REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 153 OF 2017

CHARLES MUTUKU...PLAINTIFF/APPLICANT

VERSUS

CHRISTOPHER NZIOKI..........................1ST DEFENDANT/RESPONDENT

BAZZ OIL COMPANY LIMITED...........2ND DEFENDANT/RESPONDENT

RULING

1) What is before this Court for ruling is the Plaintiff's/Applicant's chamber summons application expressed to be brought under Section 5(2)(b) of the National Land Commission Act, Sections 1A and IB of the Civil Procedure Act, 2010; Order 1 Rules 10(2) and 14, Order 10 Rule 11 and Order 45 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for orders: -

> **1. THAT this Honourable Court be pleased to forthwith stay execution of the orders given on 21st of February, 2019 which adopted the Surveyor Report by the County Government of Makueni pending the hearing and determination of this Application.**
>
> **2. THAT this Honourable Court be pleased to review and set aside its Ruling/Orders delivered on 21st of February, 2019 which adopted the Surveyor Report by the County Government of Makueni.**
>
> **3. THAT the National Land Commission be enjoined in these proceedings as the 1st Interested Party.**
>
> **4. THAT the Ministry of Lands & Physical Planning be enjoined in these proceedings as the 2nd Interested Party.**
>
> **5. THAT the Survey Report dated 17th January, 2017 prepared by Peter Ndonye, Senior Surveyor, Makueni County Government be set aside and expunged from the Court record.**
>
> **6. THAT a fresh Survey Report be done and filed by both the Ministry of Lands and Physical Planning and the Surveyor from the County Government of Machakos.**
>
> **7. THAT consequent upon the National Land Commission and the Ministry of Lands being enjoined, the Court is pleased to issue such further Orders and directions with respect to the further conduct of the suit as would be necessary for the expeditious, just, efficient and effective determination of the dispute(s) and issues arising.**
>
> **8. THAT the Costs of the Application be provided for.**

2) The application is dated 01st August, 2019 and was filed in court on 09th August, 2019. It is predicated on the grounds on its face and is supported by the affidavit of Charles Mutuku sworn on 01st August, 2019.

3) The 1st and 2nd Defendants/Respondents have opposed the application vide the replying affidavit of Christopher Nzioki, the 1st Defendant/Respondent herein, who is also a director of the 2nd Respondent.

4) By consent of the Parties herein, the court directed on 24th September, 2019 that the application be disposed off by way of written submissions. The Counsel on record for the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents filed their submissions on 29th October, 2019 and 06th December, 2019 respectively.

5) In grounds 1, 2, 3, 4 and 5, the Plaintiff/Applicant has stated that the National Land Commission is mandated as custodian of all public land, is involved in all issues to do with interest in land, responsible for all allotment and hence it is paramount that they be enjoined, that the Ministry of Land & Physical Planning are the custodians of all land records in the country and it is they that are best placed to make any findings on any disputed area of land in any party of the country, that the court on 21st of February, 2019 vide its ruling allowed the survey report by the County Surveyor to be duly filed in court in spite of the fact that there was no participation by the Plaintiff/Applicant, that the proposed Interested Parties are critical, necessary and relevant to these proceedings in so far as determining the existence of the parcels of land and their boundaries, that it is in the interests of substantial justice and an expeditious, effectual, cost effective trial herein that the proposed Interested Parties be enjoined in these proceedings.

6) The Plaintiff/Applicant has repeated the same grounds in his affidavit.

7) On the other hand, the 1st Defendant/Respondent has deposed in paragraphs 3, 4, 7, 8, 9, 10 and 12 of his replying affidavit that the application by the Applicant is completely devoid of merit, is comprised in utter falsehoods and deliberately designed to delay the speedy conclusion of the suit herein, that he has been advised by his advocate on record which advise he verily believes to be true that the Applicant's application for setting aside the ruling of the court dated 21/02/2019 and the orders consequential thereto has failed to meet the threshold set in law for such an application, that in any event, the impugned ruling and orders were granted after the Applicant had been given an opportunity to be heard, that there exists no justification in law for the review and/or setting aside of the orders of the Honourable Court of 21/02/2019, that the application is also tantamount to an attempt by the Applicant to have a second bite of the cherry, the Applicant having been heard on the merits of the two impugned survey reports now wants to be heard again on the same subject matter without any justification, that there is also no merit in the application for the joinder of 1st and 2nd interested party as the proposed interested parties are not necessary parties for the just determination of the dispute and the Applicant has failed to demonstrate the role the parties will play in the proceedings, that the joinder of the proposed interested parties will only serve to convolute issues for determination in the dispute as the dispute is between two private land owners but which risks being bogged down by unnecessary hijacking by Government institutions.

