Wainania v Nyangi (Environment & Land Case E043 of 2022)
[2023] KEELC 16609 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16609 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E043 OF 2022

JO MBOYA, J

MARCH 23, 2023

BETWEEN

PETER WANYOIKE WAINANIA ..... RESPONDENT

AND

SIMON CHACHA NYANGI ..... APPLICANT

RULING

Introduction And Background

1. Vide notice of motion application dated the December 9, 2022, the applicant herein has approached the honourable court seeking for the following reliefs;

    i. That this application be certified as urgent;

    ii. That this honourable court be pleased to strike out the originating summons dated August 19, 2022 on the ground that the same is malicious, baseless, scandalous, fictitious or vexatious and abuse of the process of the court.

    iii. That in the alternative to the above, the honourable court be pleased to order that the originating summons proceeds as if the cause had begun by filing a plaint, with leave to the respondents, to amend and or add to their affidavits or pleadings in terms of a defence and counter-claim as may be directed by the court;

    iv. That the honourable court be pleased to visit the *locus in quo* (the suit property) so as to properly appraise itself on the facts as regards possession and or occupation of the property and to verify and therefore preserve that status quo as directed by the court.

v. That the honourable court do order that the Chief Land Registrar be added as a defendant in the suit to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit, particularly since the applicant prays for an order of court directing the Registrar of Lands Nairobi to register his name as the registered proprietor of the suit property in place of the respondents.

vi. That this honourable court do order the respondent to attend court for cross-examination on his affidavit sworn on the August 19, 2022.

vii. That the costs of the application be borne by the respondent/applicant John Nyaga Karaya in any event.

2. The instant application is anchored and premised on various, albeit numerous grounds, which have been enumerated in the body thereof. For clarity the grounds thereunder are itemized from grounds (a) to (j), all inclusive.

3. Furthermore, the instant application is premised on a lengthy and elaborate affidavit sworn by the defendant/applicant on the December 9, 2022, as well as another affidavit sworn by one Antony Munyasia. For clarity, same is also sworn on the December 9, 2022.

4. Upon being served with the instant application, the plaintiff/responded thereto *vide* grounds of opposition dated the February 6, 2023, wherein the plaintiff/respondent has contended, *inter-alia*, that the current application is misconceived and bad in law.

5. Be that as it may, the current application came for mention on the January 26, 2023, whereupon the advocates for the parties agreed to canvass and dispose the application *vide* written submissions. Consequently, the honourable court proceeded to and set timelines for the filing and exchanging the written submissions.

6. It is imperative to note and underscore that the applicant thereafter proceeded to and filed written submissions dated the February 28, 2023. However, the respondent herein did not file any written submissions.

7. Notwithstanding the foregoing, when the matter came up for mention on the March 2, 2023, learned counsel for the respondent intimated to the honourable court that same will not be filing any written submissions as pertains to the subject application.

8. Additionally, learned counsel for the plaintiff/respondent proceeded and stated that same shall be relying on the grounds of opposition duly filed on behalf of the respondent.

Submissions By The Parties

a. Applicant's submissions

9. The applicant herein filed written submissions dated the February 28, 2023 and in respect of which the applicant has raised, highlighted and amplified four issues for consideration by the honourable court.

10. First and foremost, learned counsel for the applicant has contended that the impugned originating summons dated the August 19, 2022, is premised and or anchored on malicious, baseless, scandalous and fictitious grounds, which are calculated to abuse the due process of the honourable court.

11. In addition, learned counsel for the applicant has submitted that the averments contained at the foot of the affidavit in support on the originating summons are merely calculated to aid the plaintiff/ respondent in grabbing the applicant's land, albeit without lawful cause and or basis.

12. Furthermore, learned counsel for the applicant has submitted that the plaintiff/respondent has also propagated and adduced before the honourable court false and fabricated documents, which are (sic) purported to have been procured and obtained from the land office.

13. However, learned counsel for the applicant has contended that the impugned documents, which are being relied upon, are contrary to and in contravention of the requisite form that is authorized and mandated pursuant to regulation 86 of the *Land Registration (General) Regulations 2017*.

