



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 146 OF 2017**

**CAROLINE WANYUA MWENDWA.....1<sup>ST</sup> PLAINTIFF**

**ALPHONCE MWENDWA.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**CHINA ROAD AND BRIDGE CORPORATION (K).....DEFENDANT**

**R U L I N G**

1. What is coming up for ruling are the Defendant's/Applicant's and the Plaintiffs'/Applicants' Notice of Motion applications dated 27<sup>th</sup> and 29<sup>th</sup> April, 2020 and filed in court on 28<sup>th</sup> and 29<sup>th</sup> April, 2020 respectively.

2. In its application, the Defendant/Applicant seeks the following orders: -

**1) Spent.**

**2) THAT pending the hearing and determination of this application inter-parties that this court be pleased to order for extension of the orders that were issued on the 18<sup>th</sup> December of 2019 to enable the parties herein together with the County Surveyor, Makueni County to complete the Survey exercise in respect of the suit property.**

**3) THAT the costs of this application be provided for.**

3. The application is expressed to be brought under Order 50 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 and all enabling provisions of the law. It is predicated on the grounds on its face and is supported by the affidavit of Joshua Maime, sworn at Nairobi on the 27<sup>th</sup> April, 2020 and further affidavit sworn on 07<sup>th</sup> May, 2020.

4. The Plaintiffs/Respondents have opposed the application vide the replying affidavit of Alphonce Mwendwa, the 2<sup>nd</sup> Plaintiff/Respondent, sworn at Nairobi on the 4<sup>th</sup> May, 2020 and filed in court on even date.

5. As for the Plaintiffs'/Applicants' application, it is expressed to be brought under Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act cap 21 and all enabling provisions of the law for orders: -

**1) Spent.**

**2) THAT this Honourable Court be pleased to set aside its following orders made on 18<sup>th</sup> December, 2019.**

**a. THAT pending the hearing and determination of this application interparties, the court be pleased to order that the Makueni Land Registrar with assistance of the Plaintiff's private surveyor and the Defendants surveyor private surveyor do visit the disputed parcels Nos.58, 59, 31, 62 and 63 within the mother title LR No.973/1 in Emali.**

**b. THAT pending the hearing and determination of this suit herein the court be pleased to order that the Makueni Land Registrar with assistance of the Plaintiff's surveyor and the Defendants surveyor private surveyor do visit the disputed parcels Nos. 58, 59, 31, 62 and 63 within the mother title LR No.973/1 in Emali.**

**c. THAT this court be also pleased to order for the County Surveyor Makueni to be present during the survey**

**exercise. Further the land registrar surveyor's report to be filed within 30 days from the date of the exercise.**

**d. THAT the exercise mentioned in the notice of application dated 25/11/2019 to be carried on 07/2/2020 at 10:00 am.**

**e. THAT mention on 19/3/2020 for further directions.**

**f. THAT costs of the application be provided for.**

**3) THAT the costs of this Application be in the cause.**

6. The application is predicated on the grounds on its face and is supported by the affidavit of Alphonse Mwendwa, the 2<sup>nd</sup> Plaintiff/Applicant herein, sworn at Nairobi on the 29<sup>th</sup> April, 2020.

7. The Defendant/Respondent has opposed the application vide the replying and further affidavits of Joshua Maime, sworn at Makueni on the 07<sup>th</sup> May, 2020.

8. On the 04<sup>th</sup> May, 2020, the Court gave directions that both applications be disposed off together by way of written submissions.

9. The Defendant/Applicant filed his submissions in respect of the two applications on 08<sup>th</sup> May, 2020 while the Plaintiffs/Applicants filed theirs on 13<sup>th</sup> May, 2018.