8) In his submissions, the Plaintiff's/Applicant's Counsel framed three issues for determination. These were: -

(a) Whether or not to review and set aside its ruling delivered on 21st February, 2019 adopting the Survey Report by the County Government of Makueni?

(b) Whether or not to enjoin the National Land Commission and the Ministry of Lands & Physical Planning as Interested Parties?

(c) Whether or not to have a fresh Survey done and report filed?

9) On the other hand, the Counsel for the 1st and 2nd Defendants/Respondents framed the issues for determination as follows: -

(i) Whether the Honourable Court should review its orders of 21/02/2019?

(ii) Whether the National Land Commission and the Ministry of Lands and Physical Planning should be joined in the proceedings as interested parties?

(iii) Who bears the costs of the suit.

Apart from issue number (iii), the rest of the issues as framed by the Counsel for the Defendants/Respondents are similar to the ones framed by the Plaintiff/Applicant. In the circumstances, I will adopt the Plaintiff's/Applicant's issues.

Whether or not to review and set aside the Court's ruling delivered on 21st February, 2019 adopting the Survey Report by the County Government of Makueni?

10) Both the Plaintiff's/Applicant's Counsel and the 1st and 2nd Defendants'/Respondent's Counsel are in agreement that the law on review is to be found in ***Section 80 of the Civil Procedure Act Chapter 21 of the Laws of Kenya*** and ***Order 45 rule 1 of the Civil Procedure Rules, 2010*** which provide: -

Section 80

Any person who considers himself aggrieved: -

(a) By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is allowed by this Act;

May apply for a review of judgment to the Court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45, Rule 1 of the Civil Procedure Rule, 2010

1. (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

11) Arising from the above the Plaintiff's/Applicant's Counsel submitted that the court should be first inclined to question whether there is a new and important matter. He went on to submit that when the survey was being done by the Surveyor of Makueni County Government, the Plaintiff/Applicant was not present and did not participate in the exercise. The Counsel pointed out that it is instructive to note that in the initial report of the District Surveyor, both parties did participate in the Survey process.

12) The Counsel further submitted that the 1st Respondent had no Part Development Plan (PDP) which is necessary before any letter of allotment is issued with regard to public land and added that the County Surveyor did not consider this in making his report nor did he consider that the Applicant had a PDP since he did not involve the latter in the Survey. The Counsel asked the court to consider the absence of the PDP as fundamental and important.

13) It was submitted that a review is allowed for any other sufficient reason and there is no other greater sufficient reason other than the fact that there are seemingly two contradicting survey reports with both surveyors being legitimate from the Ministry of Lands and the County Government of Makueni.

14) The Counsel went on to submit that for an application for review to be successful either of the grounds may be shown and they do not have to be all met. He pointed out in this matter, two of the three grounds have been met and these are discovery of new and important matter or evidence, some mistake or error apparent on the face of the record and other sufficient reason. The Counsel urged the court to grant the orders for review and expunge the report by the County Surveyor.

15) The Counsel for the 1st and 2nd Defendants/Respondents submitted that the Applicant has failed to establish any of the grounds to invoke the court's review jurisdiction.

16) The Counsel went on to submit that the gist of the application for review is simply that it was a mistake for the court to expunge from the record, the report of P.S Nyagol, District Surveyor, Ministry of Lands and Physical Planning dated 19/10/2016 and admit that of the County Surveyor which was conducted without the Applicant's participation. That instead, the report of P.S. Nyagol is the appropriate one as both parties participated while it was being conducted.

17) The Counsel was of the view that the above arguments by the Applicant do not disclose grounds for review but grounds for appeal.

18) The Counsel cited the case of ***Pancras T. Swai v. Kenya Breweries Limited [2014] eKLR,*** the Court of Appeal cited the holding in ***Francis Origo and Another vs. Jacob Kumali Mungala (C.A Civil Appeal No.149 of 2001 (unreported***) where it was held;

"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the Appellants took the option of review rather than appeal they were proceedings in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the Learned Commissioner was right when he found that there was absolutely no basis for the Appellant's application for review."

19) The Counsel referred to the case of ***Abas Belinda vs. Fredrick Kangamu and another [1963] E.A 557,*** which was cited with approval in ***Francis Njoroge vs. Stephen Maina Kamore [2018] eKLR*** where the Court held;

"A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal"

20) The Counsel went on to submit that looking at the totality of the arguments by the Applicant, no new matter or evidence, error apparent on the face of the record or sufficient reason can be said to have been disclosed. The Counsel referred to the case of ***Tokessi Mambili and others vs. Simon Litsang*** which was cited with approval in ***Nasibwa Wakenya Moses (Supra)*** where the Court of Appeal held: -

"In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made."

