



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 255 OF 2009

DANSON MUTUKU MUEMA.....1ST PLAINTIFF

JOHN S.K. MUTISO.....2ND PLAINTIFF

NDAMBUKI KYULE.....3RD PLAINTIFF

GEORGE MUTUA KIILU.....4TH PLAINTIFF

(On behalf of 118 others)

VERSUS

GOVERNMENT OF MACHAKOS COUNTY.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

AND

RT. REVEREND MARTIN KIVUVA.....1ST INTERESTED PARTY

REVEREND FR. ALFONS MONDUI.....2ND INTERESTED PARTY

REVEREND FR. LEONARD MAWEU.....3RD INTERESTED PARTY

RULING

1. In the Application dated 21st September, 2017, the 1st Defendant is seeking for the following orders:

a. That the order issued on 19th May, 2017 setting aside the consent order given on 14th November, 2014 be set aside.

b. That the Application dated 9th February, 2017 be heard de novo on its merits.

c. That the costs of this Application be borne by the Respondents in any event.

2. The Application is supported by the Affidavit of the 1st Defendant's Chief Legal Officer who has deponed that when this suit was filed, the parties were engaged in out of court negotiations that led to the recording of the consent which was signed on 6th October, 2014; that the consent was adopted as an order of the court thus settling the matter and that the 1st Defendant proceeded to implement its development agenda on the suit land from the date of the consent without any interference from the Plaintiffs.

3. According to the 1st Defendant's Chief Legal Officer, the Defendants' advocate was discharged from the matter upon the adoption of the consent and that the said advocate had her Bill of Costs taxed.

4. It was deponed that the Plaintiffs subsequently sought to have the consent order set aside on the ground that the firm of Nyamu & Nyamu Advocates did not have their instructions to enter into the consent; that the proper party to have been served with the Application of 9th

February, 2017 was the County Government of Machakos, who would have proceeded to appoint an advocate to represent it and that the firm of Nyamu & Nyamu advocate should have also been served with the said Application.

5. According to the Defendants'/Applicants' counsel, it is only the firm of M/S Mwangangi & Co. advocates who were served with the Application of 9th February, 2017; that the 1st Defendant had not appointed the said firm of advocates to act on its behalf and that having taxed her Bill of Costs, there existed no relationship between the said firm of advocates and the Defendants and that all the other parties to the consent were never served with the Application of 9th February, 2017.

6. The 1st Defendant's Chief Legal Officer finally deponed that the Defendant was condemned unheard and that the Application should be heard on merit.

7. In response to the Application, the Plaintiffs deponed that the main issue in the Application dated 9th February, 2017 revolved around the issue of the firm of Nyamu & Nyamu advocates having acted without their consent and authority; that the firm of Nyamu & Nyamu advocates were duly served with the Application; that the services of the firm of Mwangangi & Co. advocates had not been formally withdrawn and that the Application should be dismissed.

8. The 1st Interested Party deponed that the Plaintiffs appointed the firms of F.M. Mulwa & Co. advocates together with the firm of Nyamu & Nyamu advocates to act for them; that they instructed their advocate to oppose the Application of 9th February, 2017; that their advocates did not file a Replying Affidavit in opposition to the Application dated 9th February, 2017 in good time and that all the parties should have been served with the Application.

9. According to the Interested Parties, the Application that was served on their Advocate did not indicate the date when the same was coming up for hearing and that there was a confusion in the listing of this matter when it came up for hearing on 18th May, 2017.

10. The Defendants'/Applicants' advocate submitted that there were no grounds that warranted the setting aside of the consent order that was adopted on 14th November, 2014; that the Plaintiffs appointed the firm of Nyamu & Nyamu advocates who entered into the impugned consent on their behalf and that a consent can only be varied or discharged if it is entered into fraudulently.

11. Counsel submitted that the failure by the Plaintiffs' counsel to serve the Application dated 9th February, 2017 on all parties goes against the rules of natural justice; that the 1st Defendant became a new entity which was different from the entity that the firm of M/S Mwangangi & Co. advocates was acting for and that the advocates were fully discharged when the matter was marked as settled.

12. The firm of Nyamu & Nyamu advocates submitted that due to the fact that they were not served with the Application which culminated in the setting aside of the consent, the orders that issued were irregular and the same ought to be set aside *ex debito justiae*.