10. In support of the application dated 27<sup>th</sup> April, 2020, Joshua Maime has deposed in paragraphs 4, 5, 6, 7, 8, 9, 10, 13 and 14 of his supporting affidavit that parties met on the ground on the 7<sup>th</sup> of February, 2020 but the exercise could not proceed because surveyors in respect of both parties were not ready due to lack of equipment for carrying out of the said process and as such parties by consent agreed to take another date being the 24<sup>th</sup> February, 2020, that he is further informed by the Applicant's Advocates on record which information he verily believes to be true that on the 24<sup>th</sup> February, 2020, the Defendant's Surveyor was still not ready thereby again its Counsel again sought the indulgence of the Plaintiff's Counsel and that they agreed to have the exercise done on the 2<sup>nd</sup> March, 2020, that he is further informed by the Applicant's Advocates on record which advise he verily believes to be true that on the 2<sup>nd</sup> of March, 2020, the Defendant's Surveyor was present at the site but he could not locate the Plaintiff's Surveyor and the County Surveyor and could not therefore proceed with the exercise that is meant to be a joint exercise, that the Plaintiff's Counsel however through a telephone conversation intimated to the Defendant's Counsel that she and the Plaintiff's Surveyor were on site, that he is further informed by the Defendant's Advocates on record which information he verily believes to be true that they have since established that the Plaintiffs' purported Surveyor, whom the Plaintiff is relying on for the said exercise, one Mr. Walter Atandi, is neither a licensed surveyor nor an approved assistant to a licensed surveyor and also not a member of the Land Surveyors' Board, that he is further informed by the Defendant's Advocates on record which information he verily believes to be true that they obtained the said information when they wrote to the Land Surveyor's Board seeking to establish the status of the said individual vide a letter dated the 6<sup>th</sup> November, 2019, that he is further informed by the Defendant's Advocates on record which information he verily believes to be true that the Board through its secretary replied vide a letter dated 15<sup>th</sup> November, 2019 clarifying that the said individual was neither a Licenced Surveyor nor an approved Assistant to a Licensed Surveyor and also not a member of the Board, that in view of the fact that the Plaintiffs do not have a competent surveyor to carry out the exercise as ordered by the Court, the Defendant is ready and willing to indulge the said Plaintiffs to enable them instruct a competent Surveyor so that parties can amicably commence the process and conclude the same so as to have this matter concluded without undue delay that may prejudice the interests of the parties, that it is only fair, just and in the interest of justice that an order of site visit be made and a survey report be filed before this honourable court forthwith pending the hearing and determination of the suit herein, that in view of the fact that the Pandemic that is Covid-19 has inter-alia affected the normal operations of the Judiciary, it would be just to have a proper exercise done to enable this matter be dispensed without unreasonable delay.

11. Alphonse Mwendwa, the 2<sup>nd</sup> Plaintiff/Respondent has deposed in paragraphs 6, 7, 9, 10, 11, 12, 13, 15, 16, 17 and 18 of his replying affidavit that he instructed his advocates on record not to oppose the said application and the court granted the sought orders in favour of the Applicant that this was because he wanted to save the court's time which would have been spent on arguing the application, that his advocates, the surveyor and himself attended the site on the 7<sup>th</sup> February, 2020 but the survey exercise was not conducted, that his surveyor had carried his survey tools but the Defendant's Surveyor had not, that the Defendant's Surveyor was not comfortable with using the tools provided by his Surveyor citing accuracy issues, that they further agreed that both parties would meet at the site on the 24<sup>th</sup> February, 2020 in the presence of the court appointed surveyor to confirm the results of the survey exercise, that he is informed by his advocates on record, the advice he verily believes to be true that the Defendant's Counsel called her on the 23<sup>rd</sup> February, 2020 seeking indulgence and asking to take a new date for the site visit as their surveyor was not ready to conduct the survey exercise, that after consultation with his advocates, it was agreed to take on a fresh date, that it was agreed that the Defendant, its advocates and their surveyor, his (2<sup>nd</sup> Plaintiff/Respondent) advocates, his surveyor and himself would meet at the site on the 2<sup>nd</sup> Mach, 2020 to confirm the survey exercise, that himself, his advocates on record and his surveyor were present at the said site by 9:30 am, that the Defendant, the Defendant's Counsel and the Defendant's Surveyor and the court appointed surveyor were not present, that the intended survey exercise did not therefore take place as agreed, that on the appointed day 2<sup>nd</sup> March 2020, his advocates on record called the court appointed Surveyor on his phone and who said that the Defendants called him on 1<sup>st</sup> of March 2020 evening asking him not to come to the site the next day as they will not be ready, that GEOINFO Surveyors are the appointed surveyors in charge of the survey, subdivision etc. of the whole land where the suit property sits, that the maps, beacon certificates etc., that are being used by owners of the subdivided land in the area have been officially generated by them, that in response to paragraphs, 7, 8, 9 of the supporting affidavit he avers that Walter Atandi was working with GEOINFO Surveyors and he was not brought in at any point to conduct survey neither did he appear on the suit property at any point after the orders were made by the court, that he is informed by his advocates on record that the date of 2<sup>nd</sup> March, 2020 was fixed by consent of both parties and not Walter Atandi, that therefore if there were any issues or duty concerning the date the issues should have been discussed between the Defendants advocates and his advocates, that GEOINFO Surveyors had instructions to conduct subdivision for the whole land where the suit property

