



**Snowball Investment Limited v Principal Registrar of Titles & 4 others;
Kencont Logisticis Services Limited & another (Third party) (Civil Case
23 of 2012) [2023] KEELC 16810 (KLR) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 23 OF 2012
LL NAIKUNI, J
MARCH 27, 2023**

BETWEEN

SNOWBALL INVESTMENT LIMITED PLAINTIFF

AND

PRINCIPAL REGISTRAR OF TITLES 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

PS. MINISTRY OF LANDS 3RD DEFENDANT

SPRINGWOOD INVESTMENT CO. LTD 4TH DEFENDANT

COMPACT FREIGHT SYSTEMS LTD 5TH DEFENDANT

AND

KENCONT LOGISTICIS SERVICES LIMITED THIRD PARTY

DELTA CONNECTIONS LIMITED THIRD PARTY

RULING

I. Introduction

1. The Notice of Motion Application dated 19th September, 2022 for determination by this Honorable Court was filed by the 4th and 5th Defendants/Applicants herein - Springwood Investment Co. Limited and Compact Freight Systems Limited (Hereinafter referred to as ‘The Applicants’). It was brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21 and Article 159 (1) and (2) of *the Constitution* of Kenya, 2010.



II. The 4th & 5th Defendants/Applicants' Case

2. The 4th and 5th Defendants/Applicants sought for the following prayers:
 - a. Spent.
 - b. That pending the hearing of this application inter partes, the Coast Regional Land Surveyor be ordered not to complete the preparation of the survey report relating to the two properties known as Plots Numbers MN/V2382 and MN/V/1517 situated in Miritini in the County of Mombasa and not file any such report in the Court.
 - c. That in the event that any land survey report is filed by the Coast Regional Land Surveyor prepared outside the terms set out in the Court order dated 27th July 2022 issued in this matter the said report be expunged and removed from the Court record.
 - d. That the Coast Regional Land Surveyor be directed to properly notify all concerned parties as to when the survey exercise relating to Plots No. MN/V/2382 and MN/V/1517 will take place and further notify the said parties that any such party would be at liberty to engage its own independent private land surveyor to accompany the Coast Regional land surveyor on the site when such survey exercise is scheduled to take place.
 - e. That costs be in the cause.
2. The application is premised on the grounds, the testimonial facts and the averments founded under the 11 Supporting Affidavit of Samuel Kairu Njonde, the Managing Director of the 4th and 5th Defendants/Applicants herein sworn and dated even date together with two (2) annexures marked as "SKN – 1 & 2" annexed hereto. The Deponent averred that the 5th Defendant was a tenant of the 4th Defendant of all that property known as Plot No. MN/V/2382 situated at Miritini area within the County of Mombasa (Hereinafter referred to as "The Suit Property").
3. He deponed that the 5th Defendant being a Licensed Container Freight Station, carried on its business thereon of handling containerized cargo. The Applicants maintained that by an order made by this Court of 27th July 2022 directing the Coast Regional Land Surveyor carry out a Survey exercise on 2nd September, 2022 so as to prepare a survey report and thereby assist the Court to fully understand the dispute boundary relating to the suit land and another Plot No. MN/1517 situated within Miritini area of the County of Mombasa. Subsequently, it was the reasonable and legitimate expectation of the 4th and 5th Defendants/Applicants to receive a notification as to the date when the said survey exercise was to be carried out so as to enable the 4th & 5th Defendants instruct their own private Land Surveyors to accompany the Coast Regional Land Surveyor while carrying out the said survey exercise. The Deponent stressed that this exercise was absolutely necessary so as to ensure that the final survey report was one that had integrity and well verified.
4. However, he deposed that contrary to this expectation, the survey exercise was slotted for 9th September 2022 which was much later than 2nd September, 2022 of the date the Court had directed. It was the Applicant's case that not only was the said survey exercise carried out but they were never notified of it. They were surprised to see the Coast Land Surveyor enter the suit properties wherein he took measurements on the said properties. Upon being asked why he was doing so, the Surveyor stated that he was carrying out survey work as per the aforestated Court order issued in the matter.



