultivation.

- a) For the DLASO especially she will give details concerning how the land came to be in the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of the alternative land.
- b) Any other material facts.

Those present in the entourage were:-

1. Johnson Ojwang - C.E.O/Court Administrator – Chuka Law Courts
2. Diana Nyambura - DLASO In charge Marembo/Rianthiga Adjudication Section accompanied by two officers from her office namely:-
 - (i) Lydia
 - (ii) Mwari
3. Michael for Brian Otieno Advocates for plaintiff
4. Kaimba for Mithiga & Co. Advocates for defendants
5. Professor Njoka Vice Chancellor Chuka University – plaintiff

6. Lucia Nduru – 1st defendant
7. Kariuki Nduru – 2nd defendant
8. Mutembei Nduru – 3rd defendant
9. Mutegei brothers to 2nd and 3rd defendants and sons to the
10. Gilbert Mwaniki first defendant

PREFACE

Mr. Michael & Co. Advocates for plaintiff

Mr. Kaimba & Co. Advocates for defendant

Professor Njoka the Vice-chancellor of Chuka University, who represents the interest of Plaintiff gave a brief history of the suit property and how it came to be acquired, registered and ended up in the lands hands of the plaintiff.

He started by explaining to us that;

- The residents of Marembo/rianthiga sub location requested Egerton University to open and establish a branch within the area to be used as Research Centre. Through the initiative of Chief Gitari (now deceased) the residents of Marembo/Rianthiga sub location donated 15% to become public land where schools, university, hospital and airstrip could be built.
- Various meetings were held between the local community of Marembo/Rianthiga sub location and Chuka University where residents unanimously donated approximately 500 acres of land to the plaintiff.
- The residents who included the defendants who were living in suit property were compensated by being given alternative parcels of the land adjacent to the parcels of land bordering the University Land through the District Land Adjudication and Settlement Department of the Ministry of Lands.
- To speed up the process, Chuka University in conjunction with the District Land Adjudication Resettlement Department initiated and facilitated the adjudication process which resulted to issuance of the title deed No. Marembo/Rianthiga/293 to plaintiff and the title deeds of other parcels of land of the families who were processed alongside the plaintiff's title deed.
- All other families have moved and gone to their alternative compensated parcels of land except the defendants who have refused to get out from the plaintiff's parcel of land despite being allocated land parcels No. 88, 181, 242, 272, 286 and 316 as compensation for 15% of the land donated.
- Land title No. Marembo/Rianthiga/293 measuring approximately 500 acres registered under the name of Chuka University was shown to us. The defendants were the only family who refused to move out from the plaintiff's land hence necessitated us to come to court for legal redress. That is all.

After a brief preview, we decided to take a walk to get the facts. The plaintiff showed us around the fence, beacons and the boundary the lower and the upper side of river Ruguti, passing across the plaintiff's land parcel No. Marembo/Rianthiga/293. We were also shown several developments undertaken by the plaintiff immediately after they obtained the title deed in 2011.

DEVELOPMENTS INITIATED BY THE PLAINTIFF

- Ø Installation of electricity & water
- Ø Construction of hospital, and school – now operational for the residents
- Ø Opening up of access roads leading to the said land
- Ø Construction of permanent offices and staff houses.
- Ø Grazing of livestock (cows, goats and sheep)

At around noon our team moved and converged at the site where the disputed piece of land is situated. We found the defendants waiting for us at the site. I took the opportunity once more to read the order made by the court on **6th March, 2018**, explained the purpose of our visit, the defendants gave us part of their stories as concerns the disputed piece of land, by saying that we have been living here since time immemorial.

- Ø 1st defendant found her late husband living in the place during their marriage way back in late 60's.

Ø The 2nd and 3rd defendants stated that they have been living in the said piece of land since childhood.

Ø They took us around showed us the un completed mud houses for their last born known as Mutegi.

Ø Newly built semi permanent house for their second last born in the family called Gilbert Mwaniki.

Ø Three temporary old mud houses belonging to the 1st, 2nd and 3rd defendant.

Ø Grave yard.

Ø Cowshed

Ø Tobacco and maize plantation

Ø Charcoal burning holes

While we were at the site I asked the defendants the following questions:-

Q. 1. Were you aware that the residents of Marembo/Rianthiga Sub Location donated land to the University?

ANS: The defendants said Yes

Q2. Do you know if this land including where you are residing at the moment was registered under the name of Chuka University?

ANS: The defendants – not aware

Q 3. Do you have the title deed for the land and particularly this piece of land where you are living?

ANS: Defendant – No.

Q.4. Are you aware that most parcels of land around here have title deeds?

ANS: Defendant – no.

Q5: Were you allocated alternative parcels of land as compensation of 15% donation to the university land?

ANS: Defendants – Yes

Q.6. Why have you not moved there?

ANS: Defendants – the land is uninhabitable as it is situated at the hills.

Q.7.: Have you ever bothered to go to the Land registry to check on your title deeds?

ANS: Defendants – no.

Q.8: Are you aware if you have other parcels of land allocated elsewhere as compensation for donated land to plaintiff?

ANS: The defendants – not aware

From there our team was led by the defendants to their other parcel of land which they refer as ancestral land No. MAREMBO/RIANTHIGA/242 inherited from their grandfather where they buried their late father.