sits and they are the source of the maps that are being used by both the Plaintiffs and Defendants.

12. In his further affidavit, Joshua Maime has deposed in paragraphs 3, 4, 5, 6 and 7 that he has read the Plaintiffs'/Respondents' Replying Affidavit sworn on the 4<sup>th</sup> May 2020 and where necessary the same has been explained to him by the Defendant/Applicant's Advocates and do respond that the said replying affidavit has extensively dealt with issues that are better canvassed upon a survey exercise being carried out particularly paragraphs 22-32, that in specific reply to paragraphs 15 to 21 he wishes to aver that one Walter Atandi who is not a surveyor authored reports that were filed by the Plaintiff/Respondents that they purported to rely on to advance their case, that he is reliably informed that the Principal Surveyor in regards to Geoinfo Surveyors is deceased having died in 2010 before the said reports were authored, that at the time the said Walter Atandi purported to author the said reports, the said Geoinfo surveyors did not have a principal surveyor and/or surveyor, that the said Geoinfo surveyors only came to have a principal Surveyor in the year 2019, that on the 7<sup>th</sup> February, 2020 when they visited the site, the said Walter Atandi was at the center of the Plaintiff's activities as they kept on communicating with him when it was apparent that he would be late. He went on to dispatch a representative who is also not a surveyor, that the Applicants are being economical with the truth in the circumstances, that the matter before court is a boundary dispute deserving a survey exercise, that the matter being a boundary dispute, the survey exercise is important as it will aid the Court in coming up with a fair and just determination of the same, that in response to the averments contained in paragraph 39 of the Supporting Affidavit, it is apparent that the Applicants are the ones not interested in the exercise as they know very well that the same would expose the fraudulent nature of their suit.

13. In support of their application, Alphonse Mwendwa has deposed in paragraphs 25, 36, 37 and 39 of his affidavit that himself together with his advocates and the Surveyor attended the site on the 7<sup>th</sup> February, 2020 but the survey exercise was not conducted, that his Surveyor had carried his survey tools but the Defendant's Surveyor had not, that the Defendant's Surveyor was not comfortable with using the tools provided by his surveyor citing accuracy issues, that he is informed by his advocates on record that the Respondents are not keen on executing the orders given by the Court on the 18<sup>th</sup> December, 2019, that the Respondents are merely wasting time in an effort to frustrate the suit, that there is no boundary dispute between his neighbour and him so as to warrant the exercise of survey and in fact, there is a fence demarcating the two properties.