5. The Deponent stated that the 4th & 5th Defendants were apprehensive that the Surveyor would finalize on the said report and file it in the Court on or before the 21st September, 2022 as set out in Paragraph 4 (b) of the said Court order.
6. He averred that the application was well deserved for the following reasons:-
 - a. The applicants had a legitimate expectation that they would be notified of the date of the survey to enable them instruct their private surveyors to accompany the Coast Regional surveyor while he carried out the said survey exercise. His action was contrary to the Court Order hence null and void.
 - b. The Coast Regional surveyor acted contrary to the orders of this Court and the report made from the survey exercise should not be filed but ought to be expunged from the Court record as the same would prejudice them. The applicants pleaded that they were ready and willing to participate in the survey exercise provided the same is carried out as outlined in the Court order dated 27th July 2022.
 - c. The 5th Defendant had been in occupation of the suit land for a long period of time and where they carried on their business. Further, the 4th Defendant were the legal owners of the suit properties. They were apprehensive that the decision this court will make over the boundary dispute would have serious impact on these properties. Hence, based on the principles of natural justice they ought to be heard and not condemned unheard. There should be no determination made in reliance of a survey exercise that was undertaken without their involvement.
7. He urged the Court to allow the application and the prayers sought by the 4th & 5th Defendants/ Applicants herein with Costs.

III. The Plaintiff's case

8. On 29th September, 2022, the Plaintiff while opposing the application by the Applicants herein filed an 18 Paragraphed Replying Affidavit dated even date sworn by one Joseph Mwella its Legal officer together with three (3) annexures marked as "JM – 1 to 3" annexed thereof. He deponed that he opposed the application seeking to have the land survey report by the Coast Land Surveyor be expunged and removed from the Court record for the sole reason that the same was prepared outside the timelines set out by the Court in the order issued on 27th July, 2022 pursuant to a Pre – Trail Conference given by the Court on the 21st July, 2022. He averred that on that date the Court gave a raft of orders and directed the Counsel for the Plaintiff – Mr. Busieka to extract the same and notify all the parties who were both the present and absent, including the Applicants. Upon service, the Attorney general was to notify the Coast Regional Surveyor to actualize the survey on the subject parcels of land in dispute herein and thereafter share his report with the parties as well as to file a copy thereof in Court and which had since been done as the Court record will bear it right.
9. He deposed that vide a letter dated the 28th July 2022, the Counsel for the Plaintiff forwarded the extracted Court orders of this Court dated 27th July 2022 to the office of Attorney General for the onward transmission to the Coast Regional surveyor of the said orders. The deponent stated that the said letter was sent to the 4th & 5th Defendants/Applicants' Counsel vide an email on 29th July 2022. Marked as "JM – 1 "a) to c). are the said letter, the attached extracted Court order and an email correspondence forwarding the same to the parties.



10. Upon linking up with the Counsel from the offices of the Attorney General, Mr. Mwandeje, their Advocate had communicated on 1st September, 2022 to find out whether the Coast Regional Surveyor was not be available on 2nd September, 2022 as ordered by Court, their Advocate was informed that the Survey exercise could not be conducted on the 2nd September, 2022 since there were crucial documents to be relied upon but which were not yet in the possession of the surveyor. In the given circumstances, it was It was agreed that the said exercise be deferred to 9th September 2022.
11. He deposed that their Advocate wrote to Court vide a letter dated the 1st September, 2022 and copied to all parties herein, informing them of the new development, a copy of the letter and email forwarding the same to all parties including the Applicants and the Surveyor was hereto annexed and marked as “JM – 2 (a) to (b)” respectively.
12. He deponed that it was crystal clear that all parties were well aware that the survey exercise would be conducted on 9th September 2022, the counsel who was on record for the applicants never issued a rejoinder to the Plaintiff’s Counsel to protest the new date nor join them in the said Surveying exercise.
13. There being no objection or communication from the parties, the survey exercise proceeded as per the Court order and the Land Survey Report dated 20th September, 2022 has been filed in Court. The deponent argued that the applicants were notified in good time of the said exercise and had an opportunity to liaise with other parties including the surveyor to have their representative present but the same never happened. The Survey exercise was conducted on 9th September, 2022 and not before the 2nd September, 2022 as directed in the order and which did not in any way prejudice the Applicants as the subject matter was not perishable objects and its complexion did not change in between the aforesaid dates and hence the orders sought for the expunging of the report from the Court records were not in the interest of achieving Justice but merely calculated to delay this matter further to the benefit of the Applicants who are enjoying the status quo and to the detriment of the Plaintiff.
14. He averred that the Applicants having been made aware of the date of the survey exercise in good time had all the opportunity to liaise with the other parties including the Surveyor, to have had their own representative present but for reasons only known to them they passed up a chance and should now not be heard crying foul of being left out of an exercise that they had every opportunity to join and participate and even the challenge they had on the said report was not based on the merits of its contents but rather on the fact that it was one outside the time limits.
15. The deponent maintained that the Court directed the Coast Regional surveyor to conduct the survey and assist Court as an independent and neutral expert and not to be directed by the parties in the suit on how to conduct the exercise or write the report thereafter. Thus, it would be a waste of resources for the order of expunging of the report from records. He noted that all the other parties, apart from the Applicants, availed their private land Surveyors to accompany the Coast Regional Surveyor on the material date and hence no one may claim to be prejudiced by the said report. In any case, the Deponent held that there was nothing prohibiting the Applicants from conducting their own independent land Survey exercise on the subject matter and fling their report in Court for further interrogation by the other parties.
16. He deposed that the only issue the Applicants are raising in their objection through the application was the timelines when the Survey exercise was conducted but not the qualifications nor the competence of the Land Surveyor and the validity of its report.