21) Arising from the above, the Counsel submitted that not a single matter or evidence has been raised as one that has been discovered and that the Applicant had, despite due diligence, no knowledge of or could not produce at the time when the order was made.

22) Regarding what constitutes an error, the Counsel referred to the case of ***Nyamongo & Nyamongo vs. Kogo [2001] EA 170*** which was cited with approval in ***Nasibwa Wakenya Moses (supra)*** where the Court rendered itself thus;

"An error apparent on the face of the record cannot be defined precisely, there being an element of un definitiveness inherent in its

very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established on a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

23) The Counsel went on to submit that firstly there is no error in the finding that there was no implementation of the order of the Honourable Justice Okong'o dated 18th August, 2016 and secondly there can be no error in the finding of the court that the survey report by P.S Nyagol dated 19/02/2016 was done by the person directed to do so by the court. That there can be no error in the court's finding that the report of Peter Ndonye, Senior Surveyor Makueni County Government is the proper survey report for the purposes of the orders of the court on 18/08/2016.

24) The Counsel added that even if there was error which is denied, it is not one that is apparent on the face of the record but one that would necessitate a long drawn process of reasoning to bring it out.

25) The Counsel went on to submit that no sufficient reason has been disclosed for the court to review its orders and cited the case of ***Sadar Mohamed vs. Charan Singh and Another [1959] EA 793*** cited with approval in ***Nasibwa Wakenya Moses (supra***) where the court held;

> "*Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

26) It was also submitted that it is evident that the essence of the application does nothing but to re-open the application subject to the impugned orders. The Counsel referred to the case of ***Evans Bwire vs. Andrew Nginda in Civil Appeal No.147 of 2006*** which was cited with approval in ***Nasibwa Wakenya Moses (Supra)*** where the court stated;

> "*an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or the case afresh."*

27) It was also submitted that the application has been brought after long and inordinate delay for which no explanation has been offered to the court. The Counsel pointed out that the impugned orders were given on 21/02/2019 and the application herein was filed on 01st August, 2019, a delay of about 6 months. The Counsel added that it is a cardinal principle that the Court of equity does not aid the indolent and cited the case of ***Ivita vs. Kyumbu [1984] KLR*** 441 cited in ***Republic –vs Speaker of the Nairobi City County Assembly & Another Exparte Evans Kidero [2017] eKLR*** where the Court held: -

> "*the test applied by the Courts is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite delay. Thus even if delay is prolonged, if the Court is satisfied with the Plaintiff's excuse or the delay and that justice can still be served to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing as the earliest time."*

<u>Whether or not to enjoin the National Land Commission and the Ministry of Lands and Physical Planning as Interested Parties:</u>

28) The Plaintiff's/Applicant's Counsel referred to ***Order 1 Rule 10(2)*** which provides as follows: -

> "*The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."*

He also referred to the case of ***Joseph Leboo & 2 others vs. Director Kenya Forest Services & Another [2013] eKLR*** where Munyao, J while allowing the application for enjoining an interested party stated;

> "*In my view, the joinder of a person as an interested party ought not to be as stringent as the joinder of a person as a defendant. So long as a person can demonstrate that he has a legitimate interest in the subject matter, there is little reason to deny such person a joinder as an interested party. However, this does not mean that the test for joinder ought to be so low so that any busy-body can squeeze himself into a suit as an interested party. There should be a clear demonstration that the suit affects the person directly. If the test is too liberal, then courts will be inundated by numerous applications for joinder, for suits inevitably affect more than just the litigants. The applicant must in my view demonstrate a direct interest in the subject matter, or show that the questions in the suit cannot be determined adequately without his input, even where he is not strictly plaintiff or defendant. An interested party is of course not a plaintiff and neither is he a defendant. He only has a direct interest in the subject matter of the suit.*
>
> *There is no question, that the applicants herein are interested in the subject matter of the suit. The orders sought in this suit will affect them, although it is not them who are bound to answer the questions arising in this suit. They have some knowledge which may assist the court in dealing with the matters if controversy. They can in my view be enjoined as interested parties."*

29) Arising from the above, the Counsel submitted that the National Land Commission (1st proposed Interested Party) is constitutionally mandated and some of its core functions is to manage public land on behalf of the National and County Government and also to advise the

former on a comprehensive programme for the registration of title in land throughout in Kenya thus the importance of the 1st proposed Interested Party is clear and obvious to be seen. The Counsel added that the land which is the subject of this suit is public land and thus the National Land Commission has an interest in its management. The Counsel went on to submit that now there is not just a dispute on the land but a difference in survey report, the National Land commission will be important if not fundamental in finding out the true position of the property in question due to the existence of a PDP for one part and lack thereof for another.

