



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA PETITION CASE NO. 09 OF 2017**

**IN THE MATTER OF CHAPTER FOUR – THE BIL OF RIGHTS**

**IN THE MATTER OF ARTICLE 19, 20, 21, 22 AND 23 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF ENFORCEMENT OF BILLS OF RIGHTS**

**AND**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 28, 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**KAIMBA MANGAARA.....PETITIONER**

**VERSUS**

**THARAKA NITHI COUNTY GOVERNMENT.....RESPONDENT**

**RULING**

1. This application is dated **30<sup>th</sup> July, 2018**.
2. The orders sought and apposite averments are contained in my ruling dated **31<sup>st</sup> July, 2018** which is reproduced in full here below:

**RULING**

1. This application states that it has been brought to court under orders 42 Rule 6 and orders 51 Rules 1 to 3 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. It seeks the following orders:-

1. That this application be certified urgent.
2. That the service of the application be dispensed with at the first instance owing to the urgency of the matter.
3. That there be stay of execution of the judgment delivered herein on 16<sup>th</sup> July, 2018, pending the hearing of this application or until further orders of this honourable court.
4. That there be stay of execution of the judgment delivered herein on 16<sup>th</sup> July, 2018, pending the lodging, hearing and determination of the respondent's intended appeal to the Court of Appeal.
5. That costs of this application be provided for.

2. The application is supported by the affidavit of Dr. Fredrick Njeru Kamunde, the County Secretary, and has the following grounds:-

- a) The Respondent /Applicant is aggrieved by the judgment which was delivered herein on 16<sup>th</sup> July, 2018, and has filed a notice of appeal and has applied for proceedings to enable it to lodge an appeal in the Court of Appeal;

b) Unless the orders sought are granted, the respondent/applicant shall suffer substantial loss and its right to access justice, under Article 48 of the Constitution, will be contravened in that:-

a) During the pendency of the intended appeal, the petitioner/respondent will execute the said judgment to its detriment; in it, orders for payment of Kshs.5.5 million in damages and payment of mesne profits from 1996 were made, declarations that the petitioner's rights were infringed upon and that the respondent does compensate the petitioner for the suit property were also made; the court ordered that a valuation be carried out by a government valuer within 3 months of the judgment to quantify the mesne profits payable to him in addition to the said Kshs.5.5. Million payable to him;

b) If the petitioner executes the said judgment, both this application and the intended appeal will be rendered nugatory;

c) The case of the respondent/applicant, which did not find favour with this honourable court on **16<sup>th</sup> July, 2018**, was, inter alia, that:-

i) The petition was barred by the res judicata doctrine in that on 1<sup>st</sup> February, 2013, the Chief Magistrate's Court entered judgment for the petitioner in Meru CMCC No. 262 of 2005: Kaimba Mangaara –vs- County Council of THARAKA; the issues in dispute in that suit were the same issues in the petition which was filed 4 years later;

ii) The petitioner had the opportunity of seeking in the said Meru CMCC No. 262 of 2005: Kaimba Mangaara –vs – County Council of Tharaka, the same reliefs; explanation No. 4 of section 7 of the Civil Procedure Act applies in that the reliefs in the petition were grounds of defence or attack which are deemed to have been matters directly and substantially in issue; the petitioner did not have any cause of action;

iii) The petitioner was seeking additional reliefs to the ones which were granted to him 4 years before in the said Meru CMCC No. 262 of 005: Kaimba Mangaara – vs – County Council of Tharaka;

iv) The petition was an abuse of the process of the court.

d) As the Court of Appeal has held in African Safari Club –vs- Safe Rentals Ltd, Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010, after introduction in 2009 of the overriding principle by the amendments to both the Civil Procedure Act and Appellate jurisdiction Act, Principles Governing stays of execution and injunction have been modified fundamentally; courts are enjoined to act fairly and justly, to have regard to the substantive justice of the matters before them and weigh the relative hardships of the parties before them; the application of this principle results in the maintenance of the status quo at the time of the said judgment; the courts have also introduced flexibility in the security which the judgment creditor may be requested to furnish; this ranges from depositing a part of the decretal amount and or depositing title deeds in respect of the suit property with the Registrar of the High Court;