IV. The Responses by the 1st , 2nd and 3rd Defendants/Respondents

17. On 4th October, 2022, the 1st , 2nd and 3rd Defendants also responded to the application by the 4th and 5th Defendants/Applicants vide a 14 Paragraphed Replying affidavit sworn by one Sammy Juma, the Coast Regional Land Surveyor sworn on 3rd October, 2022 together with two (2) annexures marked as “SWJ – 1 and 2” annexed thereto.
18. He deponed having been in communication with the Counsel for the Plaintiff since 1st September 2022 in confirmation with the survey exercise. He was served with a Court Order vide a letter dated 24th August, 2022 from the offices of the Attorney General. Upon receiving the letter they started the necessary preparations of establishing and sourcing the necessary survey data to enable the survey exercise. On 1st September, 2022, he received a call from a representative of the Law firm of the Plaintiff seeking to know whether the survey exercise would still proceed on the following day on 2nd September, 2022. However, in response, he informed the caller that it could not be carried out on 2nd September 2022 as he had not received the survey plans were still in Nairobi. They set a tentative date on 9th September, 2022 and communication to the Court and to the other parties was done formally through a letter by the Plaintiff dated 1st September, 2022.
19. He averred that as set and agreed on, he was able to obtain the survey plans and on 9th September 2022 the survey was carried out and a report dated 20th September 2022 was filed in Court on 21st September 2022. He maintained that since the Court issued the orders on 21st July 2022 he had not received any formal or informal communication from any other party herein save for the Counsel for the Plaintiff or the Attorney General regarding the Survey exercise date.
20. He deponed that the Court order was very specific as it directed that each party was at liberty to engage their own independent Surveyors to accompany the Coast Regional Surveyor for the site visit. That the failure by the 4th and 5th Defendants/Applicants to engage his office was implied that they never wished to engage their own independent surveyor in the process. He further deponed that he was advised that by that time the 4th and 5th Defendants had not engaged the law firm of Messrs. Gikandi and Company Advocates but instead it was the Law firm of Messrs. Maina Njanga & Company who were on record for them.

V. The Response by the 1st Third Party

21. On 12th October, 2022, the 1st third party filed their 19 Paragraphed Replying Affidavit dated 11th October 2022 sworn by Evalyne Odongo its Legal manager. She deponed that the Court issued a Court order 27th July, 2022 and provided the details of the said order. She held that due to the intense contestation of the issues herein, the Court directed that while the Coast Regional Surveyor was to conduct the an intense survey exercise, the parties were at liberty to appoint their own private surveyors to accompany the Coast Regional Surveyor. As a result of this, the 1st Third Party, therefore, got legitimate expectations that the Coast Regional Land Surveyor as the expert appointed by the Court to lead the exercise would take charge of it and engage all the parties for purposes of actualizing the Court Order.
22. She averred that though their Counsel on record was served with an email from the Counsel for the Plaintiff on 1st September 2022, indicating a change of date of the survey exercise from 2nd September, 2022 to 9th September 2022. They never received any other information or directions from Coast Regional Surveyor whom they believed was to lead and engage all parties in complying with the Court order on the date, place and time of the surveying exercise. This was important as they would have used the information to engage their private surveyors. She deposed that both the site visit by the Cast



Regional Surveyor on 9th September, 2022 and the report were at variance with the Court order of 21st July, 2022 in particular Paragraph 4 (d) of the said order. It would not have been possible for them to have organized a private surveyor without all these vital information.

23. The deponent argued that the said report was one sided and denied the Court the benefit of a report generated with all interest represented that would have represented an objective and impartial survey report. She urged Court to expunge the report filed on 21st September 2022 and direct a new report to be prepared taking into consideration all parties involved.

VI. Submissions

24. On 4th October, 2022 when all parties appeared before the Honorable Court, they were directed to dispose off the application by way of written submissions herein. Pursuant to that all the parties fully complied. The Honorable Court reserved a date to deliver the ruling accordingly.

