



REPUBLIC OF KENYA



KENYA LAW
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**Kenta v Njapit & 5 others (Environment & Land Case
E013 of 2021) [2023] KEELC 17646 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E013 OF 2021**

CG MBOGO, J

MAY 25, 2023

BETWEEN

MOITALEL OLE KENTA PLAINTIFF

AND

MARASWA OLE NJAPIT 1ST DEFENDANT

NDERI OLE NAMPASO 2ND DEFENDANT

DISTRICT SURVEYOR, NAROK 3RD DEFENDANT

NDERITU MICHAEL KIMENDERO 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

DISTRICT LAND REGISTRAR, NAROK 6TH DEFENDANT

RULING

1. Before this court for determination is the notice of motion application dated 7th November, 2022 filed by the 1st to 3rd defendants/applicants which is expressed to be brought under Section 1A,1B,3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders:-
 1. spent
 2. That pending hearing and determination of this suit, this honourable court be pleased to issue an order directing the District Land Registrar and/or District Surveyor Narok to visit land parcel no. Cis-Mara/ Oldonyorasha/ 169 ascertain its size and upon which file a report on the visit.
 3. That the costs of this application be provided for.



2. The application is premised on the grounds inter alia that the plaintiff's claim that approximately 20.23 hectares has been hived off from his land known as Cis-Mara/Oldonyorasha/169 measuring 62.45 hectares (herein the suit land) by the 1st to 3rd defendants and that the size of the said suit land ought to be determined as it is crucial for the final determination of the suit.
3. The application is supported by the affidavit of the 1st defendant/applicant on behalf of the 2nd and 3rd defendants/applicants sworn on even date. The 1st defendant/applicant deposed that the plaintiff/respondent is the registered proprietor of the suit land which measures approximately 62.45 hectares and which he claims that the 1st and 2nd defendants/applicants have hived off 20.23 hectares. The 1st defendant/applicant further deposed that on 15th June, 2022 the 4th and 5th defendants/respondents visited Oldonyorasha Group Ranch and indicated that a portion was left out unmapped and it is important to ascertain the size and confirm whether the said parcel is part of the portion that was left out during the subdivision which will assist this court arrive at a lasting solution to the dispute herein.
4. The application was opposed by the replying affidavit of the plaintiff/respondent sworn on 13th January, 2023. The plaintiff/respondent deposed that the application is defective as it offends Sections 5 and 8 of the [Oaths and Statutory Declarations Act](#) and which ought to be struck out. Further that the 1st to 3rd defendants/respondents have no locus to make declarations on behalf of a defunct and dissolved group ranch as the claim was not instituted against them in that capacity. Further, that the application offends Sections 13-21 of the Land (Group Representatives) Act on the grounds that since dissolution, members were settled and there has never been a boundary dispute and the site visit by the 4th and 5th defendants/respondents was fraudulent since it was not supported by a lawful cause. The plaintiff/respondent further deposed that some of the fraudulently created parcels have been transferred to unsuspecting members without the knowledge of the affected owners and that having established that the unlawful subdivision of his land was done by the 4th and 5th defendants/respondents, this court cannot be invited to issue an order directing the same persons to conduct an activity they had conducted unlawfully.
5. The plaintiff/respondent further deposed that the 3rd defendant/applicant is not a licensed surveyor and his practice is a sham. Also, that this is not the first time that the defendants/applicants have attempted to unlawfully alienate land from the ranch from the rightful members as they did so on 18th March, 2009 and on diverse months in the year 2020 and 2021. Further, that the defendants/applicants are now changing goal posts in order to quench their ill-fated thirst and to sanitize their fraudulent activities.
6. The plaintiff/respondent further deposed that this court is being invited to determine the very question that is for determination in the main suit which have technically been pre-meditated and which is a fishing expedition to continue wasting time.
7. In addition, the plaintiff/respondent deposed that the 1st to 3rd defendants/applicants have not established the prejudice they are likely to suffer in the event that the application is denied.
8. The 1st defendant/applicant filed a further affidavit in response thereto sworn on 27th February, 2023. The 1st defendant/applicant deposed that there is no demonstration of how the jurat on a separate page violates the law and is an incurable defect under Article 159 (2) (d) of the [Constitution](#). Also, that the practice of striking out an application is a drastic measure that should be resorted in the clearest of cases. Further, that the plaintiff/respondent has misunderstood the nature of the application as it has nothing to do with fraud allegations and it is important to ascertain the size of the plaintiff's/respondent's suit land.



