



**REPUBLIC OF KENYA**

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

**ELC CASE NO.355 OF 2017**

***(Formerly Machakos HCC Suit No.7 of 2005)***

**THOMAS MATEE NZOMO (Suing as the legal representative of the Estate of**

**DANIEL NZOMO WAMBUA – Deceased).....PLAINTIFF**

**-VERSUS-**

**MAKUENI COUNTY GOVERNMENT..... DEFENDANT**

**RULING**

1. On the 15<sup>th</sup> October, 2020, Mr. Nthiwa for the Plaintiff made an application that the court do give reasons in writing on why it allowed the Defendant to give fresh evidence from the dock (read witness box) when the Plaintiff's case was long closed. The Counsel based his application under Order 11 of the Civil Procedure Rules. The Counsel further submitted that the Plaintiff has complained all through regarding the manner in which the Defendant is trashing these proceedings. The Counsel pointed out that when the Plaintiff's witnesses were giving evidence, the Court declined leave for the Counsel to lead in chief the plaintiff in that they were directed to adopt their witnesses statements. It was further submitted that the Defendant had been allowed to lead its witnesses on two occasions. The Counsel sought for the directions of the court to apply to all the witnesses without selection.

2. In reply, Mr. Musau for the Defendant submitted that the Plaintiff's Counsel was misleading the Court in that the Counsel was in court when the Defendant's witness was stood down upon application by his Counsel. The Counsel pointed out that the Plaintiff's Counsel not only protested but he acquiesced. The Defendant's Counsel went on to submit that the Defendant finds itself in a peculiar circumstance which is different from that of the Plaintiff in that it is in court following an amended plaint registered in court on 22<sup>nd</sup> May, 2018.

That the Plaintiff had previously sued Wote Town Council and that there has never been complete finalization of the handing over of the assets and liabilities of the defunct Council thus forcing the Defendant to give evidence based on the documents which they had managed to get and were not handed over to them.

3. The Plaintiff herein testified on the 09<sup>th</sup> October, 2019 as can be seen from the proceedings of the same date. The Plaintiff adopted his statement recorded on 09<sup>th</sup> November, 2018 and proceeded to produce his 11 documents in his list of documents of the same date as exhibits. The record shows that the Plaintiff did not only elucidate on some of the documents that he produced in evidence but he also rebutted the Defendant's document marked as DMFI-1. His sole witness, Wilfred Mutuku Muindi (PW1) based his evidence on the valuation report produced as P.Exhibit No.8 as he had not recorded any statement when he came to court to testify. It is therefore not true for the plaintiff's counsel to say that PW1 was directed to adopt a statement as there was none in the file. He did elucidate on the report P. Exhibit No. 8 contrary to what the counsel has submitted.

4. Whereas, the Court may have verbally directed the Plaintiff to adopt his witness statement, as observed herein above, it is

therefore not correct to state that this is all what the Plaintiff did on the material day.

5. Having elucidated on some of the documents that he relies on, the Plaintiff cannot be heard to deny the Defendant's witness the chance to do the same. Secondly, it is not correct to say that the Defendant's witness has been allowed on two occasions to give evidence from the witness box as he was stood down on 28<sup>th</sup> January, 2020 upon the application by the Defendant's Counsel. The reasons why the witness was stood down are clearly indicated in the brief ruling by the court on the 28<sup>th</sup> January, 2020 and as such there are no other reasons to give in writing.

As at 15<sup>th</sup> October, 2020, the Defendant's witness was in the witness box to continue with his evidence that he begun adducing on 28<sup>th</sup> January, 2021

6. Order 11 Rule 1 of the Civil Procedure Rules provides as follows:-

*"This order shall apply to all suits except small claims or such other suits as the court may by an order exempt from this requirement."*

7. My understanding of the above rule is that it is within the discretion of the court to exempt such other suits such as this one even though this court did not expressly grant the exemption. It must be borne in mind that this suit was filed in court in the year 2005 while the Civil Procedure Rules herein came into force in the year 2010. Whereas the court did direct the parties to comply with the said Order 11 of the Civil Procedure Rules, it is pretty obvious that not all the procedures provided for under the Order were followed. Strictly speaking, this matter could have proceeded without necessarily invoking the provisions of Order 11 Civil Procedure Rules as it was filed long before the rules in question came into force. By allowing the Defendant's witness to elucidate on documents that originally belonged to the defunct Town Council of Wote, I see no prejudice that will be occasioned to the Plaintiff as the latter too had a chance to do the same.

8. The upshot of the foregoing is that the objection/application by the Plaintiff has no merit and same is dismissed with no orders as to costs.

**Signed, dated and delivered at Makueni via email this 04<sup>th</sup> day of December, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. G. Kwemboi



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