A. The Written Submissions by the 4th and 5th Defendants/ Applicants

25. On 17th November 2022, the Learned Counsel for the 4th and 5th Defendants/Applicants herein the Law firm of Messrs. Gikandi & Company Advocates filed their written submissions dated 16th November, 2022 in support of the application. Mr. Gikandi Advocate provided the genesis of this matter being a Court order issued on 21st July, 2022 which had directed the Costs Regional Surveyor to carry out an intense survey exercise with regard to the two parcels of land known as Plot MN/V/2382 and Plot No. MN/V/1517 which properties were adjacent to each other. The exercise was to be conducted on 2nd September, 2022 or any other nearer date convenient to the said Surveyor. Further, each of the parties in the matter were at liberty to engage their own independent private land surveyors to accompany the Coast Regional Land Surveyor on the site and field visit.
26. He reiterated that they had filed a supporting affidavit whereupon they indicated that the Defendants/Applicants were not notified of the date and venue of the Survey exercise to be led by the Coast regional Surveyor as was directed by this Court vide its Court order of 21st July, 2022 and in particular the contents of Paragraph 4 (d) of the said Court Order.
27. The Learned Counsel noted that the whole land Surveying Exercise was marred with the following irregularities. These were:-
- a. The Court order was clear on the date for conducting the survey exercise and hence conducting it on 9th September, 2022 was a violation of the Court order. The Coast Regional Surveyor had no privilege or legal mandate to extend the timelines set down by Court.
 - b. The Coast Regional Surveyor failed to notify the Applicants of the date, time and venue when the survey was to take place. From the pleadings filed by the Plaintiff and the 1st, 2nd and 3rd Defendants it appears there were a lot of conversation between them and the Surveyor but in exclusion of the 4th and 5th Defendants and the Plaintiff. The Applicants refuted the assertion made by the Surveyor that there was a technicality mix up on the dates as he never informed the Applicants of these incidences.
 - c. From the annexures marked as “JM – 2A” of the Replying Affidavit by the Plaintiff one saw that the Plaintiff stepped into the shoes of the Coast Regional Land Surveyor, who it appeared was acting like an agent of the Plaintiff.
28. The Learned Counsel submitted that the survey report dated 20th September 2022 was filed in Court on 21st September 2022 by the Counsel for the Plaintiff even before the same was shared with the



Applicants. He argued that the application was well merited and the Court ought to direct that all documents relating to the impugned survey exercise that had been filed to be expunged from the Court records and such had been filed in breach of the aforesaid Court Order . To buttress on this point he relied on the decisions of: “ELC (Mombasa) No. 135 of 2012 - Milly Glass Works Limited – Versus – Kenya Railways Corporation & Another; Lazarus Estates Limited – Versus - Beasley (1956) 1QB 702 at 712 to 713; Judicial Service Commission – Versus – Speaker of the national Assembly and Another (2013) 3KLR” to the effect that anything done contrary to a Court order was void and must be set aside “ex debito justitiae”

29. He further cited the case of “Mistry Amar Singh – Versus – Serwano Wofunira Kulubya UCA No. 74 of 1960 where the Court held thus:

“Ex – turpi causa No Orpir Action. This old and well known maxim is founded in good sense and expresses a clear and well recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality the contract ought not assist him”

30. According to the Learned Counsel, applying these principles to the instant case, the Plaintiff should not be derived or retained the benefit of a Surveyor’s report that the Plaintiff believed strongly favoured its case when the same was procured through an act of breach of the Court order. He argued that both the Counsel for the Plaintiff and the Land Surveyor had abused the Court process. The Counsel urged Court to direct the said survey be conducted by the office of the Director of survey Nairobi. This was proposed vide an amended notice of motion application dated 16th November 2022.
31. The Learned Counsel urged Court to order fresh survey at the exclusion of the Coast Regional lands office who has been biased towards the Plaintiff.

B. The Written Submissions by the Plaintiff/Respondent

32. On 24th November, 2022 the Learned Counsel for the Plaintiff the Law firm of Messrs. Oloo Chatur & Company Advocates filed their written submissions to oppose the application by the Applicants. Mr. Busieka Advocate began by stating that the Plaintiff was opposing the amended notice of motion application. He argued that the applicants had not sought the leave of Court to amend the application, hence the amended notice of motion application was a nullity and should not be allowed by Court. The Learned Counsel submitted that the Applicants could still commission their own respective and independent survey reports as opposed to seeking for the expunging of the land surveyor report already on record. The Learned Counsel argued that the competence or qualification of the Surveyor had not been called into question and the allegations of biasness had not been placed as evidence.
33. Vide the directions of the Court issued on the 4th November, 2022 and against on the 14th November, 2022, parties were guided on how to navigate the 4th & 5th Defendants’ application dated 19th September, 2022, and pursuant thereto, all parties proceeded to file their respective responses thereto, save for the 2nd Third Party, and who in any event intimated to Court that they were associating themselves with the subject application.
34. Despite the directions aforesaid not having been disturbed, on the 21st November, 2022, the Applicants herein served ourselves with their written submissions dated the 16th November, 2022, together with an



amended Notice of Motion application also of the same date. It was noteworthy that, in the amended motion application aforesaid, whereupon prayer (4) thereof had been substantially altered to the extent that it had a different meaning and intent vis-a-vis the original order sought.