14. In reply, Joshua Maime has deposed in paragraph 3, 4, 5, 6, 7, 8 and 9 of his replying affidavit that he has read the Applicant's Application dated 29<sup>th</sup> April, 2020 and where necessary the same has been explained to him by the Respondent's Advocates and replies thereto that the said application lacks merit and that the same is an abuse of the process of this Honourable Court and as such the same ought to be dismissed with cost, that the said application is laced with innuendo, insinuations, half-truths and downright falsehoods, that in specific reply to paragraph 25 of the supporting affidavit, it is not true that the purported Surveyor had carried his tools, that parties mutually agreed that they were not ready for the survey exercise as a result of which they consented to taking another date, that in specific reply to paragraph 28 of the Supporting Affidavit, he is advised by the Respondent's Advocates on record which advise he verily believes to be true that on the 24<sup>th</sup> February 2020, its Surveyor contacted the Respondent and did inform it that he was indisposed and was to take a rest upon the Doctor's recommendation and would therefore not proceed with the said exercise reason why the said Advocates sought the indulgence of the Applicant's Advocates, that the reasons for seeking indulgence were therefore not deliberate but occasioned by circumstances beyond the Respondent's reasonable control, that in reply to paragraphs 29, 30, 31, 32 and 33 of the Supporting Affidavit, he is informed by the Respondent's Advocates on record which information he verily believes to be true that on the 2<sup>nd</sup> March, 2020 when they were to undertake the joint exercise, the Respondent's representatives and its Surveyor were on site, a fact that was made aware to the Counsel to the Applicant through a telephone with Counsel for the Respondent and its Surveyor was ready to proceed with the exercise, that the location of the said Surveyor was disclosed to the said Advocate but she was adamant and led the Applicant's team in boycotting the exercise, that in specific reply to paragraph 34 and 35 of the Replying Affidavit, and in view of paragraph 7 above the Respondent equally incurred costs as a result of the Applicants actions and omissions and led to them sabotaging the said process.

15. In their written submissions, Minishi & Associates Advocates for the Defendant submitted that: -

- 1) They rely on the Supporting Affidavit, Further Affidavit and Replying Affidavit sworn by Joshua Maime on the 27<sup>th</sup> April, 2020 and 7<sup>th</sup> May, 2020.**
- 2) The reasons for failure to have the exercise completed on time have been enumerated in the said Affidavits and that the same were not deliberately occasioned by the Defendant herein.**
- 3) The Plaintiffs have failed to avail a competent Surveyor for purposes of completing the exercise.**
- 4) The Defendant is ready and willing to indulge the said Plaintiffs to enable them avail a licenced Surveyor.**
- 5) The suit concerns a boundary dispute and as such, a survey exercise is fundamental in the determination of the suit herein.**
- 6) It is in the interest of justice that the Orders issued by this Honourable Court on the 18<sup>th</sup> December 2019 be extended.**

16. And in their submissions, Ngeresa & Okallo Associates for the Plaintiffs pointed out that the two applications concern the orders of the Court entered by consent on 18<sup>th</sup> December, 2019. They went on to submit that whereas the Plaintiffs seek to have the orders set aside, the Defendant seeks to have the Plaintiffs compelled to appoint a competent Surveyor with compliance with those orders and have the said orders extended. The Counsel was of the view that the outcome of both applications have a bearing on the consent orders.

17. The Plaintiffs' Counsel enumerated the facts arising from the attempts to implement the orders of 18<sup>th</sup> December, 2019 as follows: - that the Plaintiffs took steps to ensure compliance. That the 1<sup>st</sup> Plaintiff was present on the suit property on each and every date ordered by the Court while accompanied by advocates on record and his appointed surveyor in readiness to comply with the court orders. That however, the Defendant wasn't keen on executing the orders as it misinterpreted them and failed to attend the suit property on the agreed date with no information to the Plaintiffs or their advocates or on record. That the orders obtained on the premise that the Plaintiff were claiming land

parcel number Mbitini/Nzai Block 1 (Nzai Farm)/9 (formerly land parcel number 58 and land parcel number 64 which the Plaintiffs sought to clear out by instructing their advocates not to oppose the application.