14. On the other hand, learned counsel for the applicant has further proceeded to and submitted that the Cabinet Secretary has since generated a circular to denounce the existence of certain fake certificate of searches, which are purported to have been obtained from the land registry.

15. Other than the foregoing, learned counsel for the applicant has also ventured to and contended that the respondent herein is a person of no known means and place of abode.

16. Additionally, learned counsel for the applicant has also contended that the photographic evidence, which have annexed to the supporting affidavit, in support of the originating summons, appear to be fictitious and fabricated.

17. To surmise, counsel for the applicant has therefore contended at the foot of paragraph 13 of the written submissions that there exists overwhelming evidence that the respondent has never resided on the suit property and in any event, is not in occupation of the same.

18. Consequently and in the premises, counsel has added that the originating summons is therefore baseless and hence ought to be struck out.

19. In support of the submissions that the originating summons before hand ought to be struck out for being scandalous, vexatious and or frivolous, learned counsel for the applicant has cited and relied on various decisions *inter-alia* *Mercy Nduta Mwangi T/a Mwangi Kingara & Co Advocates v Invesco Assurance Co Ltd* (2019)eKLR, *Yaya Towers Ltd v Trade Bank Ltd* (2000)eKLR, *Crescent Construction Company Ltd v Delphis Bank Ltd* (2007)eKLR and *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & 2 others* (2009)eKLR.

20. Secondly, learned counsel for the applicant has submitted that the instant originating summons ought to proceed as if same was filed *vide* plaint, to enable the honourable court to interrogate the validity and propriety of the claims made by the plaintiff/respondent.

21. Furthermore, learned counsel for the applicant has contended that the allegations at the foot of the current proceedings, include inter-alia, claims of forgery and fraud, which have been made against the plaintiff/respondent and hence such claims can only be properly addressed by way of *viva voce* evidence.

22. In any event, counsel for the applicant has added that hearing of the current originating summons by way of *viva voce* evidence, will enable the applicant to procure and bring forth evidence by the residents of Karen Golf Park Estate, which evidence would enable the honourable court to fully appreciate the picture and correct position pertaining to the subject matter.

23. As pertains to issuance of directions that the matter herein does proceed *vide viva voce* evidence, learned counsel for the applicant has invited the court to take cognizance of the provisions of order 37 rule 19 of the *Civil Procedure Rules* 2010.

24. Thirdly, learned counsel for the applicant has submitted that the facts and evidence placed before the honourable court as pertains to possession and occupation, appear to be contradictory. In this regard, counsel for the applicant has contended that whereas the plaintiff/respondent claims to be in possession and occupation of the suit property, the applicant is of the contrary position and has availed assorted photographic evidence to show that the respondent has never been in possession of the suit property.

25. As a result of the foregoing, learned counsel for the applicant has therefore contended that it would therefore be proper and imperative that the honourable court to visit the *locus in quo* and thereby establish the true facts as regards occupation and possession of the suit property.

26. In respect of the submissions pertaining to the visitation of the *locus in quo*, learned counsel for the applicant has invited the honourable court to take cognizance of *inter-alia*, the case of *Charles Ndegwa Kiragu alia Ndegwa Kiragu – deceased* (2016)eKLR, *the estate of Daniel Kibui (deceased)* (2016)eKLR, *Republic v National Environmental Tribunal & 4 others China Road and Bridges Corporation* (2016)eKLR, *Republic v Nairobi City County Government Ex- parte Mike Sonko Mbuvi* (2015)eKLR, *Ibrahim Musa Muhamed v Amina Hassan Suleiman & 6 others* (2018)eKLR and *Juma Juma Kanga & 299 others v Abdul Kadir Ahmed Rahamn & others* (2021)eKLR, respectively.

27. Fourthly, learned counsel for the applicant has submitted that there is need to grant leave and join the Chief land Registrar as a party to the instant suit, to enable all the issues in controversy, to be addressed and resolved once and for all.

28. In addition, counsel for the applicant has contended that the Chief Land Registrar is the custodian of land records and hence same would be able to address and answer issues/questions pertaining to veracity of the applicants title documents.