9. The 1st defendant/applicant further deposed that they filed the application in their own capacity as defendants and who have right to defend their claim. Further, that the claim by the plaintiff can only be established if the suit land is measured. Also, that the claims by the plaintiff/respondent is a figment of his imagination and that there is no court order to the effect that the 4th defendant/respondent conducted the duties and obligations bestowed upon him by dint of Section 16 of the [Land Registration Act](#).
10. The 1st defendant/applicant deposed further that the duty of altering boundary lines is the mandate of the 4th and 5th defendants/respondents and this court should exercise judicial restraint and allow the 4th and 5th defendants/respondents perform their duties. Further, that contrary to the allegations by the plaintiff/respondent, the 3rd defendant/applicant is a licensed surveyor under practice number 178.
11. The 1st defendant/applicant further deposed that the allegation of transfer of land to unsuspecting members of the public is not supported by any evidence and that the 4th and 5th defendants/respondents have never been charged or found guilty of the said unlawful acts. Further, that there are refuted claims by the plaintiff/respondent that there is land that was left out of the map and the said alleged fraudulent transactions have not been determined by any court of law. Further, that the 1st to 3rd defendants/applicants are exposed to irreparable harm and loss if the instant application is not allowed as the report is crucial in this case.
12. The application was canvassed by way of written submissions. The 1st to 3rd defendants filed written submissions dated 28th February, 2023. The 1st to 3rd defendants/applicants raised three issues for determination as listed below:-
 - a. Whether the orders sought will help this honourable court in the final and just determination of this suit.
 - b. Whether the plaintiff/respondent will be prejudiced if the said application is allowed.
 - c. Who shall bear the costs of the application.
13. On the first issue, the 1st to 3rd defendants/applicants submitted that there is a report filed in court in this matter on 15th June, 2020 which report indicated that a portion of land of the group ranch was left out unmapped and that it is important to ascertain its size and confirm whether it forms part of the parcel that was left out during the subdivision. Reliance was placed on the case of [Kangithi Posta & Another v David Ndwiga Njagi & 2 Others](#) [2018] eKLR.
14. On the second issue, the 1st to 3rd defendants/applicants submitted that no one should be condemned unheard and that the orders sought will not prejudice the plaintiff/respondent in any way if granted.
15. On the third issue, the 1st to 3rd defendants/applicant submitted that this court should look into the conduct of the parties herein, the subject of litigation and the circumstances which led to the filing of the instant application in making an award for costs. Reliance was placed in the case of [Supermarine Handling Services Limited v Kenya Revenue Authority](#) Civil Appeal no 85 of 2006 [2010] eKLR.
16. The plaintiff/respondent filed written submissions dated 3rd April, 2023. The plaintiff/respondent raised three issues for determination as follows:-
 - a. Should the court aid an illegality.
 - b. Does the 1st-3rd defendants have locus standi to represent the defunct Oldonyo Rasha Group Ranch.



- c. Is the supporting affidavit defective and wanting in form.
17. On the first issue, the plaintiff/respondent submitted that this court cannot be made an instrument to sanitize an illegality as the 3rd defendant/applicant had previously been arrested for selling a subdivision of Cis-Mara/Oldonyo Rasha/1300 and upon being charged in court, he offered to refund the purchase price. The plaintiff/respondent relied on the cases of *Wambui v Mwangi & 3 Others* (Civil Appeal 465 of 2019) 2021 KESA 144 (KLR) (19th November, 2021) and *Kawaljeet Singh Rekhi v Peter Wainaina Kamau & 2 Others* [2016] eKLR.
18. On the second issue, the plaintiff/respondent submitted that it is trite law that an affidavit should not have its jurat on a separate page and that the foundation of this provision was to ensure that the jurat is made part of the contextual averments in the affidavit. That as a result the supporting affidavit is defective. Also, that an affidavit cannot be amended and the only prudent discretion of the court is to strike out or order that the entire application be withdrawn with costs. The plaintiff/respondent relied on the cases of *Fredrick Mwangi Nyaga v Garam Investments & Another* [2013] eKLR and *Galaxy Paints Co. Limited v Falcon Guards Limited* Civil Appeal no 219 of 1998.
19. On the third issue, the plaintiff/respondent submitted that Oldonyo Rasha Group Ranch was dissolved upon distribution of land to its members and that a dissolved group has no life and its former representatives cannot purport to give life and their actions are voidable. The plaintiff/respondent further submitted that the 1st to 3rd defendants purported to have conducted an official group meeting on 20th July, 2020 which meeting was not sanctioned by its previous members or the directors of the society and that all these affairs are fraudulent to defraud members of the group and the public. Reliance was placed in the case of *Dennis Olooihero & 2 Others v The Art of Ventures Limited & 2 Others* [2006] eKLR.
20. I have carefully analysed and considered the application, the replies thereof and the written submissions filed by both parties and the issues for determination are as follows:-
- i. Whether the supporting affidavit of the 1st defendant/applicant is defective and ought to be struck out.
 - ii. Whether this court ought to allow the 4th and 5th defendants/respondents conduct a site visit and file a report to ascertain the size of the plaintiff's parcel of land.
21. On the first issue, the plaintiff/respondent contended that the jurat appears on a separate page and it ought to have formed part of the 1st defendant's/applicant's averments in his supporting affidavit which makes its defective. Also, that a fair and just reasonable discretion would be to disallow practice that does not conform to the mandatory provisions of the law. I have looked at the supporting affidavit of the 1st defendant/applicant and I do note that indeed the jurat appears on page 7 which is not on a similar page with the averments. The question then is, is this fatal to the application?
22. In the case of *Burnaby Properties Limited v Suntra Stocks Limited* [2015] eKLR, the court held that: -
“[8]On the basis of the above legal position, courts have stated that the jurat of an affidavit being in a separate page is not a defect or a matter that goes to jurisdiction of the court. I would, therefore, regard the alleged defect as an irregularity of form rather than substance...”
23. While I place reliance on the above cited authority, I am of the considered view that the jurat appearing on a separate page does not go into the substance or root of the application to consider it as defective. Further, it is clearly stated under Article 159(2) (d) of the *Constitution*, the courts in dispensing justice should not pay undue regard to procedural technicality. In my view and just as Gikonyo, J, observed in *Burnaby Properties Limited v Suntra Stocks Limited* (*supra*), Article 159(2) (d) of the *Constitution*