When asked why they should not move to the ancestral land, they responded by saying it is only meant for graveyard and cultivation.

a) Plaintiff's side; Present status

Ø Land parcel NO. MAREMBO/RIANTHIGA/293 measuring approximately 199.79 Ha ie about 500 acres is registered under the name of the plaintiff.

Ø The beacons and boundary are clearly marked.

Ø The plaintiff is in possession of the suit land property and fenced.

- Ø There is grazing of livestock by the plaintiff
- Ø Installation of electricity and water
- Ø Construction of hospital and schools operational
- Ø Opening up of access road leading to the land by the plaintiff
- Ø Construction of permanent offices and staff houses in existence.

b) Defendants' side – present status

- Ø No documentary evidence to prove ownership
- Ø One un completed mud house for the last born
- Ø One semi permanent house for the 2nd last born
- Ø Three old mud house belonging to the 1st, 2nd and 3rd defendants respectively
- Ø Cowshed
- Ø Grave yard

Trees:

There are indigenous trees within the said land and especially near river Ruguti which requires conservation.

Cultivation

- Small scale farming of maize and tobacco plantation
- Minimal cultivation

OBSERVATION

1. Land parcel No. MAREMBO/RIANTHIGA/203 is registered under the name of the plaintiff.
2. No documentary evidence to prove ownership of the land by the defendants
3. Construction of permanent offices and staff houses by the plaintiff
4. Installation of electricity and water by the plaintiff
5. Construction of hospital and schools operational by the plaintiff
6. Grazing of livestock by the plaintiff
7. Opening of access roads by the plaintiff
8. Fence, beacons and boundary by the plaintiff
9. Destruction of the fence, indigenous trees, burning of charcoal across river RUGUTI and interference of the boundary and beacons by the defendants.
10. One semi-permanent house newly built by the 2nd last born by the defendant.
11. Three old temporary mud houses by the 1st, 2nd and 3rd defendants
12. Small scale farming of tobacco and maize plantation by the defendants.
13. Cowshed by the defendants

14. Temporary pit latrine by the defendants

15. Old grave by the defendant.

FINDINGS

On visitation, observation, facts gathered from ground, documentary evidence, and the above mentioned developments, the suit property land parcel No. MAREMBO/RIANTHIGA/293 measuring approximately 500 acres is owned by the plaintiff.

Dated this 26th day of March, 2018

REPORT PREPARED AND COMPLIED BY:

JOHNSON OJWANG

CHIEF EXECUTIVE OFFICER/COURT ADMINISTRATOR,

CHUKA LAW COURTS.

5. The Land Adjudication Officer's report has annexed to it the following documents:

a) Appendix I – Minutes of Committee Meeting For All Leaders From MAREMBO AND RIANTHIGA SUB-LOCATIONS held at Marembo Primary School on **22nd August, 2008**. The name of Saverio Nduru Mugira from whom the defendants claim part of the suit land is number 8 in the Attendance list.

b) Appendix II – MINUTES OF A MEETING OF ALL LEADERS FROM MAREMBO AND RIANTHIGA SUB LOCATIONS OF KITHANGANI LOCATION HELD AT MAREMBO PRIMARY SCHOOL ON **10.9.2008**.

The name of SALERIO NDURU (op.cit) appears in the attendance list as number 160.

c) Appendix contains Adjudication Records as follows:

(1) No. B5502242 – showing Severio Nduru Mugiri as recorded owner of L.P. MAREMBO/RIANTHIGA/242 measuring 5.41 Hectares.

(2) No. B550286 – showing Saverio Nduru Mugira and Peter Mwoca Kanga as recorded owners of L.P. MAREMBO/RIANTHIGA/256 measuring 1.51 Hectares.

(3) B550181 – showing Severio Nduru Mugira as recorded owner of L.P MAREMBO/RIANTHIGA/181 measuring 0.25 Hectares.

(4) B550088 showing Severio Nduru Mugira as recorded owner of L.P MAREMBO/RIANTHIGA/88 measuring 2.83 Hectares.

(5) B550316 showing Severio Nduru Mugira as recorded OWNER of L.P. MAREMBO/RIANTHIGA/316 measuring 7.26 Hectares.

(6) B550272 showing Patrick Kiri Mutegi as registered owner of L.R MAREMBO/RIANTHIGA/272 measuring 0.67 Hectares. The land adjudication Officers report indicates that Severio Nduru Mugira transferred this parcel of land to Patrick Kiri Mutegi.

6. On **16th April, 2018**, this court issued the following orders:

(a) Parties be supplied with copies of the 2 reports at their costs, forthwith.

(b) Parties granted 7 days to submit their comments/submissions concerning the reports.

(c) By consent, directions on **24.4.2018**

7. On **24.4.2018**, the plaintiff's advocate served his comments/submissions upon Mr. Manasses Kariuki, the defendants' advocate, in court. Mr. Kariuki asked the court to give him one week to peruse the plaintiff's comments/submissions. The court issued the following orders:-

a) The defendants are granted 7 days to peruse the plaintiff's submissions, and if they find it necessary to respond to them, to serve their response appropriately and at least 3 days before the next date for directions, on which date the court will pronounce itself on when to deliver the apposite ruling.

b) Directions on **8.5.2018**.

8. On **8th May, 2018**, the defendant's advocate was not in court. Lucia Nduru (the 2nd defendant and Mutembei Nduru (the 3rd defendant) were in court. Lucia Nduru informed the court that the 2nd defendant was not in court because he was sick.

9. Mr. Otieno decried that the defendant's advocate had not served him with any documents as had been ordered by the court on **24th April, 2018**. He asked the court to fix a date for the apposite ruling and asked that thereafter the court gives a date for directions if the ruling did not close the entire suit.

10. The plaintiff's submissions dated **23rd April, 2018** concerning the reports filed and presented to court by the Land Adjudication Officer and this Court's Chief Executive Officer are reproduced herebelow in full:-

PLAINTIFF'S SUBMISSIONS IN RESPECT TO THE REPORTS DATED 26TH MARCH, 2018

The applicant filed a Notice of Motion dated **30th November, 2017** seeking orders that:

- a) That this application be certified and be heard ex-parte.
- b) That the honourable court be pleased to issue a conservatory order maintaining status quo to the effect that there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Marembo/Rianthiga/2923 by the defendants, their servants and / or agents pending the inter-partes hearing of this application.
- c) That the honourable court be pleased to issue a conservatory order maintaining status quo to the effect that there shall be no further digging, excavating, dumping building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the property known as Land Reference No. Maembo/Rianthiga/293 by the defendants, their servants and / or agents pending the hearing and determination of this suit.
- d) That an order of injunction do issue to restrain the defendants, their agents and / or servants from being or remaining or entering upon the suit property known as Land Reference No. MAREMBO/RIANTHIGA/293.
- e) That the costs of the application be provided for.

The court after the hearing of our application made a ruling directing;

1. Parties, their advocates, the District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/REANTHIGA ADJUDICATION SECTION and this court's Chief Executive Officer to visit the site where the disputed parcel or parcels are situated AND to give a report to court within 30 days which report would highlight;

- a) The present status of the suit land including occupation, natural features such as rivers, trees and cultivation.
- b) For the DLASO, especially, he would give details concerning how the land came to be in the ownership of the litigants and clarify if and how the defendants were compensated by way of allocation of alternative land.
- c) Any other material facts.

2. Further directions regarding the definitive disposal of this application will be given on **16th April, 2018** or any other day convenient to the parties to be agreed upon on 6th March, 2018 but not beyond the **30th of April, 2018**.

3. Interim orders are extended in terms of the provisions of section 63, CPA.

4. In the interim, costs of the visit, eventually to be in the cause, to be funded by the plaintiff/applicant.

In view of the above orders, we visited the site where the disputed parcel of land is situated, together with the court's Executive Officer, District Land Adjudication and Settlement Officer (DLASO) in charge of MAREMBO/RIANTHIGA ADJUDICATION SECTION, accompanied with two officers from her office, on the **26th of March, 2018**.

The site visit was spearheaded by the court CEO together with DLASO. The exercise took the entire day and on conclusion, the officers in charge of the exercise informed parties that they would file their report on the findings within the court's stipulated timelines.

Upon perusal of the report by the Chief Executive Officer – Chuka Law Courts, the findings made were that;

- a) Land Parcel No. MAREMBO/RIANTHIGA/203 is registered under the name of the plaintiff/applicant.
- b) There was no documentary evidence to prove ownership of the land by the defendants.

- c) Construction of permanent offices and staff houses by the plaintiff.
- d) Installation of electricity and water by the plaintiff.
- e) Grazing of livestock by the plaintiff
- f) Opening of access roads by the plaintiff
- g) Fence, beacon and boundary by the plaintiff.
- h) Destruction of the fence, indigenous trees, burning of charcoal across River Ruguti and interference of the boundary and beacons by the defendants.
- i) There are indigenous trees within the said land and especially near River Ruguti which requires conservation.
- j) One semi-permanent house newly built by the 2nd last born by the defendants.
- k) Three old temporary mud houses by the 1st, 2nd and 3rd defendants
- l) Small scale farming of tobacco and maize plantation by the defendants.
- m) Cowshed by the defendants
- n) Temporary pit latrine by the defendants.
- o) Old grave by the defendants

From the facts gathered, documentary evidence and the above mentioned developments, the Chief Executive Officer – Chuka Law Courts made the finding that the suit property land parcel No. Marembo/Rianthiga/293 measuring approximately 500 acres is owned by the plaintiff/applicant.

On the other hand, the report by the District Land Adjudication Settlement Officer made a finding that the origin of the disputed land totaling to 500 acres was as a result of several meetings held by the local leaders to award the University 500 acres and other public utilities 201.5 acres; and through a percentage cut of 15% from all the land owners in Marembo/Rianthiga sub locations.

Further, among the parties in attendance in the said meetings were Mr. Severino Nduru Mungiria (now deceased), the husband of the 1st defendant Lucia Nduru, and father to the 2nd and 3rd defendants; as evidenced by the minutes of the meeting dated **22nd August, 2008 and 10th September, 2008.**

In the meetings, the agreement was that individual plots shall be slightly pushed from the original position. When adjudication begun, all parties were involved and the land owners who were in the land that was demarcated for the university parcel No. 293 were requested to shift to their alternative land, as per community resolution.

The defendants were compensated and awarded parcel No. 88, 181, 243, 316 and 272 as evidenced by the adjudication records. From the following, the District Land Adjudication Settlement Officer made the finding that the plaintiff/applicant Chuka University is the registered owner of parcel No. 293 MAREMBO/RIANTHIGA.

We submit that the contents in the report by the Chief Executive Officer – Chuka Law Court and the DLASO have the capacity to determine our entire application together with the plaint as filed, since the orders sought both in the application and plaint are similar in nature.

The applicant is the registered owner and has absolute rights of ownership and their rights and interests are in terms of section 25(1) of the Land Registration Act No. 3 of 2012 and are indefeasible.

The applicant further asserts that being the legally registered owner of the suit property, it has been in continuous possession of the same since the year 2011, when it was issued with a Title Deed in respect to the said suit property, as evidenced in page 10 of the Chief Executive Officer – Chuka Law Courts report dated **26th March, 2018.**

The defendants have illegally settled on a portion of the suit property and continue to further trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for production of charcoal and the same has had a ripple effect on the adjacent land which includes a river that is facing an imminent dry up as evidenced in page 9 of the report of Chief Executive Officer – Chuka Law Courts; and unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the applicant herein.

The defendants were allocated parcel Nos. 88, 181, 242, 271, 286 and 316 as compensation for the 15% of land donated by their deceased father which they still occupy and at the same time encroach on the plaintiff's land. There were no permanent structures on the suit property but the defendants without any colour of right have proceeded to construct semi-permanent structures on the said property.

The plaintiff/applicant has been deprived of the use and enjoyment of the suit property as a result of the said trespass by the defendants and despite the plaintiff/applicant's repeated demands, the defendants have refused to vacate or deliver possession of the suit property to the plaintiff/applicant.

ISSUES FOR DETERMINATION

1. Whether the conditions for issuance of an injunction have been met?
2. Whether the defendants have any lawful rights and or interests on the suit property and if not, whether the defendants should be evicted for trespassing on the suit property.

1. Whether the conditions for issuance of an injunction have been met?

The defendants herein have illegally settled on a portion of the suit property and continue to further trespass on the suit property and degrade the suit property by cutting down of trees and illegally burning the same for production of charcoal; and the same has had a ripple effect on the adjacent land which includes a river that is facing an imminent dry up and not unless their activities are stopped in time, the suit property will be depleted hence rendering it useless for the beneficiary who is the applicant herein.

The Law

We submit that Article 40(1) states that; subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) of any description ; and

(b) in any part of Kenya

2) Parliament shall not enact a law that permits the state or any person

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation –

a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that-

i) requires prompt payment in full, of just compensation to the person; and

(4)Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

We submit that from the reading of the constitution, the plaintiff has the right to own property and the same should not be curtailed or undermined in any way, shape, or form as the defendants have done herein.

My lord, we submit that the plaintiff is the registered and legal owner of the suit property, evidenced by the Chief Executive Officer's findings in the report dated **28th March, 2018**.

Under section 25 (1) of the Land Registration Act No. 3 of 2012 the rights of a proprietor are indefeasible except as provided under the Act. Section 25 (1) provides as follows:

“The rights of a proprietor whether acquired on first registration or subsequently for value, consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject-

a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register and;

b) To such liabilities, rights and interest as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

In relation to section 25(1) of the Land Registration Act No. 3 of 2012, we submit that the plaintiff is the proprietor of the land as evidenced by the certificate of Title marked 'EK 1' in Prof Erastus Njoka's further affidavit dated 23rd April, 2018, the findings in the Chief Executive Officer and the District Land Adjudication Settlement Officer's Reports dated **23rd March, 2018** and **26th March, 2018** respectively.

The plaintiff gave the defendants consideration for the same which was in form of parcels of land Nos. 88, 181, 242, 271, 286 and 316 which were adjacent to the suit property as evidenced by the adjudication records in the District Land Adjudication Settlement Officer's Report dated **26th March, 2018**. The said parcels of land were to serve as consideration as well as compensation for the 15% of land donated by the defendants.

Furthermore, section 26 of the Land Registration Act, 2012 states that:

26. (1) the certificate of title issued by the Registrar upon registration, or to a purchaser of and upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the registrar, shall be received in evidence in the same manner as the original.

We submit that in light of that, the plaintiff's rights over the land cannot be defeated except as provided in the Act, and the said title must be held by the proprietor together with all privileges and appurtenances belonging thereto free from all other interests and claims.

From the foregoing sections of the law, it is our contention that the plaintiff/applicant having followed due process in obtaining the certificate of title and further having it registered in their favour, ought to be subjected to the tenets of justice as prescribed by statute and the court should not allow a stranger to interfere and/or deprive a legal/rightful owner to enjoy its rights over the parcel of land.

In light of that, we submit that an injunctive order restraining the defendants from being or remaining or entering upon the suit property known as Land Reference No. Marembo/Rianthiga/293 be granted as prayed by the plaintiff.

We wish to rely on page 8 and 9 of the Chief Executive Officer's Report wherein it is stated that there is one small semi-permanent house newly built by the 2nd last born of the defendants, three old temporary mud houses by the 1st, 2nd and 3rd defendants, a cow shed, temporary pit latrine and an old grave built by the defendants.

We further wish to rely on the Chief Executive Officer's Report dated 23rd March, 2018, in page 6 wherein it is stated that there is evidence of burnt charcoal holes and page 9 wherein it is stated there is destruction of the fence, indigenous trees, burning of charcoal across river Ruguti and interference of the boundary and beacons by the defendants.

We submit that our application goes to preserve the subject matter. It is important to take note of the fact that it is evident from the defendants' conduct of destroying the fence, indigenous trees, burning charcoal across river Ruguti and interference of the boundary and beacons, that they clearly have no intention of taking care of the suit property since they possess no legal right over it and are merely taking advantage of the same by wastefully using the same. Moreover, there is fear that if the court does not intervene, the defendants will proceed to erect permanent structures hence occasioning prejudice to the plaintiff/applicant's quest to develop the land.