13. The Plaintiffs'/Respondents' advocate submitted that the firm of Nyamu & Nyamu advocates were duly served and appeared in court; that the firm of Mwangangi & Co. advocates was notified of the hearing of the Application dated 9th February, 2017 and that the current Application should be dismissed.

14. The record shows that the Plaintiffs herein sued the then County Council of Masaku, the Municipal Council of Machakos and the Attorney General. In the Plaint, the Plaintiffs alleged that being members of the Akamba tribe, and their forefathers having occupied land known as Machakos Township/1491 measuring 3,769 acres, they have usufructuary rights over the said land; that the Defendants held the suit land as trustees and that the said land is trust land.

15. The firm of Mwangangi & Co. advocates filed a Defence on behalf of the Municipal Council of Machakos and represented it throughout the proceedings. Indeed, on 9th July, 2013, the firm of Mwangangi & Co. advocates filed an Application dated 4th July, 2013 in which it sought for the substitution of the Municipal Council of Machakos with the County Government of Machakos. That Application was allowed by consent on 26th July, 2013. It is therefore obvious that the firm of Mwangangi & Co. advocates has always been on record for the 1st Defendant.

16. The record shows that on 14th November, 2014, the firms of Nyamu & Nyamu advocates, Mulwa and Mulwa advocates, Mwangangi & Co. advocates, B.M. Musau & Co. advocates and the State Law office entered into a consent settling the matter. Each party was required to settle its own costs.

17. Although the firm of F.M. Mulwa & Co. advocates was acting alongside the firm of Nyamu & Nyamu advocates for the Plaintiffs, it would appear that the firm of F.M. Mulwa & Co. advocates was not involved in the recording of the consent which settle the matter. Consequently, the firm of F.M. Mulwa & Co. advocates filed an Application dated 9th February, 2017 in which it sought to set aside the consent of 14th November, 2014 on the ground that the firm of Nyamu & Nyamu did not have express instructions from the Plaintiffs to settle the matter.

18. When the Application came up for hearing on 18th May, 2017, the firm of Nyamu & Nyamu advocates was represented by Ms. Esami advocate. Neither the 1st Defendant's advocate nor the advocates for the Interested Parties were in court. The court allowed the Application dated 9th February, 2017 as an opposed.

19. The firm of Mwangangi & Co. advocates who were on record for the 1st Defendant was duly served with the Application dated 9th February, 2017. Despite the matter having been settled by the consent of the parties, and the said firm having taxed its Bill of Costs, it

remained on record for the 1st Defendant. It is therefore not true that the 1st Defendant should have been served with the Application dated 9th February, 2017 and not the firm of Mwangangi & Co. advocates. In the absence of an Affidavit from an advocate in the said firm of advocates explaining the reasons for their failure to attend court, I find that the 1st Defendant has not offered a plausible explanation to warrant the setting aside of the orders of this court of 18th May, 2017.

20. As I have indicated above, the firm of Nyamu & Nyamu advocates was represented in court on 18th May, 2017. Indeed, the advocate from the said firm was in court on 22nd March, 2017 when the court gave directions that the Respondents should file their Replying Affidavits within fourteen (14) days. By the time the matter came up for hearing on 18th May, 2017, the said firm of advocates had not filed its Replying Affidavit. The same situation applies to the Interested Parties, who were represented in court on 22nd March, 2017 by Mr. Malelo advocate.

21. All the parties were therefore aware of the hearing date of the Application dated 9th February, 2017. Consequently, the issue of the said parties having not been heard on the said Application does not arise.

22. In any event, I have perused the consent order of 14th November, 2014 and noticed that the firm of F.M. Mulwa advocates was not involved in the signing of said consent. This is despite the fact that in the Notice of Appointment dated 2nd February, 2012, the Plaintiffs appointed both the firm of Nyamu & Nyamu advocates and F.M. Mulwa advocates to act for them. The failure to involve the firm of F.M. Mulwa advocates in the recording of the said consent corroborates the Plaintiffs' assertion that they did not instruct the firm of Nyamu advocate to enter into the said consent.

23. Indeed, considering the number of the Plaintiffs involved in this suit and the general public interest in the matter, the firm of Nyamu & Nyamu advocates should have obtained written instructions from all the Plaintiffs before compromising the suit. They never did so. In the circumstances, I find that the 1st Defendant's Application dated 21st September, 2017 is not meritorious. The Application is therefore dismissed with costs to the Plaintiffs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE