



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 64 OF 2019**

JEREMIAH MBITHI.....1<sup>ST</sup> PLAINTIFF/RESPONDENT  
KYALO JOEL.....2<sup>ND</sup> PLAINTIFF/RESPONDENT  
MICHAEL JAMES.....3<sup>RD</sup> PLAINTIFF/RESPONDENT  
ALEX KATIKU.....4<sup>TH</sup> PLAINTIFF/RESPONDENT  
MUOKI KAMOLO.....5<sup>TH</sup> PLAINTIFF/RESPONDENT  
LEONARD KAMOLO.....6<sup>TH</sup> PLAINTIFF/RESPONDENT  
AGNES MUSYOKA.....7<sup>TH</sup> PLAINTIFF/RESPONDENT  
MUTUKU NZOMO.....8<sup>TH</sup> PLAINTIFF/RESPONDENT  
PETER GAKUNGA.....9<sup>TH</sup> PLAINTIFF/RESPONDENT  
GEOFFREY MUASA.....10<sup>TH</sup> PLAINTIFF/RESPONDENT  
GEOFFREY MWANGL.....11<sup>TH</sup> PLAINTIFF/RESPONDENT  
FAITH NDUNGE.....12<sup>TH</sup> PLAINTIFF/RESPONDENT  
GILBERT KIOKO.....13<sup>TH</sup> PLAINTIFF/RESPONDENT  
ROSE SIMON.....14<sup>TH</sup> PLAINTIFF/RESPONDENT

**VERSUS**

**ATHI WATER SERVICE BOARD.....DEFENDANT/APPLICANT**

**RULING**

1. In the Notice of Motion dated 9<sup>th</sup> June, 2020, the Defendant/Applicant has prayed for the following reliefs:

- a) That the Honourable Court be pleased to vacate or set aside the consent order recorded in court on the 25<sup>th</sup> day of July, 2019 (sic) in the suit herein.*
- b) That alternatively the Honourable Court be pleased to review/vary the consent order recorded in the court on the 25<sup>th</sup> day of July, 2019 (sic) in the suit herein.*
- c) That the Honourable Court be pleased to order the Plaintiffs jointly or severally to deposit Kshs. 250 million (Two hundred and fifty million Kenyan shillings) being security in compliance with order dated (sic).*