Case law

From the foregoing, we rely on the High Court at Nyeri in Civil Suit No. 28 of 2015 Paul Gitonga Wanjau v Gathuthi Tea factory Company Ltd & 2 others [2016] eKLR wherein Mativo J, cited the locus classicus Court of Appeal case of Giella Vs Cassman Brown Co. Ltd (1973) EA 358 on the basis of the well accepted principles set out where the court has had to consider the following questions before granting injunctive relief.

- i. The applicant had established a prima facie case with probability of success;
- ii. The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and
- iii. On which side does the balance of convenience lie?

This was also held to be the position in the famous Canadian case of R.J.R. Macdonald Vs. Canada (Attorney General) where the three part tests of granting an injunction were established as follows:-

- i. Is there a serious issue to be tried?
- ii. Will the applicant suffer irreparable harm if the injunction is not granted?

iii. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (Often called “balance of convenience”)

From the above laid principles considered before the granting of injunctive orders by any court, the first question we will then seek to address is what is a prima facie case with a high chance of success?

The High Court at Nairobi in Civil Case No. 135 of 2013, David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR answered this question when the Learned Judge cited the case of Mrao v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 which stated that;

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In line with the present case, the first issue to address is whether the plaintiff/applicant has any right to the land in question. We humbly submit that the plaintiff is the indefeasible owner of the land and that it rightfully acquired the same as a result of the donations that were done by the residents of Marembo and Rianthiga sub-locations, which was then followed by the District Land Adjudication and Settlement Department of the Ministry of Lands which ensured that the entire adjudication process was strictly carried out as evidenced by the District Land Adjudication Officer’s Report dated 26th March, 2018 and the minutes of the committee meeting therein.

As to whether the above right has been infringed, Your Honour, we submit that by virtue of the defendants still being in occupation of the suit property is itself a breach of the applicants right to freely own and use their property as enshrined in Article 40 of the Constitution.

The plaintiff/applicant maintains a claim in respect of the suit property, which claim is valid and continues to subsist. The plaintiff/applicant has therefore established a prima facie case having produced a perfect document of title to prove that he is the registered owner of Land Reference No. MAREMBO/RIANTHIGA/293 as evidenced by the applicant’s annexed copy of the title deed marked “EX 1” in the further affidavit of Prof. Erastus Njoka dated **23rd April, 2018**.

As to whether the plaintiff/applicant stood to suffer irreparable loss, we stand guided by the High Court at Nairobi Civil Case No. 135 of 2013, David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR (supra) when the learned Judge cited Hoffman La Roche & Co. Industry V Secretary of State for Trade and Industry [1975] AC 295 at 355 (H.K) wherein irreparable damage was described to be;

“The object is to prevent a litigant who must necessarily suffer the law’s delay, from losing from that delay the fruit of his litigation; this is called “irreparable damage”...”

Your Honour, in the present case, the Chief Executive Officer’s Report confirmed that there is destruction of the fence built by the plaintiff, destruction of the indigenous trees within the suit property, burning of charcoal across River Ruguti and interference with the boundary and beacons by the defendants.

We submit that with the continued felling of the indigenous trees and burning them for charcoal as well as the destruction of the suit property, the plaintiff will suffer substantial loss that may not be adequately compensated by damages.

Subsequently and in support of our submission The High Court at Malindi in Environmental and Land Case 126 of 2012 in Joseph Mlandi V Jeseph Karisa & Another [2013] eKLR where an application for temporary injunction was granted, and in regards to destruction of trees O. A. Angote J, set out that:

“24. The Wanton destruction of trees by the defendant and the construction on the suit property by the 2nd defendant will cause the plaintiff irreparable loss which will not be compensated by damages should the injunction not be granted.”

Further to the above, the balance of convenience tilts in favour of the plaintiff/applicant as it is the party that would suffer more harm should the injunction not be granted.

Your Lordship, it is our prayer that this court intervenes to ensure that the defendants, their agents and/or servants are restrained from being or remaining or entering upon the suit property known as Land Reference No. Marembo/Rianthiga/293.

Additionally, we associate ourselves with the decision in the High Court at Nairobi Civil Case No. 455 of 2012, Julius Mainye Anyega v Ecobank Kenya Limited [2014] eKLR that the guiding principle, therefore, is; that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been “wrong” in granting injunctive relief. These were the words of Justice Hoffman in the English case of Films Rover International (1986) 3 All ER 772 at Page 780-781.

From the foregoing, we submit that having already encroached onto the plaintiff’s land, the plaintiff fears and is apprehensive of the fact that if an order of injunction restraining the defendants from remaining or entering the suit property is not granted, then the defendants will continue not just to construct more permanent and semi-permanent structures, but also with the absolute destruction of the suit property.

2. Whether the defendants have any lawful rights and or interest on the suit property and if not, whether the defendants should be evicted for trespassing on the suit property?

The plaintiff in this regard is the rightful and absolute owner of the suit property, pursuant to section 24 (a), 26(1) and 30(3) of the Land Registration Act, and as evidenced by the findings in the Reports dated 23rd March, 2018 and 26th March, 2018 respectively.

We submit that the plaintiff provided incontrovertible proof that the plaintiff is in fact the registered owner of the suit land. Given that the plaintiff has proved that it was the legal and registered owner of the suit land, the defendants were obliged to obtain the consent and authorization from the plaintiff before entering into the suit property. The actions by the defendants therefore fall within the ambit of the tort of trespass.

Black's law dictionary 2nd Edition at Page 1655 defines trespass as follows:

“trespass to land is defined as the direct interference with the possession of another person's land without lawful authority.”

We submit that trespass to land occurs where a person directly enters upon another's land without permission, or remains upon the land, or places or projects any object upon the land. This tort is actionable per se without the need to prove damage. In essence, every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right.

For trespass to suffice there must be seen to be interference with the suit property. We submit that the defendants have no documentary evidence to prove ownership of the suit property, and have therefore encroached and continue to encroach onto the plaintiff's land without permission by building one uncompleted mud house, one semi-permanent house and three old mud houses; as evidenced at page 8 and 9 of the Chief Executive Officer's Report – Chuka Law Courts dated 23rd March, 2016.

Further, the defendants have interfered with the suit property by cutting down trees and illegally burning the same for production of charcoal and the same has led to the destruction of the land evidenced by the charcoal burning holes, destruction of the indigenous trees and river Ruguti which require conservation, as captured on page 6, 8 and 9 of the said report.

We submit that the defendants did enter into the plaintiff/applicant's land without consent and this action amounted to trespass and their actions on the suit land were unlawful. We therefore urge this court to make a finding in favour of the plaintiff in respect to the same.

Case law

We submit that Lord Camden CJ, in *Entick v Carrington* (1765) 95 ER 807, defined the tort of trespass to land as:

“By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing, which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him.”

Manson CJ, Brennan and Toohey JJ, in *plenty v Dillon* (1991) 171 CLR 635 at 645:

“Every unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right.”

We associate ourselves with the decision in the High Court at Kisii, ELC Case No. 45 of 2013 Zacharia Onsongo Momanyi vs Evans Omurwa Onchagwa (2014) eKLR wherein the court held that;

“The plaintiffs' clam against the defendant is based on the tort of trespass. Trespass to land has been defined as constituting of “any unjustifiable intrusion by one person upon land in the possession of another”. (See, Clerk & Lindsell on Torts, 18th Edition at paragraph 18-01). Trespass is actionable at the suit of the person in possession of land and proof of ownership is a prima facie proof of possession.

Further, in Odunga's digest on Civil Case Law and Procedure page 8253, in John Wachira Wang'ombe v Charles Mugambi Wang'ombe and Another, Nyeri High Court Civil Case Number 95 of 2003 (Makhandia, J, on 18th June, 2009) (HCK) the court held as follows:

“(d) The only known remedy against a trespasser is eviction and an award of damages and nothing has been brought to the attention of the court that would prevent the court from ordering the eviction of the defendant and his family.

(e) Trespass as a tort is a violation of the right of possession and the plaintiff must show that he has the right to immediate and exclusive possession of the right which is different from ownership. He does not have to prove damage. If the plaintiff has the right to possess and the defendants intentionally entered the plot even though the defendant honestly believed the land was his own and he had a right of entry on it, he did so under an inevitable mistake of law and fact.

Registration of the plaintiff as owner of the suit property is prima facie proof of absolute ownership of the same. Further, that being the registered proprietor of the suit property the plaintiff deserves to enjoy quiet possession and the defendant is a trespasser.

In the present case, there was actual damage to the plaintiff's land arising from the acts of charcoal burning conducted thereon by the defendants.

My lord, Justice M. S. A. Makhandia in the High Court of Kenya at Nyeri in Civil Case Number 95 of 2003 John Wachira Wangombe v Charles Mugambi Wangome & another [2009] eKLR wherein he stated:

“As already stated in a claim for damages anchored on trespass, a party making such claim need not prove any damages. See Ashby v/s White (1703) 2 Raynd 938. It is sufficient to prove the mere act of trespass and damages will automatically flow.”

We also submit that the defendants are still in occupation of the suit property and are currently farming as evidenced by the Chief Executive Officer’s Report dated 26th March, 2018. We therefore urge the court to grant the order of injunction as prayed by the plaintiff to inhibit the plaintiff from entering and further remaining on the suit property.

We wish to rely on the High Court at Kisii in Environment & Land Case No. 95 of 2007 Joyce Nyansiaboka Onchmba vs Joseph Kenyanay & 2 others (2013) eKLR. In this regard the decision in SWM vs MKK (2007) eKLR, the court held as follows:

“In this case the plaintiff has proved that she is the owner of the suit property. The defendants are therefore trespassers on the suit property. The plaintiff having satisfied the court that the defendants are trespassers on the suit property, the plaintiff is entitled to an injunction to restrain the defendants once evicted from trespassing once again into the suit property.”

In the High Court at Kericho civil case 41 of 2003 Joel Kipchirchir Kitur v David Kimutai Langat & another [2006] eKLR the learned Judge held that:

“I have considered the said evidence adduced. The said evidence is uncontroverted. The plaintiff as the owner of the suit land is entitled to quiet possession of the same. He is entitled to occupy the same. The defendants have no right to interfere with the plaintiff’s ownership and occupation of the suit land. In the premises therefore, I will enter judgment for the plaintiff against the defendants jointly and severally as prayed in the plaint. Judgment is entered for the plaintiff against the defendants as hereunder:-

- i) The defendants are hereby ordered to vacate the suit land ie Kericho/Kapsoit/1646 within thirty (30) days of being served with the order of this court or in default thereof the plaintiff be at liberty to evict the defendants from the suit land.
- ii) The defendants are hereby permanently restrained from entering, remaining or continuing in occupation of the said parcel of land without the permission or authority of the plaintiff.
- iii) The plaintiff shall have the costs of the suit.

From the foregoing your Lordship, we humbly submit that the plaintiff/applicant being the rightful owners of the suit property and having been granted equivocal rights over the said parcel by dint of Article 40 of the Constitution of Kenya 2010, it is entitled to enjoy vacant possession of the said property free from interference from the defendants herein.

The said property your honour should the defendants be left in occupation, they will further perpetuate its destruction by their continuous acts of cutting its indigenous trees, burning of charcoal across River Ruguti and malicious interference with the boundary, occasioning the plaintiff/applicant to suffer prejudice and/or grievous loss.

Conclusion

In the suit before the High Court, there is no question as to whose claim between that of the plaintiff and the defendant was superior or superseded the other. On the basis of the documents and evidence on record, the plaintiff has established a prima facie case with a very high probability of success by demonstrating that it is the legal proprietor of the suit property with an indefeasible title. It has also established that damages would not be adequate compensation unless the orders sought were granted. As a consequence, we beseech the court to grant the injunctive relief sought.

We humbly pray that this honourable court grants us the orders as prayed.

Dated at Nairobi this 23rd day of April, 2018

BRIAN OTIOENO & CO.

ADVOCATES FOR THE APPLICANT

11. The plaintiff’s advocate proffered authorities as shown here below:

1. In the High Court of Kenya at Nyeri in Civil Suit No. 28 of 2015 Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR.
2. In the High Court of Kenya at Nairobi Civil Case No. 135 of 2013 in David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR.
3. In the High Court of Kenya at Malindi Environment & Land Case No. 126 of 2012 in Joseph Mlandi v Josephat Karisa & Another

[2013] eKLR.

4. In the High Court of Kenya at Nairobi Civil Case NO. 455 of 2012 in Julius Mainye Anyega v Ecobank Kenya Limited [2014] Eklr

5. In the High Court of Kenya at Nyeri in Civil Case No. 95 of 2003 John Wachira Wangombe v Charles Mugambi Wangombe & Another [2009] eKLR.

6. In the High Court of Kenya at Kisii in Environment & Land Case No.45 of 2013 in Zacharia Onsongo Momanyi v Evans Omurwa Onchagwa [2014] eKLR.

7. In the High Court of Kenya at Kisii in Environment & Land Case No.95 of 2007 Joyce Ntansiaboka Onchmba v Joseph Kenyanya & 2 others [2013] eKLR.

8. In the High Court of Kenya at Kericho Civil Case No. 41 of 2003 JOEL Kipchirchir Kitur v David Kimutai Langat & Another [2006] eKLR.

12. I have considered the pleadings proffered by the parties in support of their diametrically opposed assertions. I have also considered the eight authorities proffered by the plaintiff/ applicant's advocate in support of its assertion.

13. I find the following authorities relevant to this matter in that they eruditely set out the issues to be considered by a court in granting injunctions/restraining orders:

i) Paul Gitonga Wanjau versus Gathuthi Tea Factory Company Ltd and 2 Others, Nyeri H.C.C.C No. 28 of 2015 [2016 eKLR]

ii) David Ngugi Ngaari versus Kenya Commercial Bank, Nairobi H.C.C.C No. 135 of 2013 [2015 eKLR]

iii) Joseph Mlandi versus Joseph Karisa & Another, Malindi ELC 126 of 2012 [2013 eKLR]

iv) Julius Mainye Anyega versus Ecobank Kenya limited, Nairobi H.C.C.C. No. 455 of 2012 [2014 eKLR]

14. The following authorities are relevant to this matter in that they eruditely elaborate upon issues to be considered by the court in granting orders for eviction/vacation of the suit land and permanent injunctions/restraining orders:

i) John Wachira Wang'ombe versus Charles Mugambi Wang'ombe & Another, Nyeri H.C.C.C. 95 of 2003 [2009 eKLR]

ii) Zacharia Onsongo Momanyi versus Evans Omurwa Onchagwa, Kisii ELC 45 of 2013 [2014 eKLR]

iii) Joyce Onchomba versus Joseph Kenyanya & Another, Kisii ELC 95 of 2007 [2013 eKLR]

iv) Joel Kipchichir Kitur versus David Kimutai alias David Cheruiyot & Another, Kericho H.C.C.C. 41 of 2003 [2006 eKLR]

15. I find the uncontroverted submissions filed by the plaintiff, in totality, relevant to this suit.

16. The issues for determination in this ruling are:

a) Taking into account the totality of the evidence adduced by the parties, is the plaintiff entitled to issuance of an injunction as prayed?

b) Can the court at the interlocutory stage dispose the entire suit if there is enough evidence to warrant such disposal?

c) Who will be entitled to costs?

17. I find that the reports filed by the Land Adjudication officer and by this court's Chief Executive Officer have not been, to any probative extent, been controverted. I also find that the submissions proffered by the plaintiff have not been controverted and are in consonance with the reports filed by the Adjudication Officer and this court's Chief Executive Officer.

18. One cannot have his/her case and still retain it for eating or enjoyment. The defendants were allocated alternative land. On a balance of probabilities, they have not proved that they can continue occupying part of the suit land and also continue to retain parcel Nos. MAREMBO/RIANTHIGA/88, 181, 242 and 362. This court notes that parcel No. MAREMBO/RIANTHIGA/272 was initially recorded in the Adjudication Record as belonging to Severio Nduru Mugira, who transferred it to Patrick Kirimi / Mugeti.

19. In the circumstances, this application is allowed.

20. For avoidance of doubt, costs are awarded to the plaintiff but will be remitted should the defendants vacate the suit land within 3 months, as will be ordered later in this ruling.

21. I do note that in its plaint, the plaintiff prays for judgment against the defendant for:

- a) A declaratory order that the plaintiff is the legal owner of Land Reference Number MAREMBO/RIANTHIGA/293;
- b) A declaratory order that the defendants are trespassers on Land Reference Number Marembo/Rianthiga/293;
- c) A permanent order of injunction restraining the defendants, their agents and / or servants from interring the late Saverio Nduru Mugira on Land Reference Number MAREMBO/RIANTHIGA/293;
- d) An order to evict the defendants from Land Reference Number MAREMBO/RIANTHIGA/293;
- e) Costs of the suit.
- f) Any other relief that this Honourable Court may deem fit.

22. Prayer C in the plaint is spent as the late Saverio Nduru Mugira was interred on land other than the suit land.

23. I find that this application definitively establishes ownership of the suit property. I opine that a court of law should not engage itself in a pyrric judicial exercise. Having found that the suit land belongs to the plaintiff, I do not find it necessary that this suit should be escalated to full hearing. This court is enjoined by section 1 A (1) of the Civil Procedure Act to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes. Section 3A of the Civil Procedure Act grants this court the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I therefore, declare this suit as having been heard and determined in favour of the plaintiff.

24. As this court is going to issue an order of eviction against the defendants, the intended eviction will be conducted in congruence with the provisions of Section 152 G (1) (d) (e) (f) (g) (h) and (i) of the Land Act.

25. It is pellucid from the report of the Chief Executive Officer of this court that there has been destruction of the defendants' fence, cutting down of indigenous trees, burning of charcoal and interference with the boundary and beacons of the plaintiff's land by the defendants. There is need, therefore, for urgent action to be taken with a view to preserving the plaintiff's property and the environment in accordance with the precautionary principle. However, in the interests of justice and to respect the dignity, right to life and security of the defendants, I will not order that they be evicted from the suit land immediately. I will order that the defendants do vacate the suit land within three months after delivery of this ruling and should they fail to do so, they will be evicted from the suit land without further reference to this court.

26. More specifically and as provided in section 152(G) (1) (i) of the Land Act the defendants are accorded first priority to demolish and salvage their property within three months after delivery of this ruling.

27. It is reiterated that prayer (c) in this application, which has been allowed, seeks to uphold the precautionary principle as enshrined in section 18(a) (vi) of the Environment and Land Court Act. It is, therefore, ordered that there shall be no further digging, excavating, dumping of building materials, wasting, felling of trees, constructing thereon or in any other way dealing with or interfering with the plaintiff's property known as Land Reference No. Marembo/Rianthiga/293 by the defendants or their agents.

28. Regarding costs, they generally follow the event, and ought to be granted to the plaintiff. However, I do find that the defendants are persons of humble means. Awarding costs against them may render them destitute. If they vacate the suit land within the time stipulated by the court, they will pay no costs. However, should they not vacate the suit land within the three months stipulated by this court, they are hereby condemned to pay costs without further reference to this court.

29. The plaintiff's suit is allowed.

30. The defendant's counter-claim is dismissed.

31. This court issues the following orders:

- a) The plaintiff's suit succeeds and it is hereby declared that the plaintiff is the legal owner of Land Reference Number MAREMBO/RIANTHIGA/293.
- b) The defendants' counter-claim is hereby dismissed.
- c) It is hereby declared that the defendants are trespassers on Land Reference Number MAREMBO/RIANTHIGA/293.
- d) An order is hereby issued to evict the defendants from Land Reference Number MAREMBO/RIANTHIGA/293.
- e) Costs for this application, the plaintiff's claim and the defendants' counter-claim will follow the event and are awarded to the plaintiff BUT should the defendants vacate the suit land within the stipulated period of 3 months from the date of this ruling, I exercise my discretion and order that there will be a judicial remission of the costs so that the defendants will not be condemned to pay any costs to the plaintiff.

32. To recapitulate, it is reiterated that the defendants are hereby ordered to vacate the suit land within 3 months of this Ruling AND should they not do so, the plaintiff is at liberty to move appropriately to have the defendants evicted from Land Reference Number MAREMBO/RIANTHIGA/293 without further reference to this court AND the Officer Commanding Station (OCS) in charge of the area where the suit land is situated is hereby ordered to facilitate the implementation of the eviction order issued by this court.

33. Orders accordingly.

Ruling written and signed by Hon. Justice, P. M. Njoroge, Judge, at Chuka this 24th day of May, 2018.

P. M. NJOROGE,

JUDGE.

Ruling delivered in open Court at Chuka this 19th day of June, 2018 in the presence of:

CA: Ndegwa

Okoth h/b Otieno for the Applicant

Kariuki Nduru 2nd defendant- present

Firm of Mithega Kariuki for the defendants - absent

P. M. NJOROGE

JUDGE.