35. The Counsel stated that he was alive to the fact that, since the last directions were issued on the 14th November, 2022, no application has been made to amend, nor leave granted to amend the subject motion dated the 19th September, 2022, and it was his humble submissions that, the purported amendment was but a cheeky attempt by the Applicants to circumvent the directions of the court, that the same was null and void in law, and was thus a proper candidate for expunging from the Court record in the circumstances and which they had urged this Honorable Court to do. Similarly, since the Court only issued directions on the application dated the 19th September, 2022, they confined their submissions to the merits of that particular application and not the illicitly amended version.
36. The pertinent prayers left for determination by this Honorable Court was prayer number (3) seeking that the survey report filed by the Coast Region Surveyor be expunged from the record and prayer number (4) which sought for the Court to direct the same surveyor to undertake a fresh survey exercise in accordance with the court order issued on the 21st July, 2022; It was noteworthy that, the subject application was opposed by the Plaintiff through the Replying Affidavit of one Joseph Mwella that was lodged in court on the 29th September, 2022 and the contents wherein they herein reiterated and relied upon.
37. The genesis of the instant application and/or dispute was the order and/or the pre-trial directions issued by the Court “Suo Moto” on the 21st July, 2022 upon invoking the provisions of Section 173 of the *Evidence Act*, Cap. 21 and which, inter alia, enjoins this Court, in order to discover or obtain proper evidence, ask any question it pleased, in any form, at any time, of any witness, or of the parties about any fact whether or not it was otherwise admissible; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to object to any such question or order, nor without leave of the court, to cross-examine the witness upon any answer given in reply to any such question.
38. In issuing the order aforesaid, the court invariably was of the considered view that, the subject matter being a boundary dispute and not one about ownership, it needed the assistance by way of an opinion of an independent expert, in this case the Coast Regional Surveyor, to undertake an intense survey exercise to determine the position on the ground before the matter could take-off for hearing proper; He submitted that this to be in tandem with the applicable law as was re-stated in the case of: “Stephen Kinini Wang’onde –Versus - The Ark Limited (2016) eKLR where at page 3 paragraph 7 and 8, the court observed thus:-

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for Court use being commissioned on any factual matter, technical or otherwise, provided it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative



value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a Court has to take into account”

39. Borrowing from the above decision, he humbly submitted that, the Applicants’ prayer to have the report filed by the Coast Regional Surveyor be expunged from the record was without any basis, as the Court was not enjoined to rely on the same solely in determining the case herein. More so, considering that all parties still had an opportunity to commission their own respective survey reports to be considered along the disputed one.
40. Indeed, in the subject application before court, the competence and/or expertise of the surveyor had not been called into question, and the allegations of bias as against him that he favoured the Plaintiff in his report was but just hot air, as the same had not been backed up by any cogent evidence.
41. In fact, in his Replying Affidavit filed before this Court, Coast Regional Surveyor had succinctly stated the facts and circumstances surrounding his actions in reaction to the court order herein directed at him. Thus, the Counsel further submitted that he could not be faulted for acting in the manner in which he did.
42. Moreover, it had not been shown in the subject application what prejudice the absence of the applicants’ representatives during the survey exercise had caused them. Besides, the Learned Counsel averred that the orders issued on the 21st July, 2022 never envisaged a situation where the expert witness surveyor was to act according to the dictates and or directions of the parties and/or their representatives present at the exercise.
43. In the same vein, the Learned Counsel argued that the Court while issuing the aforesaid orders directed at the surveyor never expected the parties herein and or their representatives to guide the good Coast Regional Surveyor on how to write his report upon the conclusion of the exercise. Thus, he submitted that the report since filed in court by the surveyor met the criteria of expert evidence. The report was good in law and it ought not be expunged from the Courts’ record.
44. As a testament to the obvious expertise and credibility of the surveyor, the Applicants prayer (4) of the subject application sought that the same individual be directed by the Court to re-do the survey; after properly informing all the parties concerned and further requiring parties to have had their own representatives present. He felt the said prayer was of no useful value to the Court as the surveyor, as a competent expert that was not required to act under the directions of the parties, had already conducted the exercise on the subject suit properties and lodged his report before this Honorable Court.
45. In conclusion, maybe the question this Honorable Court ought to ask itself was, would the Applicants and the 3rd parties from whom they derive their title have had any issue with the subject report if the Surveyor had found it in their favour and stated that it was indeed the Plaintiff who had encroached on their land? The answer was obvious.
46. In the premises, he urged this Honorable Court to dismiss the application by the 4th and 5th Defendants/Applicants dated the 19th September, 2022 with attendant costs.