18. The Counsel went on to submit that the suit has birthed all the above applications which comprise of trespass, illegal excavation of soil, compensation and special damages, that the dispute does not comprise of a boundary dispute as the Defendant would want this Court to believe.

19. The Counsel went on to submit that there is no boundary dispute between any neighbour and the Plaintiffs so as to warrant the exercise of survey. That a fence erected by the neighbour who owns land parcel number Mbitini/Nzai/Block 1 (Nzai Farm)/9 (formerly land parcels number 58 and 64) demarcates land parcel number Mbitini/Nzai Block 1 (Nzai Farm)/266 (formerly land parcel number 57 and 63 and land parcel number Mbitini/Nzai Block 1 (Nzai Farm)/9 (formerly land parcel numbers 58 and 64).

20. It was the Counsel's view that the following issues arise for determination: -

**(a) Whether or not the survey conducted is lawful.**

**(b) Whether or not there is a boundary dispute.**

**(c) Whether or not the consent orders were occasioned by mistake or misrepresentation.**

21. On the issue of whether or not the survey conducted is lawful, the Counsel submitted that survey was conducted on the land where the suit property sits and the same was duly approved by the Survey of Kenya. That there is a map on record duly stamped and approved by the Survey of Kenya and that this would defeat the need for fresh survey to be conducted. The Counsel pointed out that the Plaintiffs would be greatly aggrieved should fresh survey be conducted as it would not only slow down the course of this suit but also deplete their resources further as they would have to facilitate the conduct of the exercise again.

22. On the issue of whether or not there is a boundary dispute, the Counsel submitted that the Defendant lacks locus standi to bring about the issue of boundary dispute as they have never owned any ownership rights over land parcels number Mbitini/Nzai Block 1/(Nzai Farm)/9 (formerly land parcel numbers 58 and 64), land parcel number Mbitini/Nzai/Block 1 (Nzai Farm)/266 (formerly land parcel number 57 and 63) and Land parcel number Mbitini/Nzai Block 1 (Nzai Farm)/9 (formerly Land parcel number 58 and 64). The Counsel pointed out that this suit which the Plaintiffs filed in court comprises of trespass, illegal excavation of soil, compensation and special damages. That the Plaintiffs claim that the Defendant trespassed into their land, excavated soil and left a brough which has since prevented them from utilizing their land.

23. On whether or not the consent orders were occasioned by mistake or error, the Counsel submitted that an order by consent can only be set aside upon grounds such as mistake, fraud and misrepresentation of material facts.

24. In support of her submissions, the Counsel relied upon the case of **Broke Bond Liebig vs. Mallya [1975] EA 266** and added that this is a clear case of mistake.

25. The Counsel further referred to **Black's Law Dictionary** but she did not cite the edition of the Dictionary which defines "mistake" as;

*"A misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable."*

26. It was further submitted that the Plaintiffs did not oppose the application because they wanted to make it clear to the court and to the Defendant that land parcel number Mbitini/Nzai Block 1 (Nzai Farm)/266 situate in Emali/Sultan Hamud (formerly land parcel number 57 and 63 and not land parcel number Mbitini/Nzai Block 1 (Nzai Farm)/9 (formerly land parcel number 58 and 64) was the suit property.

27. The Counsel added that while the Plaintiffs were mistaken to believe that the Defendant intended to carry out a survey to confirm the respective parcels and encroachment into their land, the Defendant had other ulterior motive evidenced by the first site visit where they wanted to determine issues including the volume of soil excavated. That had the Plaintiff known that this was the intention of the Defendant, they would have opposed the application in the first instance.

28. Regarding misrepresentation, the Plaintiffs' Counsel submitted that the Defendant tried to extend and misrepresent the orders of the Court in order to bring the issue of a boundary dispute which is neither the subject of this suit or application nor did it have locus standi. In support of her submissions, the Counsel cited the case for **Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR** where the Court stated thus: -

*"The term locus standi means a right to appear in Court and, conversely, as it stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."*

The Counsel emphasized that the Defendant lacks locus standi to bring out the issue of boundary dispute as it has no ownership rights.