29. Furthermore, learned counsel for the applicant has ventured and stated that a failure to join the Chief Land Registrar would deprive the honourable court of the requisite opportunity to fully understand and appreciate the issues that are in dispute and which have been raised before this honourable court.

30. Consequently and in the premises, counsel for the applicant has submitted that the Chief Land Registrar is indeed a necessary party and thus ought to be joined and/or impleaded in line with the provisions of order 1 rule 10(2) of the *Civil Procedure Rules* 2010.

31. In support of the submissions that the Chief Land Registrar is a necessary party and thus ought to be joined in the matter, learned counsel for the applicant has cited and quoted *inter-alia*, the case of *Peter Irungu Wainaina v Chege Njuhia & others* (2018)eKLR, *Teknomatic Ltd T/a Promo Park Company v Kenya Wine Agencies Ltd & another* (2014)eKLR and *Werrot & Company Ltd & 3 others v Andrew Douglas Gregory & 2 others* (1998)eKLR.

32. In the premises, learned counsel for the applicant has therefore implored the honourable court to find and hold that the originating summons filed by and on behalf of the respondent is otherwise an abuse of the due process of the court.

33. In the alternative, counsel for the applicant has submitted that the honourable court should decree and or direct that the originating summons herein does proceed *vide viva voce* evidence and that the Chief Land Registrar be joined/impleaded as an additional party.

b. Respondents submissions

34. Though the respondent had initially intimated and indicated that same would be filing written submissions in opposition to the current application, same ultimately failed to do so.

35. In any event, when the matter came up for mention on the March 2, 2023, learned counsel for the respondent expressed himself and intimated that contrary to the initial position, same would not be filing any written submissions.

36. For coherence, learned counsel for the respondent thereafter impressed upon the honourable court to proceed and craft a ruling, albeit relying on the grounds of opposition which were filed on behalf of the respondents.

37. Essentially, learned counsel signified that same would be relying on the grounds of opposition dated the February 6, 2023.

Issues For Determination

38. Having reviewed and evaluated the application dated the December 9, 2022, the supporting affidavit thereto as well as the grounds of opposition filed on behalf of the plaintiff/respondent and having duly considered the written submissions filed on behalf of the defendant/applicant, the following issues do arise and are thus pertinent for determination;

    i. Whether the originating summons beforehand constitutes and amounts to an abuse of the due process of the court and thus ought to be struck out.

    ii. Whether the Chief Land Registrar ought to be joined (sic) as a party to the instant proceedings or better still, whether sufficient basis has been laid out for the intended joinder.

    iii. Whether the applicant has established and demonstrated a basis to warrant visitation to the *locus in quo*.

    iv. Whether the subject matter ought to proceed as if same was commenced *vide* plaint or otherwise.

Analysis And Determination

Issue number 1

Whether the originating summons beforehand constitutes and amounts to an abuse of the due process of the court and thus ought to be struck out.

39. It is common ground that the subject matter was commenced and/or originated *vide* originating summons dated the August 19, 2022 and in respect of which the plaintiff/respondent contended to have been in occupation and possession of the suit property for more than 12 years.

40. Pursuant to and on the basis that same (read plaintiff/respondent) has been in occupation and possession of the suit property for more than 12 years, same has therefore implored the honourable court to decree that the defendant/applicant's right and title to and in respect of the suit property have been extinguished by effluxion of time.

41. Furthermore, the plaintiff/respondent has also sought that upon the finding and declaration that the defendant's/applicant's title has been extinguished *vide* effluxion of time, then the honourable court

should proceed and make a declaration that the plaintiff/respondent has thereby acquired title to the suit property vide adverse possession.

42. It is imperative to point out that the originating summons filed by and on behalf of the plaintiff/ respondent is duly supported by an affidavit, which contains various, albeit numerous averments therein.

43. Furthermore, the impugned supporting affidavit has also brought forth various annexures *inter-alia*, photographic evidence, exhibited by the plaintiff/respondent and which (sic) are contended to show that the plaintiff/respondent has been in occupation of the suit property.

44. There is no gainsaying that upon being served with the impugned originating summons, the defendant/applicant herein filed various responses vide affidavits and in respect of which same has heavily contested the allegations by the plaintiff/respondent.

45. For completeness, the defendant/applicant herein filed a replying affidavit sworn on the October 19, 2022 and a supporting affidavit, similarly sworn on even date.

46. In respect of both affidavits, the applicant has made various averments including paragraph 18 thereof, wherein particulars of falsehoods and fraud have been articulated and supplied.

47. Other than the foregoing affidavits, the applicant herein has also caused additional documents to be filed in respect of the subject matter. To this end, it is imperative to take cognizance of the affidavit of one Anthony Munyasia sworn on the December 9, 2022; and the witness affidavit of Samuel Gicheru Mburu sworn on even date.

48. From the totality of depositions/ affidavits, filed on behalf of the applicant, what becomes apparent and evident is that the factual situation is hugely in contest and thus debatable.

49. For one, the plaintiff/respondent contends to have been in occupation and possession for (sic) a continuous period of 12 years and thus claims adverse possession.

50. On the contrary, the defendant/applicant has contended *inter-alia* that the claims by the respondent are anchored on fraud, misrepresentation, deceit, falsehoods and fabrication.

51. Additionally, the defendant/applicant has also contended that assorted documents which had been relied upon by the plaintiff/respondent are actually false and fabricated. Clearly, the picture that comes out of the various depositions, ventilated and espoused by the adverse parties, is one of serious evidential controversy.

52. Consequently and in the premises, the question that does arise is whether this honourable court can interrogate and investigate the veracity or falsity of the various allegations at an interlocutory stage and on the basis of affidavit evidence.

53. The incidental question that also arises and flows as a matter of course is whether this court can make precipitate/ substantive pronouncements on whether there is fraud and fraudulent manufacture of documents, either in the manner contended by the defendant/applicant or at all.

54. Contrary to the invitation, by counsel for the defendant/applicant, the correct and obtaining jurisprudential position is that a court of law is barred and prohibited from making substantive and precipitate pronouncement on issues of facts/evidence and law, at the interlocutory stage.

55. Clearly, the making of such precipitate finding of facts and law is the preserve and province of the trial court and same can only be undertaken after a plenary hearing, in the manner established under the law.

56. To this end, it is imperative to restate and reiterate the now established and hackneyed position *vide* the holding of the Court of Appeal in the case of *Thomas Mumo Maingey (Suing on his own behalf and on behalf of the Franciscans of Our Lady of Good Counsel Sisters Registered Trustees) v Sarah Nyiva Hillman & 3 others* [2018] eKLR, where the court stated and held as hereunder;

> 23. It was not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence. As *Lord Diplock warned in American Cyanamid Co (No 1) v Ethicon Ltd* [1975] UKHL 1 "it is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial." This court expressed a similar view in *Mbuthia v Jimba Credit Finance Corporation & another* [1988] KLR 1 where it was held that "the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

57. Other than the foregoing, it is also established and trite that whilst dealing with an application for striking out of pleadings, the honourable court is not called upon to carry out and or undertake minute analysis and examination of the factual position/controversy and thereafter arrive at a firmed position.

58. Suffice it to point out that a court dealing with and adjudicating upon an application for summary judgment or for striking out, (the latter which is the case herein), is barred from undertaking a mini-trial of the factual and legal controversies arising from and attendant to a particular case.

59. Consequently and in this regard, the court is called upon to and must exercise necessary caution and circumspection so as to avoid undertaking a plenary hearing through a disguised process.

60. In this respect, the position of the law was well articulated and succinctly espoused by the Court of Appeal in the case of *Industrial and Commercial Development Corporation v Daber Enterprises Limited* [2000] eKLR, where the honourable Court of Appeal observed as hereunder;

> "Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination - see the case of *Wenlock v Moloney and others* , [1965] 1 WLR 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim.
>
> And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment.
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> The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable - see the cases of *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd (In Liquidation)* , [1990] 1 WLR 153, 158 and *Balli Trading v Afalona Shipping*, *The Coral, [1993 1 Lloyd's* Rep 1, CA. A defendant who can show by affidavit that there is a bona fide

triable issue is to be allowed to defend that issue without condition - see the case of *Jacobs v Booth's Distillery Co*, (1901) LT 262 HL".

61. Notwithstanding the foregoing, the discussion pertaining to the application for the use of summary process (whether summary judgment or striking out) cannot be concluded without referring to the famous decision in *D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[1980] eKLR, where the Court of Appeal thus held as hereunder;

> " That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."
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> per *Lindley LJ* ibi, p 602.
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> "It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."
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> Per Lord Justice Swinfen Eady in *Moore v Lawson and another* (supra) at p 419.
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> "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved" per Lord Herschell in *Lawrence v Lord Norreys*, 15 A.C 210 at p 219.
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> "The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court." per Danckwerts, L.J in *Nagle v Fielden* (1966) 2 QBD 633 at p 646.
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> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal." per Salmon, L.J, ibi at p 651.
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> "It is not the practice in civil administration of our courts to have preliminary hearing as it is in crime.... If it involves the parties in the trial of the action by affidavit's is not a plain and obvious case on its face."
>
> "per Sellers, L.J in *Wedlock Maloney and others* (1965) 1 WLR 1238 at pp 1242.
>
> "This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power." per Danckwerts L.J ibi at p 1244.
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> "The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading." *Rayer Carl Zeiss Stiftung v Keeler Ltd and others* (No 3) (1970) Ch D 506.

62. In my humble view, the story being told by the plaintiff/respondent, may and could be very well be improbable, but the fact of such improbability does not warrant that the plaintiff/respondent be driven away from the seat of justice without being heard.

63. Consequently and in the premises, I am afraid that the invite to find and hold that the plaintiffs'/ respondents' suit is vexatious, frivolous and an abuse of the due process of the court is legally untenable.

Issue Number 2

Whether the Chief Land Registrar ought to be joined (sic) as a party to the instant proceedings or better still, whether sufficient basis has been laid out for the intended joinder.

64. Other than seeking to strike out the suit by and on behalf of the plaintiff/respondent, the applicant herein has also sought to join and implead the Chief Land Registrar as a co-defendant/necessary party.

65. According to the applicant, the Chief Land Registrar is a necessary party in respect of the current proceedings, by virtue of and on account on being the custodian of all land records, inter-alia records pertaining to the suit property.

66. Furthermore, the applicant has contended that the Chief Land Registrar would enable the court to understand and fully appreciate the veracity and or otherwise of the claims by the respondent that the applicant title are fraudulent and forgery.

67. Other than the foregoing, it has also been contended that the joinder of the Chief Land Registrar, will enable the honourable court to resolve all the issues in controversy once and for all.

68. Despite the contention by and at the instance of the applicant, it is imperative to state and underscore that the claim beforehand touches on and concerns adverse possession and hence, the allegations of fraud, if any, can not be adverted to and be addressed by the honourable court *vide* the current proceedings.

69. To my mind, all that the plaintiff/respondent is claiming is that same (plaintiff/respondent) has been in occupation and possession of the suit property for more than 12 years and hence seeks to be declared as the owner thereof on the basis of such occupation and possession.

70. Given the nature of the claim contained at the foot of the originating summons, the critical evidence that will have to be placed before the court for purposes of determining the dispute, relates to evidence of possession and occupation.

71. Consequently, where no evidence is tendered and placed before the court, to establish and demonstrate such occupation for the requisite/statutory duration, then the honourable court will have no basis to make any declaration or at all.

72. In my humble and respectful view, the dispute beforehand, touches on and concerns adverse possession and I do not see how relevant and necessary, a Chief Land Registrar will be, in respect of such a matter.

73. Furthermore, from the various affidavits filed by the applicant himself, there is no dispute that the applicant is indeed the lawful and legitimate owner of the suit property. However, the only question is whether his title to the suit property has been extinguished on the basis of a third-party occupation.

