



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MIGORI**

**ELC CASE NO. 660 OF 2017**

**(CONSOLIDATED WITH MIGORI ELC CASE NO. 146 OF 2017)**

**ELISHA OKOTH OTIENO**

**FANUEL ACHOLA OTIENO**

**ISAIAH OJOWI OTIENO.....PLAINTIFFS/APPLICANTS**

**VERSUS**

**JARED OTIENO AOKO (Sued on his own and as the legal administrator of the Estate**

**ELIZAFAN AOKO GUMBO, Deceased}.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 22<sup>nd</sup> October 2019 filed in court on 29<sup>th</sup> October 2019 pursuant to Order 46 Rules 13,14,16 and 17 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3, 3A & 63 (e) of the Civil Procedure Act Chapter 21 Laws of Kenya and Articles 48, 50 (1), 159 (2)(d) & 165 of the Constitution, 2010 and the inherent jurisdiction of the court (The application herein). The same is contained in the lead file herein, Migori ELCC No. 660 of 2017.

2. Notably, on 5<sup>th</sup> April 2018, the lead file was consolidated with the other file namely Migori ELCC No. 146 of 2017. This followed consent of Mr. Omotto, learned counsel for the plaintiff and Miss. Ochwal learned counsel for the defendant in the other file.

3. It is noteworthy that the instant suit as per the lead file was lodged at Kisii Environment and Land Court and commenced by way of a plaint dated 19<sup>th</sup> January 2015 whereby the applicants are seeking, inter alia, a declaration that the respondent holds the suit land, Kamagambo/Kongudi/1111 on trust for the applicants and a permanent injunction restraining the respondent from dealing with the suit land. The respondent denied the claim in his statement of defence of 26<sup>th</sup> February 2015.

4. In the other file, the respondent has sued the 1<sup>st</sup> applicant for a permanent injunction in respect of the suit land. The claim is denied by the 1<sup>st</sup> applicant in his statement of defence dated 17<sup>th</sup> November 2011 and filed on 19<sup>th</sup> November 2011.

5. In the application the three (3) plaintiffs (The applicants herein) through Oguttu, Ochwangi, Ochwal and Co Advocates, are seeking the following orders:

I. The Honourable Court be pleased to set aside, annul and/or expunge the reports, filed by and/or on behalf of the Land Registrar and Surveyor, Migori County respectively, dated the 19<sup>th</sup> day of September 2019, which were filed and/or lodged on the basis of the Order of this Honourable Court made on the 1<sup>st</sup> day of July 2019.

II. Consequent to prayer (1) hereinabove being granted, the Honourable Court be pleased to order and/or direct the Substantive Land Registrar In-charge and the County Surveyor, Migori County, respectively, to visit LR NOS. KAMAGAMBO/KONGUDI/1111, 1106 & 1107, respectively and thereby comply with the express/explicit terms/tenor of the court order made on the 1<sup>st</sup> day of July 2019.

III. In the alternative and without prejudice, to the foregoing, the Honourable Court be pleased to review and/or set aside the Consent

Order entered into and endorsed onto the court record on the 1<sup>st</sup> day of July 2019.

IV. The Honourable Court be pleased to make such further and/or other directions as the court may deem fit and expedient.

V. Costs of this application be in the cause.

6. Briefly, the application is premised on grounds (1) to (4) set out on its face. The grounds include that the Land Registrar and County Surveyor, (the two public officers herein). Migori County denied the parties the right to incorporate the two elders in line with the order of this court granted on 1<sup>st</sup> July 2019 hence the applicants were deprived of a fair hearing. That unless the orders sought herein are granted, the applicants stand to suffer detriment.

7. The application is also based on a 26-paragraphed supporting affidavit sworn on even date by the 1<sup>st</sup> applicant, Elisha Okoth Otieno for and on behalf of the other two (2) applicants. Accompanying the affidavit are documents marked as EOO1, E002 (a) and E002 (b) namely the court order dated 4<sup>th</sup> July 2019, Migori County Surveyor's report dated 19<sup>th</sup> September 2019 and Land Registrar's report regarding observation on the ground respectively. Thus, the gist of the application is per the said grounds, the supporting affidavit and the annexed documents.

8. By a 23-paragraphed replying affidavit sworn by Jared Otieno Aoko, the defendant (The respondent herein) filed in court on 12<sup>th</sup> November 2019, through O.M Otieno and Co Advocates, the two defendants (applicants) opposed the application and sought its summary dismissal to pave way for the hearing and determination of the suit. It is deposed therein, inter alia, that the move that culminated into the orders of reference herein was originated by the applicants and their counsel who are now attempting to shift goal posts. That even if the current request was to be granted, the result of the revisit will be the same as both parties were accorded opportunity to be heard by the Land Registrar and Surveyor as envisaged under Sections 19 and 20 of the Land Registration Act.

9. It is deposed further that reports duly filed in court by the two public officers are mere evidence and the applicants should seek to cross examine the authors on the contents thereof. That therefore, the application constitutes an abuse of the due process of the court and intended to delay, frustrate, impede the fair and expedient disposal of the suit which was mounted in the year 2015. The respondents deposed that the application is contrary to Sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya and Article 159 of the Constitution of Kenya, 2010.

10. On 13<sup>th</sup> November 2019, this court ordered and directed that the application be argued by written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.**

11. Accordingly, learned counsel for the applicants filed a 7-paged submissions dated 12<sup>th</sup> March 2020 while learned counsel for the respondents filed a 12-paged submissions dated 13<sup>th</sup> December 2019. Interestingly, the submissions of the latter are contrary to Practice Direction number 33 (supra) and this court deplore the same. Nonetheless, in the spirit of Articles 50 (1) and 25 (c) of the Constitution (supra), I do not lose sight of the said submissions.

12. In the applicants' submissions, reference is made to this court's orders of 1<sup>st</sup> July 2019, the two public officers' reports duly filed in court on 30<sup>th</sup> September 2019, issues for determination framed therein including whether the Land Registrar and County Surveyor fully complied with the court orders and whether the court can grant the orders sought in the application. It is submitted that hat the two public officers did not fully comply with the orders which were propelled by consent of the parties hence the court cannot grant prayers sought in the application.

13. To fortify the said submissions, counsel cited Articles 50 (1) and (4) and 159 (2)(e) of the Constitution (supra) as well as Section 4(1)(a) of the Contempt of Court Act. He relied further on authorities, inter alia, **Central Bank of Kenya and another-vs-Ratilal Automobile Ltd and others Civil Application No. 247 of 2006**, applied in **Republic-vs-Principal Secretary Ministry of Defence ex-parte George Kariuki Waitaha (2018) eKLR**, and **B-vs-Attorney General (2004) 1KLR 431**.

14. In their submissions, the respondents, too, referred to the orders sought in the application, gave a brief background of the suit and the application, termed the application an abuse of the process of the court and urged this court to dismiss the same to pave way for further proceedings. They submitted, inter alia that the grounds of the application are inadequate to warrant review of the consent order made at the instance of the applicants on 1<sup>st</sup> July, 2019 and that the filed reports are pieces of evidence which can be subjected to cross examination of the two public officers.

15. To buttress their submissions, the respondents relied on the case of **Isaac Kinyanjui Njoroge-vs- National Industrial Credit Bank Ltd (2018) eKLR**, on application for review, and the decision in **Johnson Nyamoko-vs-Otiso Ondicho and another (2019) eKLR**, regarding setting aside of such report(s). They also cited the case of **Peter Ng'ang'a Muiruri-vs-Peter Njoroge Muiruri and another (2009) eKLR**, in regard to rules of procedure and technicality.

16. I have duly considered the application, the replying affidavit and submissions of counsel for the respective parties including issues framed and authorities cited therein. I am of the view that the issues for determination at this stage are compressed thus:

- a. Did the Land Registrar and County Surveyor Migori comply with this court's orders of 1<sup>st</sup> July 2019?
- b. Depending on the outcome in issue number 1 hereinabove, what is the fate of the application?

17. In regard to the first issue, on 1<sup>st</sup> July 2019, by further consent of counsel for the respective parties, it was ordered, inter alia;

a. “The Land Registrar and County Surveyor, Migori to visit LR Nos. Kamagambo/Kongudi/1111, 1106 and 1107 and to establish and or ascertain the original homes of the plaintiffs and their parents’ graves and the current occupation and file their report(s) within the next sixty (60) days from this date.

b. During the visit in order number (1) hereinabove, two elders from the plaintiffs’ side and two elders from the defendant’s side to accompany the officers and participate during the exercise.”

18. It is noted that the said orders were issued pursuant to sections 18, 19 and 20 of the Land Registration Act, 2016 (2012). It is common baseline that the two public officers visited the site in dispute on 19<sup>th</sup> September 2019 and generated their respective reports duly filed in court on 30<sup>th</sup> September 2019.

19. On 3<sup>rd</sup> October 2019, this court did direct and order the parties to file and serve their respective comments, if any, in respect of the reports in line with Articles 25(c), 48 and 50 (1) of the Constitution (supra). However, the parties failed to do so and in lieu thereof the applicants initiated the present application.

20. Be that as it may, the two (2) reports amount to opinion evidence as envisaged under Sections 48 and 54 of the Evidence Act Chapter 80 Laws of Kenya. So, are the reports binding on this court?

21. Generally; such evidence is persuasive in nature depending on the facts and circumstances of each case as held in the case of **Amosam Builders Developers Ltd -vs- Gachie and 2 others (2009) KLR 628; see also CD Desouza-vs-BR Sharma (1953) 26 KLR 41 at 42.**

22. The conclusion and recommendations in the two (2) reports indicate that nine (9) persons attended the exercise conducted by the Land Registrar and County Surveyor further to orders of court given on 1<sup>st</sup> July 2019. As such, did the nine persons include the elders as per order number 2 given on 1<sup>st</sup> July, 2019? The answer is subject to cross examination of the authors of the reports.

23. It is apparent from the reports and the respondent’s submissions that the two public officers determined the dispute concerning boundaries of Land Reference Number Kamagambo/Kongudi/1104, 1106, 1112 and the suit land. To that extent, does the determination conclude the matter?

24. To answer the foregoing question, it is cardinal to note that this court has the mandate to entertain the instant suit in view of Section 18(2) of the Land Registration Act (supra) which reads:

**“The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”**

25. The applicants contend that the two (2) reports ought to be set aside for non-compliance with the orders of 1<sup>st</sup> July 2019. The respondent’s counsel submitted otherwise and cited **Isaac Njoroge** and **Julius Nyamoko cases** (supra).

26. It was therefore, the applicant’s assertion that the two reports border on contempt of court. In **Hadkinson-vs-Hadkinson (1952) 2 ALLER 567**, it was held that there is unqualified obligation upon every person against or in respect of an order was made by a court of competent jurisdiction, to obey it.

27. Moreover, the court has powers to restrain by injunction, threatened contempt; see **Mutitika-vs-Baharini Farm Ltd (1985) eKLR.**

28. Having noted the two reports duly filed and the parties’ respective submissions including all the case law, constitutional and statutory provisions cited therein, it is quite clear that the two (2) public officers complied with court orders (1) and (2) made on 1<sup>st</sup> July 2019. In the circumstances, any issue implied or arising from the reports, is to be brought to light during cross examination of the officers who authored them, at the hearing of the suit.

29. This court is fully conscious of the special and inherent powers under Section 3 of the Civil Procedure Act Chapter 21 Laws of Kenya and the overriding objective under Section 3 of the Environment and Land Court Act, 2015 (2011) as aligned to Article 159 (2)(b), (c), (d) and (e) of the Constitution (supra). In order to meet the threshold as commanded by the said provisions of the law, the applicants are at liberty to challenge the two reports during the hearing of the suit in the spirit of Articles 50(1) and 25(c) of the said Constitution. Whereas the application is made within the law and well presented, the same is quite premature and devoid of merits.

30. Wherefore, the application dated 22<sup>nd</sup> October 2019 and filed in court on 29<sup>th</sup> October 2019 by the applicants hereby fails. I proceed to dismiss the same with costs in the cause.

**Delivered, Signed and Dated at Migori in open Court and through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the Corona Virus pandemic challenge this 15<sup>th</sup> day of JULY , 2020.**

**G.M.A ONGONDO**

**JUDGE**

**In Presence of :-**

Mr. O. M. Otieno learned counsel for the plaintiffs/applicants

Ms. Ochwal learned counsel for the defendant/respondent

Court Assistant – Tom Maurice