



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 220 OF 2008**

**WARAB LIMITED.....PLAINTIFF**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIOKO.....2<sup>ND</sup> DEFENDANT**

**HARRISON MUSYA MUSAU .....3<sup>RD</sup> DEFENDANT**

**FLORENCE KAMENE.....4<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**ANTHONY MUTUA .....6<sup>TH</sup> DEFENDANT**

**DAVID KAVOO.....7<sup>TH</sup> DEFENDANT**

**PETER MUMO MAINGI .....8<sup>TH</sup> DEFENDANT**

**MUSEMBI NZIOKA.....9<sup>TH</sup> DEFENDANT**

**BENJAMIN SEVE.....10<sup>TH</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> March, 2018, the Plaintiff is seeking for the following orders:

***a. That the Plaintiff be granted leave to reopen its case and call additional evidence.***

***b. That the Defendants be at liberty to reopen their case and call whatever evidence they may wish to call.***

2. The Application is supported by the Affidavit of the Plaintiff's Director who has deponed that this suit proceeded for hearing on several occasions; that the Defendants closed their case on 14<sup>th</sup> November, 2017 and that the matter was coming up for mention on 10<sup>th</sup> April, 2018 to confirm filing of submissions.

3. According to the Plaintiff's Director, after all parties testified, she managed to get some crucial documents from the Ministry of Lands and Settlement; that the documents include the letters of settlement of the dispute between the Plaintiff, some of the Defendants and other parties over the disputed land known as L.R. No. 337/996 and that she also managed to get the map for the suit land.

4. The Plaintiff's Director deponed that after the closure of the Defence case, the court directed witness number DW4 to prepare a report on the two Deed Plans in question which was presented in court on 20<sup>th</sup> February, 2018; that the Plaintiff did not have an opportunity to rebut the contents of the report and that the said report was not prepared by a neutral party to the proceedings.

5. The Plaintiff's Director finally deponed that the only way the Plaintiff can respond to the report is by being granted an opportunity to reopen its case and call additional evidence and that the Plaintiff stands to suffer irreparably if the orders sought are not granted.

6. In his Replying Affidavit, the 8<sup>th</sup> Defendant deponed that this is a 2008 matter; that the Plaintiff had its day in court; that the documents that the Plaintiff is seeking to be allowed to produce were re-introduced by the Plaintiff in its Application filed on 19<sup>th</sup> June, 2014 and that nothing stopped the Plaintiff from relying on the documents it now wants to be allowed to produce.

7. According to the 8<sup>th</sup> Defendant, it's this court that directed Mr. James Kitili to produce his report and that both the Plaintiff and the Defendants' advocate had a chance to cross-examine Mr. Kitili extensively on his Report. Both the Plaintiff's and the Defendants' advocates filed submissions which I have considered.

8. This matter was commenced by way of a Plaint dated 21<sup>st</sup> November, 2008. The Plaintiff amended the Plaint on 18<sup>th</sup> December, 2008 and further amended it on 10<sup>th</sup> December, 2009. The Plaintiff filed a bundle of documents running into 222 pages on 19<sup>th</sup> August, 2011.

9. The pleadings having closed, and the parties having held a pre-trial conference, the matter proceeded for hearing on 18<sup>th</sup> October, 2017. On the said date, the Plaintiff's Director, PW1, testified and produced the bundle of documents filed on 9<sup>th</sup> August, 2011 as PEXB 1-29. PW1 also produced the Further List of documents filed on 6<sup>th</sup> March, 2017 as PEXB 30-31 and the Supplementary List of Documents filed on 11<sup>th</sup> October, 2017 as PEXB 32-35. Indeed, all the documents that were filed by the Plaintiff were produced without any objection by the Defendants.

10. The 10<sup>th</sup> Defendant, DW1, together with DW2, DW3 and DW4 testified on 14<sup>th</sup> November, 2017. DW4, a Government Surveyor, informed the court that he had been summoned vide the Witness Summons to testify in the matter. After the testimony of DW4, the Defendants' counsel made an oral Application as follows:

***"I close my case but I pray that the Director of Surveys makes a report on the issue of Deed Plan No. 163310 for L.R. No. 337/996."***

11. The Plaintiff's counsel did not oppose the oral Application by the Defendants' advocate. In his response, the Plaintiff's counsel stated as follows:

***"I am agreeable."***

12. The two advocates having agreed to the preparation of a report in respect of Deed Plan No. 163310, the court recorded the consent by both counsels as follows:

***"Court: By consent, a report by the Director of Surveys or his nominee to be made in respect of Deed Plan No. 163310 for L.R. No. 337/996 within thirty (30) days. DW4 to produce the report on 20<sup>th</sup> February, 2018."***

13. The preparation of an additional report by DW4 was therefore consented to by the Plaintiff's advocate. Indeed, when DW4 produced his report, the Plaintiff's advocate cross-examined him at length. In the Circumstances, the issue of the report that was produced by DW4 being adverse and biased can only be taken up by the Plaintiff in his submissions. In fact, the court will have to determine whether indeed the said report is adverse and biased while writing its Judgment.

14. The Plaintiff is seeking for leave to re-open its case and call additional evidence. According to the Plaintiff, the additional evidence that it wants to produce were obtained after the parties had closed their respective cases. The documents that the Plaintiff intends to produce, in addition to the exhibits already produced, are letters dated 22<sup>nd</sup> November, 2001, and 18<sup>th</sup> May, 2001. The said letters emanated from the Ministry of Lands.

15. The evidence before me shows that the Plaintiff was in possession of the letters dated 22<sup>nd</sup> November, 2001 and 18<sup>th</sup> May, 2001 as at the time PW1 testified. Indeed, the said letters are attached as annexures on the Plaintiff's Director's Replying Affidavit that was filed on 20<sup>th</sup> June, 2009 in Machakos HCCC No. 181 of 2009.

16. I have perused the Plaintiff's bundle of documents which were produced as PEXB1-29. The said bundle has the pleadings that were filed in Machakos HCCC No. 181 of 2009 running from pages 152-194.

17. The Replying Affidavit of the Plaintiff's Director which makes reference to the letters that the Plaintiff wants to be allowed to produce is at page 175 of the Plaintiff's bundle of documents. However, that Replying Affidavit, although produced as an exhibit, does not have the annexures, which includes the letters that the Plaintiff wants to produce.

18. To the extent that there is evidence showing that the letters that the Plaintiff now wants to produce were actually in possession of PW1, and were even annexed in an Affidavit that was filed on 20<sup>th</sup> June, 2009 in Machakos HCCC No. 181 of 2009, it cannot be true that the said documents were only retrieved from the Ministry of Lands after both parties had closed their respective cases.

19. Considering that both parties have closed their cases, and in the absence of a compelling reasons to recall PW1 to testify in this matter, I find and hold that the Application dated 14<sup>th</sup> March, 2018 is unmeritorious.

20. For those reasons, the Application dated 14<sup>th</sup> March, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5<sup>TH</sup> DAY OF JULY, 2019.

O.A. ANGOTE

JUDGE