VII. Analysis and Determination

47. I have fully considered the Notice of Motion application dated 19th September, 2022 by the 4th & 5th Defendants/Applicants herein, the responses thereto and the written submissions and cited authorities made by the Counsels herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the



statures. The issues before the Honorable Court for its determination as it arrives at an informed, reasonable and fair decision are five (5). These are:-

- a. Whether the Notice of Motion application dated 19th September, 2022 by the 4th and 5th Defendant/Applicant herein has any merit?
- b. Whether the Counsel for the Plaintiff, Mr. Busieka complied with the Order dated 21st July 2022 to issue notice to all parties herein.
- c. Whether the survey exercise carried out on 9th September 2022 by the Coast Regional Surveyor herein complied with the orders of Court issued on 21st July 2022.
- d. Whether the Land Survey report dated 20th September 2022 and filed in Court on 21st September 2022 ought to be expunged from the Court records.
- e. Who will bear the Costs of the application dated 19th September, 2022.

Issue No. a). Whether the Notice of Motion application dated 19th September, 2022 by the 4th and 5th Defendant/Applicant herein has any merit?

48. Under this sub heading, the genesis of this matter is based on the facts that on 21st July 2022 the matter came up for mention for Pre – Trial directions on compliance of parties and fixing a hearing date. Mr. Busieka was on record for the Plaintiff and addressed Court on the need for a Court led land survey. Mr. Njeru was on record for the 1st Third party while Mr. Mwanjeje were on record for the 1st, 2nd and 3rd Defendants. There was no appearance for the 4th and 5th Defendants. The Court then gave directions on the request of Mr. Busieka to carry out a survey report. The said directions have now come to be known in this case as the orders of Court dated 21st July 2022 and issued on 27th July 2022. For avoidance of doubt, I wish to re produce verbatim the said orders that this Court granted:

- a. That all the parties have fully complied with the provisions of order 11 of Civil Procure Rules, 2010 except the 1st to 3rd Defendants herein.
- b. That the 1st to 3rd Defendants herein are hereby granted 21 days to file and serve the documents per order 11 of the Civil Procedure Rules, 2010.
- c. That in order to obtain more evidence as pertaining all known as Land Reference No. MN/V/2382 and MV/V/1517 respectively, which are adjacent to each other and situated around the Miritini, County Government of Mombasa.
- d. That the Court hereby invokes the provisions of Section 173 of the *Evidence Act* Cap. 80 of the Laws of Kenya.
- e. That the Coast Regional Surveyor be and is hereby authorized to forthwith conduct an intense survey exercise with regards to these two parcels of land on 2nd September 2022 or any other nearer date convenient to him/her thereof.
- f. That the said Coast Regional land survey to prepare a detailed report covering the brief historical background, the observations and conclusion and recommendation on or before 21st September 2022 to be shared with parties and filed in Court.



- g. That there be a pre-trial conference mention date on 11th October 2022 and admission of the surveyor's report.
- h. That each party to be at liberty to engage their own independent private land surveyors to accompany the Coast Regional land surveyor on the site field visit.
- i. That the matter be fixed for hearing on 23rd January 2022.
- j. That notice to issue to all by the Counsel for the Plaintiff, Mr. Busieka Advocate.

49. It is the applicants case that the Plaintiff neither informed them nor involved them in the survey exercise that was carried out on 9th September 2022. The Applicants claim that the failure of the Plaintiff and the Coast Regional Land Surveyor to notify them of the date of the survey denied them the chance to instruct their own independent surveyors to join in the exercise. The Plaintiff on the other hand, maintain that they served the Counsel who was on record for the Applicants at the time with both letters communicating the date of survey.
50. The Counsel for the Plaintiff claimed to have emailed the law firm of Messrs. Maina Njenga & Co. Advocates through their last known email being "legal@njeru-advocates.com" on 29th July 2022. In the said email they attached a letter dated 28th July 2022 addressed to the Attorney General and copied to "inter alia" the law firm of Messrs. Maina Njenga & Co Advocates. The letter enclosed the orders of Court issued on 27th July 2022 and requested Mr. Makuto Advocate to transmit the same to the Coast Regional Surveyor, and to further confirm the availability of the surveyor on 2nd September 2022 to survey the suit properties. The second email that was sent to the Counsel who was on record for the Applicants was dated 1st September 2022 and attached a letter dated 1st September 2022. The said letter was addressed to the Deputy Registrar of this Court to inform that the Coast Regional Surveyor had rescheduled the exercise to 9th September 2022 on the ground that there were some crucial documents – Survey Plans, yet to be received from Nairobi.

Issue No. b). Whether the Counsel for the Plaintiff, Mr. Busieka complied with the Order dated 21st July 2022 to issue notice to all parties herein.

51. Upon perusing the said emails, the question that comes to Court is whether the said service to the parties herein amounted to proper service as envisioned in the Court order issued on 27th July 2022? The orders of Court issued on 27th July 2022 directed the Counsel for the Plaintiff - Mr. Busieka to issue notice to all parties. This meant that Mr. Busieka Advocate for the Plaintiff ought to have written to all parties herein to inform them of the Court orders. The relaying of this information ought to have been done through a letter to all parties herein, attaching a copy of the orders of Court. Instead of this, what the Counsel for the Plaintiff did was to write a letter on 28th July 2022 to the Attorney General, and copied to the other parties herein, inquiring about the availability of the Coast Regional Surveyor to conduct the survey on 2nd September 2022.
52. It is paramount for parties to understand the importance of complying with Court orders as issued by Court. There was reason why Court had directed Mr. Busieka Advocate to issue notice to all parties, from the Court's proceedings of the 21st of July 2022. Essentially, it is instructive to note that there was no Counsel who had come on record for the 4th and 5th Defendants. Therefore, it follows that the 4th and 5th Defendants were not privy to that day's proceedings. In the interest of the principle of natural justice, Equity and Conscience that it was fair and right for them to have been notified by Mr. Busieka Advocate on all the Court proceeding and happenings, particularly this significant site visit event by the



Coast Regional Surveyor. Indeed, Mr. Busieka Advocate undertook to accomplish this task without any reservation. In any case, he was the one who had even made this request of a Court led Survey exercise before the Court. Unfortunately, as far as notifying of all parties herein of the survey ordered by Court is concerned, the Plaintiff through their Counsel Mr. Busieka Advocate failed to comply with the orders of Court as directed. He never informed them through proper service enclosing an extracted Court Order as directed. The Court has had a keen assessment of all the correspondences exchanged herein. For instance, on 28th September, 2022 and 1st September, 2022 Counsel for the Plaintiff writes to the Attorney General enclosing the extracted Court order for the onward transmission to the Coast Regional Surveyor. The Counsel later on writes to Court on the change of the date from 2nd September, 2022 to 9th September, 2022. None of these letters are addressed directly to the Applicants as ordered by Court. Further, vide a letter to the Coast Regional Surveyor writes to the law firm of Messrs. Gikandi & Company Advocates informing them that the Land Surveying exercise had already taken place on 9th September, 2022. This is extremely wrongful and un-procedural. It's a case of closing the horse stable after the horse had already bolted. The importance of complying with Court orders was emphasized in the case of "Hadkinson – Versus - Hadkinson (1952) 2 All E.R 567 where Romer L.J held that:-

“It is the plain and unqualified obligation of every person against, or in respect of, who an order is made by a Court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

53. Other than failing to notify the parties of the orders of Court as instructed by Court on 21st July 2022, the Plaintiff also failed to comply with Order 5 Rule 22B of the Civil Procedure Rules, 2010 which mandates filling of an affidavit of service even where service has been effected on email. The Civil Procedure Rules, 2010 now allow service through electronic means which is now provided for under Order 5 Rule 22B of the Rules as follows:
1. Summons sent by Electronic Mail Service shall be sent to the Defendant's last confirmed and used E-mail address.
 2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.
 3. Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
 4. An officer of the Court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.
54. The Service of an order of the Court cannot be taken casually as was done by the Counsel for the Plaintiffs. A Court order made by a Court of competent jurisdiction was made on 21st July 2022 ought to be obeyed and discharged by all parties addressed to it. The Plaintiff ought to, have filed an affidavit of service, as directed by the mandatory terms of the provision of Order 5 Rule 22B, confirming service of the Court order was effected to all parties herein. The failure of the Plaintiff to properly effective service of the court order to the parties herein stripped the legitimacy of the survey report dated 20th September 2022.



55. Clearly, the Counsel for the Plaintiff failed to properly effect service upon all parties herein with the orders of Court issued on 27th July 2022. In so doing, he denied them a chance to decide whether or not they wanted to instruct their own independent surveyors to accompany the Coast Regional surveyor to the site visit during the survey. Proof of service of the Court orders as instructed is paramount especially in a case where the other party is denying being serviced.

Issue No. c). Whether the survey exercise carried out on 9th September 2022 by the Coast Regional Surveyor herein complied with the orders of Court issued on 21st July 2022.

56. From the Court order, the Survey exercise was to have been conducted on 2nd September, 2022 or any other nearer date convenient to the Coast Land Surveyor. In as much as the Coast Regional Surveyor had such a genuine reason to have caused the variation or alteration of the date fixed for the Surveying Exercise – 2nd September, 2022 to 9th September, 2022, the only main issue was how this was done.
57. This information regarding the new date, place, time and venue of the exercise was once again was never communicated to all the parties as required by law as stated above. Was it by sheer coincidence that apart from the Plaintiff and the 1st, 2nd and 3rd Defendants were present while the 4th and 5th Defendants/ Applicants and the 1st and 2nd Third Party were conspicuously absent during this important exercise. Ideally, and in the given circumstances, the exercise should not have continued until the Court gave further direction.

Issue No. d). Whether the Land Survey report dated 20th September 2022 and filed in Court on 21st September 2022 ought to be expunged from the Court records.

58. The validity of the Surveyor report is based on whether the due process was followed or not. The Court fully agrees that from the Court order, the Coast Regional Surveyor as the lead expert was to be accompanied by other independent and private surveyors. In my own view, of Course, these other surveyors were not to be present to guide him on the development of the report but at least all the parties ought to have been part of the development of this report. But unfortunately, they were never served and hence never involved in the process.
59. For all these reasons, therefore, the Honorable Court cannot consider the merits of the survey report dated 20th September 2022 since the same was carried out in defiance of its orders issued on 27th July 2022. It will proceed to expunge it from record. Further to this, the Court has noted that the Applicants filed an Amended Notice of Motion application without the leave of Court. The prayers sought by the 4th and 5th Applicants based on the Amended Notice of Motion application have been disregarded.

Issue No. e). Who will bear the Costs of the application

60. It is well established that costs is at the discretion of the Court. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 provides that Costs follow the event. By events it means the result of the legal action and/or proceedings in any litigation.
61. In the instant case, although the 4th and 5th Defendants herein have successfully managed to prosecute their application herein, taking that this matter is still proceeding on to full trial, it is just fair and reasonable that the costs to be in the cause.



VIII. Conclusion & Disposition

62. In the long run, having conducted an elaborate analysis of the framed issues, the Honorable Court finds that the Notice of application dated 19th September 2022 has merit. Thus, the Court proceeds to make the following orders:
- a. That the Notice of application dated 19th September 2022 is merited and hence be and is hereby allowed as prayed.
 - b. That the survey that was conducted on 9th September 2022 and not as directed to take place on 2nd September, 2022 by the Coast Regional Land surveyor be and is hereby declared a nullity and its consequential report dated 20th September 2022 and filed in Court on 21st September 2022 by the Attorney General is expunged from the records.
 - c. That consequently, the Coast Regional Surveyor be and is directed to conduct a fresh survey exercise of Land Parcel MN/V/1517 and MN/V/2382 and file a report in court in accordance with the orders of Court issued on 27th July 2022 within 60 days from the date of this ruling.
 - d. That an order be and is hereby made that all parties in this matter to be properly served with a Seven (7) days both through i). physical and ii). electronic notices at their well-known addresses and/or offices of operation and an affidavit of service to be filed under the provision of Order 5 Rules 15 of the Civil Procedure Rules, 2010.
 - e. That an order be and is hereby that the fresh Land Survey to be undertaken strictly as per the terms and conditions stipulated from the Court order issued on 21st July, 2022 herein without fail.
 - f. That the matter be mentioned on 5th June, 2023 for ascertainment and compliance of the Court order, the progress made and further direction on the matter.
 - g. That costs of the application to be in the cause.

It is so Ordered Accordingly.

RULING DELIVERED VIDE MICROSOFT TEAMS VIRTUAL TEAMS, SIGNED AND DATED AT MOMBASA THIS 27TH DAY OF MARCH 2023

HON. JUSTICE L. L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT AT

MOMBASA

In the presence of:

a. M/s. Yumnah, the Court Assistant.

b. Mr. Busieka for the Plaintiff.

c. Mr. Mwandeje for the 1st, 2nd & 3rd Defendants;

****d. M/s. Kiptum Advocate holding brief for Mr. Gikandi Advocate for the 4th & 5th Defendants.**

e. No appearance for the 1st & 2nd Third Parties.

