



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 153 OF 2017**

**CHARLES MUTUKU ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**CHRISTOPHER NZIOKI .....1<sup>ST</sup> DEFENDANT/1<sup>ST</sup> APPLICANT**

**BAZZ OIL COMPANY LIMITED .....2<sup>ND</sup> DEFENDANT/2<sup>ND</sup> APPLICANT**

**RULING**

1. What is before this Court for ruling is the Notice of Motion application expressed to be brought under Section 1A, 1B, 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules (2010) and all other enabling provisions of the law for orders:-

**1) Spent.**

**2) Pending the hearing and determination of the suit herein, the Honourable Court does hereby issue an order directing the County Surveyor, County Government of Makueni does effect the orders of Justice Okong'o dated 18/08/2016.**

**3) In the alternative to prayer (3) above, the Honourable Court does find that the Survey report dated 17/01/2017 prepared by Peter Ndonge, Senior Surveyor, Makueni County Government and addressed to the Deputy Registrar, Machakos High Court is the proper Survey report for the Purposes of the orders of Justice Okong'o dated 18/08/2016.**

**4) An order expunging from the Court record, the Survey report dated 19/10/2016 by P. S. Nyagol, District Surveyor, Ministry of Lands and Physical Planning of the National Government of Kenya.**

**5) The Honourable Court be pleased to grant leave for the joinder of the County Government of Makueni as an interested party to this suit.**

**6) The Honourable Court does grant leave to the parties to amend their pleadings to include the County Government of Makueni as an interested party.**

**7) The costs of this application be provided for.**

2. The application is dated 05<sup>th</sup> March, 2018 and was filed in Court on 07<sup>th</sup> March 2018. It is predicated on the grounds on its face and is supported by the affidavit of Christopher Nzioki, the 1<sup>st</sup> Defendant/Applicant and director of the 2<sup>nd</sup> Defendant/Applicant, sworn at Nairobi on the 06<sup>th</sup> March, 2018. Charles Mutuku, the Plaintiff/Respondent, has opposed the application vide his replying affidavit sworn at Nairobi on the 14<sup>th</sup> May, 2018 and filed in Court on even date.

3. Amongst the ten grounds upon which the application is predicated are that by the orders dated 18<sup>th</sup> June, 2016 Okong'o, J ordered the County Surveyor Makueni County to visit plot number 1298 Kinyoo Settlement Scheme and plot number 244 BCR Zone E Emali Market to ascertain the existence of the two parcels of land and if the same are in existence, to mark their boundaries and file a report in Court, the surveyor's report dated 19<sup>th</sup> October, 2016 filed in Court by the District Surveyor, Ministry of Lands and Physical Planning of the National Government is not a report by the County Surveyor as required by Okong'o, J. That the County Surveyor Makueni County Government has since furnished the Applicant with a Survey report dated 17<sup>th</sup> January, 2017 on the same property whose findings contradicts those of the District Surveyor, Ministry of Lands and Physical Planning, National Government. That the Makueni County Government through the Chief Officer, Department of Lands, Mining and Physical Planning has since denounced the survey report dated 19<sup>th</sup> October, 2016 and denied their involvement in the exercise. That the orders of Justice Okong'o have therefore never been effected. That the actions by the Respondent to involve the District Surveyor instead of the County Surveyor are tantamount to unilaterally amending the orders of Justice Okong'o dated 18<sup>th</sup> August, 2016.

4. Directions were given that the application be disposed off by way of written submissions.

5. The Applicant's Counsel in his submissions framed the following issues for determination namely:-

**(i) Which of the two survey reports between that of the District Surveyor, P. S. Nyagol, and Peter Ndonye, County Government Surveyor, is the proper report for the purposes of the orders of Justice Okong'o issued on 18/08/2016.**

**(ii) Whether the County Government of Makueni should be enjoined as an interested party.**

6. In answer to the first issue, the Applicant's Counsel submitted that where a Court order is issued, its intention and purpose must be adhered to. The Counsel pointed out that it is clear that the intention and purposes of the order of 18<sup>th</sup> August, 2016 which was for the Court to benefit from a survey report by a relevant office was never achieved. The Counsel cited the case of **Republic Vs. Kenya School of Law & 2 others Ex parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR** where D. V. Odunga J had this to say;