74. In the premises, I do not see the relevance of (sic) joining the Chief Land Registrar in a matter, where his presence, will not add value. For clarity, the provisions of order 1 rule 10(2) of the *Civil Procedure Rules 2010* are only meant to facilitate the joinder of necessary parties or better still, parties whose presence is necessary for purposes of determining the issues in dispute.

75. To the contrary, the impugned provision of the *Civil Procedure Rules* are not meant to facilitate the joinder of (sic) parties who have no role to play and/or contribute in the impugned proceedings. Clearly, such joinder would only operate to convolute and obscure the issues.

76. Other than the foregoing, it is also not lost on the court that the current suit was filed by the plaintiff/respondent and hence it was the business of the plaintiff/respondent to determine who are the parties, against whom he has claims/causes of actions.

77. Unfortunately, the plaintiff/respondent herein did not deem it fit and appropriate to implead the Chief Land Registrar and perhaps, for good measure.

78. Having not impleaded the Chief Land Registrar, the question that does arise is whether the defendant/applicant can now compel the plaintiff/respondent to implead a party and/or better still join a party, against whom he has no cause of action.

79. In a nutshell, my answer to issue number two (2) is two – pronged; Firstly, the issue in dispute touches on adverse possession and jurisprudence pertaining to adverse possession is to the effect that same can only be impleaded where the title of the adverse party is not under challenge on the basis of how it was acquired.

80. Secondly, the suit herein is owned by the plaintiff herein and hence, unless there are exceptional situations, to warrant the invocation and application of the provisions of order 1 rules 10(2) of the *Civil Procedure Rules*, 2010, the plaintiff must be left to pilot his case in the manner same deems best and appropriate.

81. In this respect, I share the sentiments and observation of the court in the case of *Joseph Leboo & 2 others v Director Kenya Forest Services & another* (2013)eKLR, wherein Hon. Justice Sila Munyao, Judge, stated and observed as hereunder;

> I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to an existing party, or a clear lacuna in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant, and this choice ought not to be disturbed without the presence of compelling reasons. Joining a defendant to the proceedings on an application which is not coming from the plaintiff, may also compel the plaintiff to pursue a cause of action that the plaintiff, for his own reasons, or lack of any, of which there is perfect freedom, the plaintiff has opted not to pursue. Where there is an application for a person to be joined as defendant, and the plaintiff objects to such joinder, the court should even be more cautious before making an order for such joinder. It ought to be clear that the remedy sought by the plaintiff in the proceedings, actually ought to be directed against the party sought to be enjoined, or that the remedy the plaintiff seeks cannot be granted, or the proceedings cannot be properly conducted without the person sought to be enjoined being a party.

82. Furthermore, the jurisdiction of the court to facilitate the joinder of a person either as a co-defendant (see order 1 rule 3 of the *Civil Procedure Rules*) or as an interested party/necessary party (see order 1

rule 10(2) of the *Civil Procedure Rule*), is similarly, circumscribed and the court can only proceed to decree joinder, in whatsoever capacity, once the court ascertains (sic) the stake hold and/or interests of (sic) the parties sought to be joined into the suit.

83. To this end, the holding of the Court of Appeal in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* (2000)eKLR, is relevant, applicable and appropriate.

84. For coherence, the court stated and held as hereunder;

> The jurisdiction of the court under o.1 rule 10(2) and o.vi rule 3(1) of the *Civil Procedure Rules*, respectively, is specific. The decision as to who to sue is essentially that of the plaintiff, and the court's duty thereafter, is to consider the allegations made against the named defendants and if it considers that there are other parties who should have been joined or were improperly joined give appropriate directions under o.1 rule 10(2), above.

85. As a result of the foregoing exposition, details in terms of the preceding paragraphs and coupled with the decisions (supra), I am not disposed to order and direct that the Chief Land Registrar be joined in the suit, either in the manner sought or at all.

Issue Number 3

Whether the applicant has established and demonstrated a basis to warrant visitation to the locus in quo.

86. In civil proceedings, like the one beforehand, the burden of proving the claims and issues raised before the honourable court lies on the shoulders of the plaintiff. See sections 107, 108 and 109 of the *Evidence Act* chapter 80 Laws of Kenya.