30) It was further submitted that the delay has not been inordinately long in bringing this application. The counsel pointed out care should be taken in dismissing this application whose prayers are not to any party's advantage but rather they will advance, facilitate and enable the court make a just and fair decision. The Counsel went on to submit that enjoining an interested party will not prejudice the Defendants/Respondents in any way.

31) On the other hand, the Counsel for the 1st and 2nd Defendants/Respondents submitted that whereas the court has discretion to allow joinder of parties at any stage of the proceedings, it is incumbent upon the court to consider whether the presence of the party sought to be enjoined is necessary for the effectual and complete adjudication and settlement of all questions involved in this suit. The Counsel referred to the case of ***Attorney General vs. Kenya Bureau of Standards and another [2018] eKLR*** where the Court of Appeal stated thus: -

> *"…the court can, at any stage of the proceedings, upon application by either party or suo motu, order the name of a person who ought to have been joined or whose presence before the Court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added/joined as a party."*

32) It was the Counsel's view that the dispute in question involves two private individuals and the question rising for determination in the proceedings is one of private proprietary rights thus the two proposed interested parties have no role to play in this dispute. The Counsel urged the court to decline the application to enjoin the proposed interested parties and therefore dismiss the application with costs.

Whether or not to have a fresh survey done and report filed?

33) The Counsel for the Plaintiff/Applicant submitted that it has been established that the Applicant was not involved in the survey process done by the County Surveyor and that the Surveyor did not take into consideration material facts like PDP and also the fact that the two independently done survey reports had material discrepancies, fresh survey is paramount so as to allow a clear report that can be relied on.

34) Having read the application, the supporting and the replying affidavits as well as the submissions filed, my finding is that as regards the issue of whether or not the Court should review its ruling delivered on 21st February, 2019, the Applicant has failed to establish any grounds upon which this Court should invoke judicial review jurisdiction. As was correctly submitted by the Counsel for the 1st and the 2nd Respondents, the Applicant's complaint is that the Court expunged the survey report dated 19/10/2016 of P.S Nyagol who is the District Surveyor Ministry of Lands and Planning and in its place admitted the survey report dated 17th January, 2017 prepared by Peter Ndonye, Senior Surveyor Makueni County Government. The Applicant has submitted that he did not participate in the survey exercise which led to the preparation of the latter report. In my view, the Applicant has not shown any error apparent on the face of the record or an account of mistake. If anything, the reasons he has advanced do not disclose grounds for review but rather grounds for appeal. I do note that the Applicant has not shown that there has been discovery of new and important matter or evidence which was not within his knowledge or he could not produce the same at the time the order was made. If the court erred in arriving at its decision delivered on the 21st February, 2019, the Applicant ought to have appealed against the said ruling instead of filling an application for review.

35) The prayer for review and to set aside the ruling delivered on 21st February, 2019 having failed, it follows therefore an order for fresh survey and report filed cannot issue.

36) Regarding the issue of whether or not to enjoin the National Land Commission and the Ministry of Lands and Physical Planning as Interested Parties, it is not in doubt that some of the core functions of the former is to manage public land on behalf of the National and County Governments and also to advise the National Government on a comprehensive programme for registration of title in land throughout Kenya while the latter is the custodian of all the government's records with regard to land. As such, I hold that the presence of the two entities is necessary for the effectual and complete settlement of all the issues brought forth in this suit.

37) The upshot of the foregoing is that the application partially succeeds in terms of prayers 3 and 4. Having enjoined the two as interested parties, the Applicant should further make a determination as to whether or not to enjoin the two as defendants or plaintiffs in this matter.

38) Owing to the partial success of the application, it is only fair that each of the parties herein should bear their own costs. In the circumstances, I hereby proceed to grant prayers 3 and 4 of the application with an order that each party bears his/its costs. It is so ordered.

Signed, dated and delivered at Makueni this 27th day of January, 2020.

MBOGO C.G.,

JUDGE.

In the presence of: -

Mr. Masaku holding brief for Mr. Owaga for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

Court Assistant – C. Nzioka

MBOGO C.G, JUDGE,

27/01/2020.