*"...by deliberately interpreting Court orders with a view of evading or avoiding their implementation can only be deemed to be contemptuous of the Court. Where a party is for some reason unable to properly understand the Court order one ought to come back to Court for interpretation or clarification..."*

7. The Counsel further cited the case of **Woburn Estate Limited Vs. Margaret Bashforth [2016] eKLR** where the Court of Appeal cited with approval the case of **Refrigeration and Kitchen Utensils Ltd vs. Gulabchand Popatlal Shah & Another, Civil Application No.39 of 1990** where it was observed;

*"A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the Court and not take upon themselves to determine such a question.... he should apply to the Court that it might be discharged. As long as it exists it must not be disobeyed."*

8. The Counsel further cited the case of **Sam Nyamweya & 3 others V Kenya Premier League Limited & 2 others [2015] eKLR** where it was stated that;

*"A Court order requiring compliance is not a mere suggestion or an opinion or a point of view. It is a command that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy. If one is dissatisfied with an order of the Court, the avenues for challenging it are also set out in the law. Defiance should never be an option".*

9. On the issue of whether the County Government of Makueni should be enjoined as an interested party, the Counsel cited **Order 1 Rule 10(2) of the Civil Procedure Rules, 2010** 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 a 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 a plaintiff or a 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."*

10. The Counsel was of the view that given the nature of the dispute in question, which touches on what was considered a public land at some point, and long history of the land in question involving the County Government of Makueni and its predecessors, the County Government of Makueni is a proper and necessary party for the just determination of the dispute herein.

11. The Counsel cited the case of **Brek Sulum Hemed Vs. Constituency Development Fund Board & another [2014] eKLR** where Muriithi, J stated as follows while commenting on the import of enjoining an interested party to a suit;

*"The issue therefore becomes whether it is in the interest of justice for the Applicants to be joined, whether as necessary parties or as interested parties – whether it is on own motion of the Court or on their application. As necessary parties, the provisions of Rule 10 Order 1 will apply to require that their involvement to be necessary for the Court to 'effectually and completely adjudicate upon and settle all questions involved in the suit'. As interested parties, the Applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit".*

12. Arising from the above, the Counsel submitted that it is in the interest of justice for the County Government of Makueni to be enjoined as an interested party.

13. The Counsel cited the case of **Attorney General Vs. Kenya Bureau of standards and another [2018] eKLR** where the Court of Appeal while citing the **Provisions of Order 1 Rule 10(2) of the Civil Procedure Rules** stated as follows:-

*"Although premised on the provisions of Order 1 Rule (10)(2) of the Civil Procedure Rules, this Court in M K v M W M & another, Cause No.268 of 2013, emphasized that 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. The*

guiding principle in joinder of parties is that;

*“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”*

14. The Counsel submitted that the presence of the County Government of Makueni is necessary for the effectual and complete settlement of the issues brought forth in this suit especially in light of the contrasting positions taken by the County and National Governments on the issue and added that the Respondent will not suffer prejudice if the County Government is enjoined as an interested party.

15. On the other hand, the Counsel for the Plaintiff/Respondent framed the following issue for determination;

**(a) Whether the report filed by the County Surveyor seconded from the Ministry of Lands & Physical Planning is properly on record.**

16. The Counsel submitted that although the application has been carefully couched as an opposition to the report that was filed in Court, it is in essence an application to set aside the report as consented by all the parties.

17. The Counsel went on to submit that the application must be tried with the same test as setting aside a consent order. The Counsel pointed out that the 1<sup>st</sup> Applicant has taken lightly the fact that even this Court acquiesced this report and took it in its entirety. The Counsel added that the Court would never have allowed the report that has not obeyed orders and proceeded to cite **Setton on Judgments and Orders (7<sup>th</sup> Edn) Vol 1 page 124** which provides 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 on those claiming under them.....*

*Cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the Court.....; or if the consent was given without sufficient material facts, or in general for a reason which would enable the Court to set aside an agreement”.*

18. The Counsel submitted that the above passage was followed by the Court of Appeal in **Brooke Bond Liebig Ltd V Mallya [1975] EA 266 at 269** where Law Ag P said;

*“A Court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties”*

19. The Counsel further submitted that the consent order and its enforcement is not in question. That it was not obtained fraudulently nor by an agreement contrary to the policy of the Court. The Counsel pointed out that the survey was done in 2016 with the participation of all the parties.

