



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT CHUKA**

**CHUKA ELC CASE NO 15 OF 2017**

**FORMERLY MERU ELC CASE NO. 170 OF 2014 (OS)**

**IN THE MATTER OF 1 ½ ACRE OF LAND WITHIN LAND PARCEL NO. MAGUMONI/THUITA/494**

**REGISTERED IN THE NAMES OF KITHINJI NJOKA, MURITHINJOKA, MUTEMBEI NJOKA**

**LOYFORD MURIUKI RIARA.....1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH MUTHONI RIARA.....2<sup>ND</sup> PLAINTIFF**

**CATHERINE CIANDEKE.....3<sup>RD</sup> PLAINTIFF**

**SUSAN CIAMWARI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KITHINJI NJOKA.....1<sup>ST</sup> DEFENDANT**

**MURITHI NJOKA.....2<sup>ND</sup> DEFENDANT**

**MUTEMBEI NJOKA.....3<sup>RD</sup> DEFENDANT**

**JUSTIN NYAGA NKIINI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This application is dated **11<sup>th</sup> October, 2018**. It states that it has been brought to court under Order 45 Rules 1(1) (a) & (b) of the Civil Procedure Act, Article 50(1) of the Constitution of Kenya and all other enabling provisions of the law. It seeks the following orders:

1. That this application be certified urgent, the same be heard urgently without delay owing to its urgent nature.
2. That the honourable court be pleased to review and / or set aside its consent orders dated 9<sup>th</sup> October, 2018.
3. That upon reviewing and / or setting aside the consent orders dated 9<sup>th</sup> October, 2018, the honourable court be pleased to hear the defendants/ applicants by allowing them to give viva voce evidence in court and call their witnesses.
4. That the honourable court be pleased to issue an order allowing the defendants/applicant to cross-examine the plaintiffs/respondents on the basis of their statements, pleadings, documents and the Executive Officer's Report dated 5<sup>th</sup> October, 2018 before the defendants/applicants and their witnesses give evidence as prayed in prayer 3 hereinabove.
5. That the honourable court be pleased to order that the plaintiffs/respondents herein be at liberty to call their witnesses and/ or give their evidence herein be at liberty to call their witnesses and / or give their evidence if they so wish before the defendants / applicants and their witnesses give evidence and their evidence be subject to cross-examination by the defendants/applicants and / or their advocates.

2. The application has the following grounds:

1. This case was coming up for mention and/or directions on 9<sup>th</sup> October, 2018 when the honourable court was to receive the Executive Officer's Report on his visit on the suit land on 30<sup>th</sup> August, 2018.
2. When the parties and their advocates appeared in court on 9.10.2018, and before the said Report by the Executive Officer could be supplied to the parties and their advocates, the advocate for the plaintiffs/respondents expressed his wishes not to call any evidence on behalf of the plaintiffs/respondents and he further indicated that he will rely on the said Executive Officers' Report in the plaintiffs'/respondents' submissions.
3. The defendants'/applicants' advocates Mr. Nyamu Nyaga Advocate expressed his wish to have the defendants/applicants heard by calling evidence.
4. Subsequently, the said report was supplied to the advocates for the plaintiffs/respondents and the advocates for the defendants/applicants in court by the court clerk.
5. Owing to the advocates for the plaintiffs/respondents' insistence that he would wish to rely on the said Executive Officer's Report as the plaintiffs/respondents' evidence, the court proceeded to record a consent that the parties proceed to file their submissions.
6. At the time when the said consent was being recorded, the defendants/applicants had not yet read the report by the Executive Officer of the court because the court was still proceeding with other matters.
7. After the court adjourned, the defendants'/applicants' advocates Mr. Nyamu Nyaga Advocate gave the defendants/applicants a copy of the said report by the Executive Officer and upon perusal of the same, they expressed their desire to be heard by the honourable court on merit and they be allowed to call witnesses.
8. It is to be noted that the defendants/applicants did not have an opportunity to peruse the Executive Officer's Report so that they could give their advocate the way forward before the consent orders dated 9<sup>th</sup> October, 2018 were recorded by the court.
9. It is the defendants'/applicants' desire that they would like to be allowed by the court to ventilate the issues raised by the plaintiffs/respondents in their statements, pleadings, and documents and in the Executive Officer's Report dated 5<sup>th</sup> October, 2018.
10. It is also to be noted that the plaintiffs'/respondents' claim is based on adverse possession and this being a land matter, it is only just and fair that the defendants/applicants be heard on merit by being allowed to tender their evidence in court.
11. If the defendants/applicants are not allowed to call their evidence and that of their witnesses, they will seriously be prejudiced as they will be condemned unheard.
12. In view of the above grounds and/or issues raised by the defendants/applicants, and taking into account the circumstances under which the said consent was recorded, there are sufficient reasons that the desire to obtain a review and/or setting aside the said consent orders for the interest of justice.
13. That it is clear that in exercise of due diligence, the defendants'/applicants' advocates had no instructions from the defendants/applicants to record the said consent as the court was in session and the defendants/applicants could not instruct their advocates in court when they had not even seen the Executive Officer's Report.
14. No prejudice will be occasioned to the plaintiffs/respondents if the defendants/applicants and their witnesses are allowed to give evidence in this case.
15. The plaintiffs/respondents shall also have liberty to tender their evidence and cross-examine the defendants/applicants and their witnesses if they so wish.
16. The defendants/applicants and/or their advocates should be allowed to cross-examine the plaintiffs/respondents and their witnesses on their statements, pleadings, their list of documents and the Executive Officer's Report.
17. It is only by hearing this suit on merit that the truth about the issues raised by the plaintiffs/respondents and the defendants/applicants in this case shall come out.
18. Even if the plaintiffs/respondents may opt not to call any evidence, the defendants/applicants should be given an opportunity to cross-examine them.
19. This application is brought without any inordinate delay.
20. It is only just and fair that this application be allowed.

3. On 15<sup>th</sup> September, 2018, Mr. I.C. Mugo told the court that he was not opposed to the application as he felt that there were contentious issues which could only be satisfactorily brought out through oral evidence.

4. In the circumstances, the application is allowed.
5. Costs shall be in the cause.
6. By consent, the suit will be heard on **29<sup>th</sup> October, 2018 at 2.30pm**

**Delivered in open Court at Chuka this 15<sup>th</sup> day of October, 2018**

in the presence of:

CA: Ndegwa

I.C. Mugo for plaintiffs

Nyamu Nyaga for the defendants

**P. M. NJORGE,**

**JUDGE.**