**d) That the Honourable Court be pleased to make such further orders it may deem best in the circumstances.**

2. The Application is premised on the Affidavit of the Defendant's Principal Legal Officer who has deponed that the Plaintiffs filed this case on the 11<sup>th</sup> May, 2020 (*sic*) under a Certificate of Urgency seeking for the following orders: a declaration that the Plaintiffs are entitled to exclusive and unimpeded right of possession and occupation of the suit property; a declaration that the Defendant, whether by itself or its servants or agents or otherwise howsoever, is not entitled to remain on the suit property; and a permanent injunction restraining the Defendant from occupying the suit property.
3. The Defendant's Principal Legal Officer deponed that the Plaintiffs claimed interest in the land as *project affected persons* who have homes and permanent amenities on the land and as such they would be entitled to compensation.
4. It was deponed that the Defendant is a Water Works Development Agency established under Section 65 of the Water Act, 2016 and that the Defendant's roles are listed under Section 68 of the Act and include the duty to undertake the development, maintenance and management of the national public water works within its area of jurisdiction.
5. According to the Defendant's Principal Legal Officer, the Defendant intended to undertake the construction of Miwongoni 15m High Earth Fill Weir with a storage capacity 1.6 mm<sup>3</sup>; Raw Water Main 650m long, DN 600 & DN 450mm diameter street gravity; New Miwongoni Treatment Works with the capacity of 10,000m<sup>3</sup>/d which is about 300m to the southwest of the existing Maruba Dam Treatment works including pumps, staff houses, laboratory and administrative building; The new Miwongoni treatment works with a new storage tank at Katelembo with 5,000m<sup>3</sup> capacity; 5km long pipe, 400mm diameter; DN 350 mm, 9km along Rising Main from Maruba Treatment plant to the rehabilitated Iveti Tanks (*Replacement*); and Gravity Transmission main from the proposed Katelembo Tanks to Machakos Town 5.2 km long, steel Diameter.
6. It was deponed that this project was to assist the people of Machakos and the surrounding areas in the eradication of the perennial water shortage, diseases and poverty; that the Defendant appointed Jiangxi Water and Hydropower Construction Company Limited to undertake the project and that the contractor went on site to commence the project which was valued at Kshs. 1,068,364,818 and funded by Africa Development Bank (ADB).
7. It is the Defendant's case that the said project stopped as a result of an *ex parte* injunction issued by the court on the 25<sup>th</sup> July, 2019 (*sic*) and that when the matter came up for inter parte hearing on 2<sup>nd</sup> July, 2019 (*sic*), the parties entered into a consent order to the effect that the parties have agreed that for the purpose of determining who are the *bona fide* affected land owners in the project area for the dam and the necessary works, a Committee be constituted consisting of: the Consultant in the Resettlement Action Plan Review (*RAP Review*); ten representatives from the Plaintiffs and two representatives of the Defendant.
8. It was deponed by the Defendant's Principal Legal Officer that the Committee that was to be formed was to be granted full and un-interfered access for purposes of determining the project area; that all project works were stopped until the Resettlement Action Plan Review Report was prepared and presented to the parties herein and that the Committee which majorly comprises of the Plaintiffs is yet to commence its work as the Plaintiffs appear not to be interested in the process.
9. It was deponed that the Plaintiffs were motivated by malice and mischief in entering in the consent; that their intentions were achieved when they obtained the injunctive orders; that it has come to the Defendant's knowledge that there are other suits pending in court concerning the ownership of the suit property which are yet to be dealt with such as Civil Appeal No. 151, 167, 169 of 1989 and ELC No. 76 of 2017.
10. The Defendant's Principal Legal Officer deponed that whereas the Plaintiffs were aware of these matters, they did not disclose the same to the court or the Defendant prior to entering into the consent and that in the circumstances, it is not foreseeable that a report will be made by the said Committee.
11. The Defendant's Principal Legal Officer deponed that as a result of the Plaintiffs' misrepresentation, the contractor Jiangxi Water and Hydropower Construction Company Limited, who was already on site demanded for additional payment contained in the Agreement to the tune of Kshs 120,048,502.55 to compensate him for the additional costs expended throughout the period of delay plus reasonable profit.
12. It is the Defendant's case that the Defendant continues to incur further losses due to the delay; that the Plaintiffs should jointly and severally be ordered to provide security; that the Defendant is ready and willing to compensate the affected persons once they are identified and the affected parcels of land valued and that the Defendant is ready to provide security to the National Land Commission for the acquisition of the land or as the court may order.
13. The Defendant's Principal Legal Officer finally deponed that it is in the interest of the general public that the project which is meant for sustainable water supply and sanitation for the people of Machakos Town and surrounding areas is completed as opposed to the personal interest of the Plaintiffs and that the government has a duty to fulfill its obligation under Article 43 of the Constitution which provides for the right to clean water to its citizens.
14. In response, the 1<sup>st</sup> Plaintiff/Respondent deponed that the Plaintiffs are the owners of the vast land situated in Katheka kai, in Machakos Constituency, Machakos County; that they have been in occupation of their ancestral land since time immemorial and that they have developed it without any interruption or interference.
15. The 1<sup>st</sup> Plaintiff deponed that sometime in 2017, the Defendant started a discussion of building up a dam to be known as Miwongoni dam without involving them as the land owners and that in September, 2017, the Defendant awarded a tender to M/S CAS Consultant Ltd for consultancy services for feasibility study, preliminary design and a detailed design of Miwongoni dam and that the same was undertaken

without involving the stakeholders and without public participation.

16. According to the Plaintiffs, on 2<sup>nd</sup> November 2018, the Defendant awarded a tender for construction of Miwongoni dam to Jiangxi Water and Hydropower Construction Co. Ltd; that the Defendant and its agents started trespassing on their parcels of land and that on 2<sup>nd</sup> July, 2019 (*sic*), the Defendant's Advocate and their Advocate appeared in Court for the *inter partes* hearing of the Plaintiffs' Application for injunction where they recorded a consent and interim orders were issued in their favour.

17. It is the Plaintiffs' case that the injunctive orders were obtained procedurally and lawfully; that the Defendant has not in any way demonstrated that the Injunctive Orders which are in force were not obtained procedurally; that the Defendant has not demonstrated in any way that L.M. Wambua Advocate was not properly instructed to represent the Defendant and that the Application by the Defendant lacks merit and is an abuse of the Court process.

18. It was deponed by the 1<sup>st</sup> Plaintiff that the assertion that the Plaintiffs should deposit Kshs. 250 Million as security is baseless and is a blackmail because the Plaintiffs cannot provide security for the property they own and that for there to be said to be a lawful compulsory acquisition of the suit property within the meaning of Article 40(6), of the Constitution of Kenya, there must be a finding made through a legally established process and not by forceful taking of their property.