e) This honourable court in giving effect to the appellant's right, under Article 48 of the Constitution to access justice by way of an appeal, has jurisdiction to order that the Appellant furnishes a security of up to one third of the decretal amount as held in Nairobi High Court Milimani Commercial Courts Civil Case No. 922 of 2000: Southern Credit Banking Corporation Ltd –vs- Atlantic Products and by the Court of Appeal in African Safari Club –vs- Safe Rentals Ltd, Court of Appeal at Nairobi, Civil Appeal No. 53 of 2010;

f) As held by the Court of Appeal in Assanand –vs- Pettit [1989] KLR 242, the object of an injunction is to keep things in status quo so that if at the hearing of the appeal, the respondent/applicant obtains a judgment in its favour, the petitioner/respondent will have been prevented from dealing with the subject matter in such a way as to make that judgment ineffectual; in it, the law was stated as follows:

The object of an injunction is to keep things in status quo so that, if at the hearing the plaintiff obtains a judgment in their favour, the defendants will have been prevented from dealing in the meantime in the property in such a way as to make the judgment ineffectual.

g) This court as demonstrated by the Court of Appeal decision in Reliance Bank Limited vs. Norlake Investments Limited, (2002) 1EACA 227, and the Court of Appeal of Tanzania in Ndyabo –vs- Attorney General (2001) 2 EACA 485, seeks to ensure that litigants are not kept out of the seat of justice by poverty;

h) Following the judgment of 16<sup>th</sup> July, 2018, there is nothing the petitioner/respondent cannot do to defeat the objects of both this suit and the intended appeal;

i) This honourable court has jurisdiction to preserve the subject matter of a suit;

j) It is in the interest of justice for this honourable court to grant the orders sought so as to preserve the subject matter of the appeal;

k) The respondent is ready and willing to furnish a reasonable security for the due performance of such decree as may ultimately be binding on it.

3. During ex-parte hearing on **31<sup>st</sup> July, 2018**, Mr. Karanja Munyori, the applicants advocate told the court that the urgency of the application was predicated upon the fact that this court's recess would commence on 1.8.2013, one day after the ex-parte hearing of this application. He told the court that he had annexed the Notice of Appeal filed at the Court of Appeal.

4. In the interest of Justice, I grant prayer 3 in the application until **24<sup>th</sup> September, 2018** when this application will be heard.
5. The applicant is directed to serve the application upon the respondent within 10 days of today.
6. The application will be heard **interpartes on 24<sup>th</sup> September, 2018**
7. It is so ordered.

**Delivered in open court at Chuka this 31<sup>st</sup> day of July, 2018**

in the presence of:

CA: Ndegwa

Karanja Munyori for the Applicant

**P.M. NJOROGE**

**JUDGE**

3. When the matter came up for interpartes hearing, Mr. Mwanzia for the plaintiff, intimated that he was not ready to proceed with the hearing because he had just been served with a further affidavit and he needed to peruse, seek instructions and respond to it.
4. I point out that in my ruling dated 31<sup>st</sup> July, 2018 I stayed execution of the apposite Judgment/Decree in the interest of justice because this court was going on a six weeks recess the following day. I do observe that the respondent is amenable to depositing security in court.
5. Mr. Murango Mwenda, holding brief for Mr. Mwanzia for the plaintiff, asked the court to order the applicant to deposit a sum of Kshs.5,500,000/= (Five and a half million shillings) as security in view of the fact that the mesne profits had not been assessed. I take a middle ground. I will order the applicant to deposit a sum of Kshs.4,500,000/= (Four and a half million shillings) in an interest earning account in the names of the parties' advocates.
6. In the circumstances I issue the following orders:
  1. The plaintiff is granted 14 days to respond to the respondent's further affidavit and all the parties are granted open leave to further respond, as and if necessary, before **5<sup>th</sup> October, 2018**.
  2. In the interim, the applicant is ordered to deposit as security a sum of Kshs.4,500,000/= (Kshs. Four and a half million shillings) in an interest earning account in the names of the parties' advocates.
7. The application will be heard and/or given further directions on **9<sup>th</sup> October, 2018**.
8. It is so ordered

**Delivered in open court at Chuka this 24<sup>th</sup> day of September, 2018**

in the presence of:

CA: Ndegwa

Linus Ndungu for the Applicant

Murango Mwenda h/b Mwanzia for the Plaintiff

**P.M. NJOROGE**

**JUDGE**