29. As for the Surveyors, the Counsel submitted that the whole land where the suit property i.e. Mbitini/Nzai Block 1(Nzai Farm) was surveyed by Geoinfo Surveyors. That the Geoinfo Surveyors drew maps that have been presented before the Court by the parties herein and that those maps have been approved by the Survey of Kenya.

30. Having read the two applications by the Defendant and the Plaintiffs respectively as well as the submissions filed by their advocates on record, I am of the view that the issue that arises is whether or not the orders issued by this Court on 18<sup>th</sup> December, 2019 should be extended or set aside.

31. I will start by reproducing the orders that this Court issued on 18<sup>th</sup> December, 2019. They were: -

**1) THAT pending the hearing and determination of this application inter-parties that this court be pleased to order that the Makueni Land Registrar with the assistance of the Plaintiff's private surveyor and the Defendant private surveyor do visit the disputed parcels Nos.58, 59, 31, 62 and 63 within the mother title L.R No.971/1 in Emali.**

**2) THAT pending the hearing and determination of the suit herein that this court be pleased to order that the Makueni Land Registrar with the assistance of the Plaintiff's private surveyor and the Defendant private surveyor do visit the disputed parcels Nos. 58, 59, 31, 62 and 63 within the mother title L.R No.973/1 in Emali**

**3) THAT this court be also pleased to order for a County Surveyor's report to be filed within 30 days from the date of the exercise.**

**4) THAT the exercise mentioned in the notice of application dated 25/11/2019 to be carried on 07/2/2020 at 10:00 am.**

**5) THAT mention on 19/3/2020 for further directions.**

**6) THAT the cost of the application be provided for.**

It is clear that the orders in question indicated that the disputed parcels are 58, 59, 31, 62 and 63 within the mother title LR No.973/1 in Emali. The Defendant contends that the survey exercise could not take place because the Plaintiffs did not have a licenced Surveyor and that since the suit concerns a boundary dispute, a survey exercise is necessary. On the other hand, the Plaintiffs have stated that they have no boundary dispute with any of their neighbours and as such the Defendant lacks the locus standi to raise this issue. The Plaintiffs further contend that when they entered into the consent, they were of the mistaken believe that the Defendant wanted to ascertain the encroachment of neighbouring parcels of land into their land. They further contend that during the site visit, they realized that the Defendant wanted to determine other issues including the volume of the soil excavated. The Defendant has not controverted the deposition by the Plaintiffs. They have instead sought to dwell on the issue of the Plaintiffs having gone to the site in the company of a person who was not a licenced Surveyor. I see no reason why the exercise could have not been carried out in compliance with the Court's order in view of the fact that the County Surveyor and the Land Registrar were to be present. The Defendant could have expressed their reservation regarding the surveyor that the Plaintiffs had and thereafter proceeded to allow the exercise to go on. Be that as it may, I am in agreement with the Plaintiffs that they have no boundary dispute with any of their nieghbours and their claim is that the Defendant trespassed into their land and excavated from it. That being the case, the Defendant has no locus standi to purport to raise the issue of boundary dispute. I see no good reason to extend the orders of 18/12/2019. Their extension would only convolute the issues in dispute between the Plaintiffs and the Defendant.

32. The upshot of the foregoing is that the Defendant's application dated 27<sup>th</sup> April, 2020 has no merit while the Plaintiff's application dated 29<sup>th</sup> April, 2020 is meritorious. In the circumstances, I hereby proceed to dismiss the Defendant's application with costs to the Plaintiff. I proceed to grant prayer 1 of the Plaintiff's application. The Plaintiffs/Applicants shall have the cost of the application.

**Signed, dated and delivered at Makueni via email this 09<sup>th</sup> day of June, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant: Ms. C. Nzioka**