20. The Counsel was of the view that the survey and subsequent report by Mr. Nyagol is properly on record for the reasons that;

***i. The Surveyor who carried out the survey is indeed based at Makueni and working as the County Surveyor seconded from the Ministry of Lands & Physical Planning and hence the right person to prepare this report.***

***ii. At the time of allocation of the land all rights in respect of public land was a reserve of the National Government and therefore all the relevant process were centrally managed by the National Government under the Ministry of Lands.***

***iii. Since there seems to be a problem with the documents that the parties herein have in their possession the only way this Honourable Court can resolve this is by having parties present all their documents at the Ministry of Land and Physical Planning offices and/or the National Land Commission in Nairobi for purposes of verification of those documents with the records that are in custody of these office.***

***iv. Whereas the Respondent's plot No.244 appears in the PDP (Part Development Plan) of the area, the Defendant/Applicants' does not appear anywhere. There can never be two different PDPs for the same area. The Respondent is personally aware that several plots appearing in the PDP just like his have already been developed by the owners such as Plot No. 77 where SKY HOTEL has been developed belonging to a prominent personality and Plot No. 243 just next to the Respondent's. The existing PDP has not been cancelled and therefore it is the relevant reference document.***

21. The Counsel submitted that while recording the consent, they were of the view and rightly so that since the Court was well aware of the situation of public land and that it is the Ministry of Lands and Physical Planning along with the National Land Commission who manage the same, that the consent was for a surveyor based at Makueni from the Ministry of Lands and Physical Planning and not necessarily from the County office.

22. The Counsel submitted that the Applicants are estopped by the maxim of equity;

***“equity aids the vigilant and not the indolent”*** from raising an issue now.

23. The Counsel added that since the report was in 2016, the Applicants cannot claim to have woken up from their slumber of irregularity 2 years later taking into consideration that the matter had even been set down for pre-trial. The Counsel termed the application as one that is frivolous, vexatious and a waste of Court's time and ought to be dismissed with costs.

24. The Counsel submitted that the Respondent while filing the report did the same in good faith, *bona fide*. That the surveyor was mutually agreed upon, he conducted his work in the presence of all the parties and tabled a report. The Counsel went on to submit that the order was complied fully and that in the absence of the reasons for setting aside and expunging the report, the same filed by the County Surveyor seconded from the Ministry of Lands and Physical Planning is properly on record and hence be relied upon by the Court.

25. I have read the application together with the supporting affidavit as well as the replying affidavit. I have also read the submissions that were filed by the Counsel on record. I will address the issues for determination raised by the parties herein together. I have looked at the order issued by my brother, Okong'o J on the 18<sup>th</sup> August, 2016. Order 1 was directed to the County Surveyor Makueni County and not to the Surveyor seconded from the Ministry of Lands and Physical Planning to the County. Whereas there was nothing wrong with seconding a Surveyor from the National Government to the County Government, it was incumbent upon the said Surveyor to prepare the report and sign it as a County Surveyor and not as a Surveyor from the National Government. I am persuaded by the authority of in **Republic V Kenya School of Law & 2 others Ex parte Juliet Wanyiru Njoroge & 5 others [2015] eKLR**. I hold that it was not open to the Respondent to interpret the order of 18<sup>th</sup> August, 2016. The Respondent ought to have moved the Court to interpret or clarify the order in question before embarking on the process of surveying. It is clear to me therefore that there was no compliance with the order of 18<sup>th</sup> August, 2016. I am not convinced therefore that the application should be tried on the same test of setting aside a consent order as the Respondents would want this Court to believe for the obvious reasons that there was no compliance with the order of the Court in the first instance. I also agree with the 1<sup>st</sup> Applicant's Counsel that given the nature of dispute in question, the County Government of Makueni is a proper and necessary party for the just determination of the dispute herein. It will therefore be necessary for the parties to amend their pleadings.

26. The upshot of the foregoing is that the application has merits and same is allowed in terms of prayers 3, 4, 5, 6 and 7.

Signed, dated and delivered at Makueni this 21<sup>st</sup> day of **February 2019**.

**MBOGO C.G.,**

**JUDGE.**

**IN THE PRESENCE OF:**

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

No appearance for the 1<sup>st</sup> Defendant/Applicant

Ms Nzioka - Court Assistant

**MBOGO C.G, JUDGE,**

**21/2/2019.**