expressly depreciates such technicalities in favour of substantive justice. It is my considered view that the supporting affidavit by the 1st defendant/applicant herein is proper for all purposes and intents as the defects in the jurat being on a separate page with the rest of the affidavit is curable under Article 159 of the *Constitution*.

24. On the second issue, it was the 1st to 3rd defendants/applicants prayer that the 4th and 5th defendants/respondents do visit the suit land and ascertain its size and upon which file a report on the visit.
25. It should be noted that ownership of the suit property is not disputed. I have looked at the plaint dated 2nd July, 2021 and I note that the plaintiff/respondent claims fraudulent actions of the defendants to hive off 20.23 hectares in the pretense that the same is the property of Oldonyo Rasha Group Ranch. On the other hand, the 1st to 3rd defendants/applicants are of the view that in ascertaining the size of the suit land, through a site visit and filing a report by the 4th and 5th defendants/respondents, this court will arrive at the just determination of the suit herein.
26. In the case of *Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 others* [2017] eKLR, the court made the following observations:-

“From time to time it becomes necessary for the court to visit a site with a view to helping it reach a just decision in a matter. It must however be remembered that all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the sole route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof is always on he who alleges and the court never goes out to seek facts on its own. It is always incumbent on parties to adduce sufficient evidence to prove the facts which they assert. On the other hand the law can be cited by parties in pleadings or submissions. The court can access the law on its own. Needless to state, parties are free to urge the court to interpret the law one way or the other. If the court visits a site, it can only be for purposes of receiving evidence which will assist it make a just decision. So long as a site visit is incapable of yielding any evidence or for that matter any admissible evidence then the judge will be no better than a tourist satisfying curiosities and taking photographs during the site visit. A court in session must perform judicial functions and must resist distractions that take it away from its mission. The dispute herein is whether the property known as plot no 100 Business Jewathu site is the same one also known as Njoro Township Block 1/1144 or whether they represent two different parcels on the ground. A visit to the site by a judge who is not a survey expert and who is not armed with survey equipment wouldn't yield anything. An expert report by a surveyor compiled with the aid of survey equipment would certainly be more useful.”

27. While ownership of the suit land is not disputed, the 1st to 3rd defendants/applicants are curious to ascertain its size. The size of the suit land is contained in the copy of the title deed which forms part of the documents sought to be relied upon by the plaintiff/respondent. A further look at the 1st and 2nd defendants/applicants undated statement of defence filed in court on 21st October, 2021 shows that the said defendants/applicants vehemently denied any interest in the suit land but disputed the boundaries thereof.



28. In the case of *Chira & 2 others v Kenya Power & Lighting Company Limited* (Environment & Land Case 94 of 2019) [2022] KEELC 2519 (KLR) (4 July 2022) (Ruling) Oguttu Mboya, J, had the following to say:-

- “ 20. Premised on the foregoing, it is my considered view that visitation to the locus in quo, may be carried out and/or undertaken by the court, but before such visitation are undertaken, the Applicant must place before the court special, exceptional and peculiar circumstances that will warrant the Visitation.
21. Despite the foregoing, it is appropriate to point out that the failure of either party to bring forth and/or adduce sufficient evidence to help in proving his/her case, cannot be a basis to invite the court to undertake a visitation.
22. Simply put, the court shall not be converted into and or be constituted as an investigation forum, to be used by either Party, whenever a Party believes that same has not availed and / or procured sufficient Evidence in a matter.
23. In view of the foregoing, I beg to point out that this court is not keen to engage in and indulge in the controversy, leading to the mounting and/or filing of the subject suit and that the court shall be content and satisfied with the totality of the evidence adduced by the Parties.”

29. I am reluctant to allow this prayer at this stage for the reason that parties are yet to present their case. Whereas I place reliance on the above authority, this court appreciates that it is good practice to conduct a site visit or order for filing a report by the 4th and 5th defendants/respondents in this case. It would be prudent in my view that parties present their case first and where need arises or if the court deems fit in the course of trial, do order for a report of site visit.

30. The upshot of the above is that the notice of motion application dated 7th November, 2022 is dismissed with costs to the plaintiff/respondent. This matter is fixed for mention on 30th May, 2023 for directions to enable parties fix a date for hearing. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 25TH DAY OF MAY, 2023.

HON. MBOGO C.G.

JUDGE

25/5/2023.

In the presence of:

CA:T.Chuma