87. Consequently and in respect of the instant matter, there is no gainsaying that the plaintiff herein shall be called upon to tender and place before the honourable court the requisite evidence towards proving the claims beforehand.

88. Conversely, where the plaintiff fails to discharge the burden of proof cast upon him/her, then the plaintiff's case must collapse and or fall. In this regard, it appropriate to reiterate the holding in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, where the court held and observed as hereunder;

> " The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller v Minister of Pensions* (1947) explained as follows:-"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

89. Other than the foregoing, the obtaining legal system/ position calls upon the parties, that is, both the plaintiff and the defendant, to procure and bring forth all the requisite evidence before the court. For clarity, it is imperative to underscore that it is the parties to bring the evidence before the honourable court and not the converse.

90. Be that as it may, there are instances where a court may be called upon to venture out of the legal strictures, where parties are to bring forth evidence and go out to the *locus in quo* to ascertain, confirm or verify an issue/situation.

91. However, it must be clearly understood that the circumstances where a court will venture out and visit the status in quo are limited in scope and number. Simply put, visitation to the *locus in quo* is an exception, and not the general norm.

92. In the premises, where a party to the civil proceedings requires a court of law to venture out and go to the *locus in quo*, it behooves such a party to place before the honourable court exceptional and peculiar circumstances that would warrant visitation to the locus in quo.

93. Furthermore, a court of law must not be called upon to carryout and or undertake investigation(s) on behalf of a party to the civil proceedings. Better still, a court of law, given its nature and in particular, the aspect where same is an impartial arbiter, same must not allow itself to be reduced into an investigative forum, by and on behalf of either of the parties to the dispute.

94. Furthermore, it is also important to underscore that where as a court of law may feel enjoined/ obliged to visit the *locus in quo*, such invitation cannot precede the production and adduction of evidence, in the conventional way.

95. Consequently and in this regard, I hold the persuasion that this honourable court can only visit the *locus in quo* after taking conventional evidence and not before.

96. At any rate and for good measure, there is also need to add a rider that such visitation will only arise and be adverted to, if after the production of evidence, there remains an aspect of the dispute that requires verification, confirmation and/or authentication, so as to enable the honourable court to fully appreciate the issues beforehand.

97. Other than the foregoing, I am not persuaded, not at the very least, that this is a matter that is deserving of visitation to the *locus in quo*, beforehand and at the onset.

98. For coherence, the purposes why a court of law should proceed to and visit the *locus in quo*, is now well established. In this respect, the ratio decidendi in the case of *Badiru Kabalega v Sipiriano Mugangu* Kampala HCCS No 7 of 1987 [1992] II KALR 110 that was cited in the case of *Republic v National Environmental Tribunal & 4 others Ex parte China Road and Bridge Corporation*, Nairobi miscellaneous application 82 of 2016, is succinct and apt.

99. For ease of reference, the court stated and held as hereunder;

> " .....when the court deems it necessary to visit the locus-in-quo then both parties, their witnesses must be told to be there. When they are at the locus-in-quo, it is my view not a public meeting where public opinion is sought as it was in this case. It is a court sitting at the locus-in-quo.
>
> In fact the purpose of the locus-in-quo is for the witnesses to clarify what they stated in court. So when a witness is called to show or clarify what they had stated in court, he/she must do so on oath. The other party must be given opportunity to cross-examine him. The opportunity must be extended to the other party. Any observation by the trial magistrate must form part of the proceedings."

100. Furthermore, Sir Udo Udoma CJ, in the case of *Mukasa v Uganda* (1964) EA 698 at page 700, stated and held as hereunder;

> " A view of a locus in-quo ought to be, I think, to check on the evidence already given and, where necessary, and possible, to have such evidence ocularly demonstrated in the same way a court examines a plan or map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be substituted for evidence."

101. Finally, it is appropriate to restate and reiterate the dicta in the case of *Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (interested party)* [2022] eKLR, where the court stated and observed as hereunder;

> 9. I agree with the plaintiffs' observations that the court may be perceived to be collecting evidence for the applicants. We must never lose sight of the fact that ours is an adversarial system. The *Black's Law Dictionary* (10th edition), defines such a system as a legal system, 'involving active and unhindered parties contesting with each other to put forth a case before an independent decision-maker.'
>
> The decision-maker, in this case, the court must remain impartial. Sir Barclay Nihill put it thus; "a trial judge should not descend into the arena where his vision may become clouded by the dust of the conflict." (*Jashbhai C Patel v BD Joshi*).

Issue Number 4

Whether the subject matter ought to proceed as if same was commenced *vide* plaint or otherwise.

102. The applicant herein has sought that the honourable court be pleased to issue directions that the instant suit does proceed as if same were commenced and/or originated *vide* plaint.

103. Additionally, the applicant has also sought directions that the honourable court be pleased to order and direct that the plaintiff/respondent does attend court for cross examination on the basis of his affidavit sworn on the August 19, 2022.

104. Despite the fact that the applicant has mounted the instant application and sought for orders, in the manner articulated *vide* the preceding paragraph, it is common knowledge that prior to and or before originating summons can be set down for hearing, it behooves the court to issue directions.

105. For coherence, part of the directions that the honourable court is called upon to give touches on and concerns the manner in which the originating summons shall proceed and or be prosecuted. In this regard, there are two ways which are available.

106. Firstly, the parties to the suit can agree that the originating summons could be disposed of on the basis of affidavit evidence. In such a situation, the court would be called upon to issue appropriate directions, including filing and exchange of additional affidavits and written submissions, where appropriate.

107. The second option is where the parties propose to proceed *vide viva voce* evidence and in which case, the honourable court will be called upon to deem the originating summons and the supporting affidavit thereto as the plaint, whilst the replying affidavit shall be deemed as the statement of defense.

108. Thereafter, the parties shall be at liberty to file and exchange witness statement and further list and bundle of documents, if any, and where appropriate.

109. Obviously, where directions are given that the originating summons shall proceed *vide viva voce* evidence, then it shall be incumbent upon the parties and their witnesses to attend court and thereafter be subjected to cross examination in the usual manner.

110. However, I must point out that the prayer at the foot of the current application to direct that the plaintiff/respondent does attend court for purposes of cross examination on the basis of affidavit sworn on the August 19, 2022, is not only premature but misconceived.

111. Clearly, learned counsel for the defendant/applicant misconstrued and misapprehended the import of the provisions of order 37 rules 16, 17 and 18 of the *Civil Procedure Rules*, 2010.

112. For ease of reference, the said provisions are reproduced as hereunder;

> 16. Directions [order 37, rule 16]
>
> The registrar shall, within thirty days of filing of the originating summons and with notice to the parties list it for directions before a judge in chambers.
>
> 17. Procedure [order 37, rule 17]
>
> The day and hour of attendance under an originating summons to which an appearance is required to be entered shall after appearance be fixed for hearing in chambers of the judge to whom such summons is assigned.
>
> 18. Evidence and directions upon hearing of summons [order 37, rule 18]
>
> At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

113. In my humble view, the question as to whether the plaintiff/respondent shall be called upon to attend court for purposes of cross examination on the basis of his affidavit sworn on the August 19, 2022, must await the giving of directions by the honourable court.

114. To surmise, the impugned prayer for cross examination of the plaintiff/respondent was made prematurely and is hence, same is stillborn.

Final Disposition

115. Having calibrated upon the various nuances/perspectives, which were itemized in the body of the ruling, it must have become apparent and evident that the entire motion before the honourable court was not only premature and misconceived but legally untenable.

116. Furthermore, the current application was made and mounted in flagrant disregard of numerous provisions of the law, *inter-alia*, order 37 rules 17 and 18 of the *Civil Procedure Rules*, 2010, which are peremptory and mandatory in nature.

117. Consequently and in the premises, the application dated the December 9, 2022, is devoid and bereft of merits.

118. In a nutshell, same be and is hereby dismissed with costs to the plaintiff/respondent.

119. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH 2022.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Benson Court Assistant

Mr. Wendo h/b for Mr. Lubullelah for the Defendant/Applicant.

Mr. Joseph Angwenyi for the Plaintiff/Respondent.