19. It was deponed that none of the Plaintiffs was compensated as per the provisions of the Land Act, 2012; that there was no stakeholder identification and analysis carried to determine who were the *project affected people* and that public interest does not override the right to acquire property. Further, it was deponed, the project was kept in abeyance due to the failure by the concerned parties to adhere to the procedures of compulsory acquisition.

20. The 1<sup>st</sup> Plaintiff finally deponed that a consent order can be set aside only in certain circumstances such as on grounds of fraud or collusion; that the parties and their advocates were certainly aware of all the material facts before recording the consent and that the parties complied with the Orders issued by the Honourable Court on 2<sup>nd</sup> July, 2019 (*sic*) where a Committee was constituted and resolutions made.

21. The 1<sup>st</sup> Plaintiff finally deponed that the alleged losses being incurred by the Defendant's contractors cannot be attributed to them because they were not privy to the contract; that public interest does not override the right to acquire property and that the Defendant should follow the right procedure of compulsory acquisition of property.

22. In her Supplementary Affidavit, the Defendant's Principal Legal Officer deponed that the orders the Defendant is seeking to be varied are the ones issued on the 17<sup>th</sup> July, 2019; that exhibit No. DN-6 is not a decision of the Committee or at all and that the Plaintiffs have admitted that there was non-disclosure of the existing disputes in court which they were aware thereof. Both the Plaintiffs' and the Defendant's advocates filed submissions and authorities which I have considered.

23. This suit was commenced by way of a Plaint dated 6<sup>th</sup> June, 2019. Filed contemporaneously with the Plaint was an Application of the same date seeking for orders of injunction restraining the Defendant or its agents from dealing or interfering with the "*Plaintiffs land in Katheka kai, Machakos County until the hearing and determination of the main suit.*" The said Application was filed under a Certificate of Urgency and was heard *ex parte* at the first instance by the court on 13<sup>th</sup> June, 2019. The court granted to the Plaintiffs an *ex parte* order of injunction which was to subsist until 26<sup>th</sup> June, 2019.

24. On 26<sup>th</sup> June, 2019, the court was not sitting whereupon the Plaintiffs filed another Application seeking for the extension of the interim orders of injunction. The court extended the interim orders of injunction until 17<sup>th</sup> July, 2019. On the said date, the parties recorded a consent order in the following terms:

*"By consent*

*a. the parties have agreed that for the purpose of determining who are the bona fide affected land owners in the project area for the dam and necessary works*

*A committee be constituted constituting of*

*i. The consultant in the Resettlement Action Plan Review (RAR Review)*

*ii. 10 Representatives of the Plaintiffs*

*iii. 2 Representatives of the Defendant*

*b. In the meantime, the Committee formed in paragraph (a) above be granted full and un-interfered access for the purpose of determining the project area.*

*c. All project works are hereby stopped until the RAP Review Report is prepared and presented to the parties herein.*

*d. These orders apply mutatis mutandis to ELC No. 50 of 2019*

*e. That the matter be mentioned on the 25<sup>th</sup> September 2019."*

25. It is the above order that the Defendant seeks to set aside or review on numerous grounds. According to the Defendant, the Plaintiffs were motivated by malice and mischief in interring into the said consent; that the Plaintiffs intentions were achieved when they obtained the injunctive orders and that it has come to the Defendant's knowledge that there are other suits pending in court concerning the ownership of the suit property which are yet to be dealt with.

26. It is the Defendant's case that whereas the Plaintiffs were aware of these matters, they did not disclose the same to the court or to the Defendant prior to entering into the consent and that in the circumstances, it is not foreseeable that a report will be made by the said Committee as envisaged in the consent order.

27. The principles upon which a court may interfere with a consent order or Judgment were outlined in **S M N vs. Z M S & 3 others [2017] eKLR** in which the Court of Appeal held as follows:

*“Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is of necessity slightly higher than on a balance of probability but perhaps not beyond reasonable doubt.”*

28. In the case of **Flora N. Wasike vs. Destimo Wamboko [1988] eKLR**, the Court of Appeal stated the conditions on which a consent order can be vitiated as follows:

*“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983.”*

29. In **Kenya Commercial Bank Ltd vs. Specialized Engineering Co. Ltd [1982] KLR 485**, Harris, J correctly held, *inter alia*, that:

*“1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.”*

30. **Henry Wilmot Seton** on *Forms of decrees, Judgments and Orders* 7<sup>th</sup> Edition Vol. 1 page 124 states as follows:

*“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by any agreement contrary to the policy of the court ... or if the consent was given without sufficient material facts, or in misapprehension or ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement.”*

31. More recently, while dealing with an Application seeking to set aside a consent order, the Court of Appeal in **Intercountries Importers and Exporters Limited vs. Teleposta Pension Scheme Registered Trustees & 5 others [2019] eKLR** stated as follows:

*“We have considered the application and the submissions of parties, and consider that the central issue for our consideration is whether the threshold requirements for setting aside the consent have been met. To do so, it will be necessary to consider whether the tests to be fulfilled have been satisfied. The principles that appertain to setting aside of consent orders are well established in a line of cases including **Brooke Bond Liebig vs. Mallya (1975) EA 266** where **Mustafa Ag. VP** stated thus:*

*The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g. on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case, the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”*

32. In view of the above cited authorities, this court ought to consider whether the consent order that was entered into on 17<sup>th</sup> July, 2019 and adopted by the court on the same day was obtained through misrepresentation; mistake; misapprehension or ignorance of facts; and or whether the consent order is against public policy.

33. The Defendant's Principal Legal Officer deponed that the consent that the parties entered into on 17<sup>th</sup> July, 2019 was to facilitate an amicable expeditious disposal of this suit. According to the Defendant's Legal Officer, the Defendant entered into the impugned consent on the understanding that the Plaintiffs were the owners of the suit property, and that the Defendant was not aware of any pending suits between the Plaintiffs and other third parties.

34. One of the ground that the Defendant is seeking to have the consent order set aside is that the Plaintiffs misrepresented to them, and to the court, about the status of the suit property. **Mary Charman** in her book **Contract Law** defines misrepresentation as follows:

*“A misrepresentation is an untrue statement of fact, made by one party to a contract to another, which is not a term of the contract,*

*but has an inducing effect on it.”*

35. Misrepresentation of facts can be made by carelessly issuing facts without checking the actual details. Also, misrepresentation can be a deliberate lie, intended to deceive and stated in the full knowledge that it is untrue. An innocent party in both types of misrepresentation is entitled to rescind the contract if he chooses to (*Mary Charman, 2007, pg. 179*).

36. The classic definition of fraudulent misrepresentation comes from the House of Lord's case, *Derry v Peek (1889) UKHL 1*, in which it was stated that a fraudulent misrepresentation was a false statement made “*knowing, without belief in its truth, or recklessly as to whether it be true or false.*”

37. In the Plaintiff and the accompanying Affidavits, the Plaintiffs averred that they are the owners of the suit. The Plaintiffs did not mention in the pleadings, or during the recording of the consent order, that indeed there are in existence pending suits between them and other third parties in respect of the suit property.

38. The issue of the pending suits arose after the said consent had been recorded, and when the Plaintiffs proposed (*the Plaintiffs’ annexure DN 6*) to have the matter settled in the following terms:

*“The project to be suspended pending the determination of two cases, Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited vs. Daniel Mutisya & Another, Court of Appeal Civil Appeal No. 151, 167, and 169 of 1989 and Onesmus Nthaga Nguma & Others vs. Katelembo Athiani Muputi Farming and Ranching Cooperative Society Limited & Others, Machakos ELC 76 of 2017.”*

39. Considering that the Plaintiffs did not disclose to this court or to the Defendant about the pendency of the suits in relation to the suit property, it is my finding that the Plaintiffs knowingly made a false representation of material facts which intended to induce the Defendant to act in reliance on that representation, which representation the Defendant acted upon to record the consent of 17<sup>th</sup> July, 2019.

40. Indeed, the disclosure about the pendency of other suits changes the trajectory of the consent completely. I say so because until the purported suits are heard and determined, the Plaintiffs cannot state with certainty that they are the only people who will be affected by the proposed project as contemplated in the consent order of 17<sup>th</sup> July, 2019.

41. However, considering that the Plaintiffs were entitled to move the court to ventilate their case, and in view of the fact the issue of who is entitled to the suit property for the purposes of compensation is still pending, I decline to direct the Plaintiffs to deposit any form of security.

42. That being the case, and without going into the merits of the Plaintiffs’ Application for injunction which is still undetermined, I allow the Defendant’s Application dated 9<sup>th</sup> June, 2020 as follows:

***a) The consent order recorded in this court on 17<sup>th</sup> July, 2019 and adopted by this court on the same day is hereby set aside.***

***b) The Plaintiffs to pay the costs of the Application.***

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29<sup>TH</sup> DAY OF JANUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**