



**Murithi & another v Kigia (Environment & Land Case E014 of 2022)
[2023] KEELC 22198 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E014 OF 2022
CK YANO, J
DECEMBER 14, 2023**

BETWEEN

JOSPHAT MURIUNGI MURITHI 1ST PLAINTIFF

LUSETA M'MURITHI 2ND PLAINTIFF

AND

MICHAEL KUNGU KIGIA DEFENDANT

RULING

1. The application for determination is the notice of motion dated 6th July, 2023 in which the defendant/applicant seeks the following order-;
 1. Spent
 2. That the Honourable court do issue an order against the 1st plaintiff/respondent herein deponed signatures be verified by Director of Criminal Investigations.
 3. That this Honourable court do issue an order to the Land Registrar and District Surveyor Meru do establish existing boundaries of land parcel Nos. Abothuguchi/Lower Kaongo/700 and Abothuguchi/Lower Kaongo/701 as exhibits shown do not exist on defendant/applicant lands except their lands.
 4. That the Honourable court do issue an order for site visit to prove that no building in both lands except on their lands.
 5. That the Honourable court do issue an order against the 2nd plaintiff/respondent herein to deposit substantial title deed in court in order to comply with the existence of the claim and meet the costs of site visits.
 6. That the cost of this application be condemned on the plaintiffs/respondents.



2. The application is supported by the affidavit of Michael Kungu Kigia, the applicant sworn on 6th July, 2023. The application which is stated to be brought pursuant to Order 51 Rule 3 of the Civil Procedure Rules and Section 3, 3(a) and 63 (e) of the Civil procedure Act is premised on the grounds that the plaintiffs have conspired to use the court to fraud lands through falsehoods, that since 1979 up to date, the plaintiffs have never set foot on the lands nor built any buildings nor any developments as alleged, that the court is requested to visit the site to prove the allegation heaped and investigate the signatures of the 1st plaintiff and for the court to dismiss the plaintiff's suit.
3. The applicant states that he is the owner of land parcel Nos. Abothuguchi/Lower Kaongo/700 and Abothuguchi/Lower Kaongo/701. That there stands no single building on the suit parcels as deposed in the originating summons and the supporting affidavits and that the same is an afterthought. The applicant further states that there is only a shelter and that at no time did the respondents occupy the applicant's parcels of land.
4. The applicant states that he has requested the court to issue an order for the verification of the 1st plaintiff's signatures by the Director of Criminal Investigation because he is over 90 years and never saw the door of a school. That the order to the Land Registrar Meru and Surveyor is to verify that there is no single building on the applicant's parcels of land, except on the respondents' parcel. The applicant further states that he wants an order for the 2nd respondent to meet the cost of site visit and other expenses because he is lying to court. That the respondent (sic) herein stands with the ruling issued on the 7th June 2023. That this is a Honourable court of law or highest court in this country and its integrity ought to be protected from falsehood in this suit.
5. The applicant further states that the late Murithi Nchore who sold land parcel No. Abothuguchi/Lower Kaongo/700 in 1979 had four wives and the 2nd plaintiff/respondent herein is dragging his mother and his children sisters(sic) of one house on falsehoods and the applicant wonders why not the other three wives who are still alive and that the 2nd plaintiff herein has taken over 60 acres selling without legal documents denying other families and challenged him to produce any succession filed showing all beneficiaries of their deceased father. The applicant urged the court to allow the application.
6. The 2nd plaintiff/respondent filed a replying affidavit sworn by himself on 3rd October, 2023 in response to the defendant's application. It is the 2nd respondent's contention that the application is a sham, vexatious and a waste of court's time and that the same ought to be dismissed with costs to the plaintiffs. The 2nd respondent avers that the application for orders that he deposits a substantial title deed in court is misguided as the same is not supported by any provisions of law. That if the applicant wishes that the court visits the site, then he should meet the costs of the site visit and not demand that the 2nd respondent meets such costs. That the applicant has admitted at paragraph 4 of his supporting affidavit that there is a shelter in the suit parcels which is in line with the plaintiff's claim that they have constructed a semi – permanent house on the suit land.
7. The 2nd respondent further states that the prayer that the Land Registrar and the District Surveyor do establish the existing boundaries of the suit parcels is misconceived since the instant suit is for a claim for adverse possession and not a claim for boundary dispute. Relying on advice, the 2nd respondent believes that this court cannot visit a site just to satisfy curiosity but such visit must be made with a view to assist the court to determine the issue before it.
8. The application was canvassed by way of written submissions which were duly filed by the applicant in person and by M/s G.M Wanjohi Mutuma & Co. Advocates for the respondents, and which I have read and need not reproduce in this ruling.



9. I have considered the application, the response and the submissions by the parties. The issues for determination are-
- I. Whether the defendant has made out a case to enable me direct the Director of Criminal Investigations to verify the 1st plaintiff's signatures.
 - II. Whether the land registrar and the District Surveyor Meru should be ordered to establish the existing boundaries of land parcel No. Abothuguchi/Lower Kaongo/700 and Abothuguchi/Lower 701.
 - III. Whether the 2nd plaintiff should be ordered to deposit a substantial title deed in court.
 - IV. Whether a site visit by the court should be ordered.
 - V. What is the order on costs.
10. In this case, the plaintiff's are seeking the determination of whether they have occupied the whole of land parcels No. Abothuguchi/Lower Kaongo/700 and 701 for more than 12 years, whether the plaintiffs' occupation has been open, unhindered, notorious, undistributed and uninterrupted for more than 12 years, whether the plaintiffs' and their families have been in occupation of the said parcels since the year 1979, and whether the plaintiffs have become entitled to the suit properties by way of adverse possession. Therefore, the plaintiff's claim over the suit properties is for adverse possession. The defendant has denied the plaintiffs' claim and filed a lengthy replying affidavits date 22nd October, 2022. The defendant now prayer for an order directing the DCI to verify the 2nd plaintiff's signatures. According to the defendant, the 2nd plaintiff is aged over 90 years and never went to school. The defendant also wants the land registrar and the District Surveyor to go and establish the existing boundaries of the suit properties and for the 2nd plaintiff to deposit the title deed in court as well as an order for a site visit by the court. From the pleadings filed, it is clear that the issues in this case are highly contested.
11. Section 7 of the *Evidence Act* deals with the burden of proof in any case, and it is clear that the same lies with the party who desires any court to give judgment as to any legal right or liability, and it is for that party to show that the fact which he alleges his case depends upon exist. This is known as the legal burden. In the *Halsbury's Law of England* 4th edition, volume 17 at paragraph 13 and 14 it is stated:-
- “The legal burden is the burden of proof which remains constant throughout a trial, it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action, thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegations, the burden lies upon the party for whom substantious of that particular allegation is an essential of his case. There may therefore be separate burden in a case with separate issues.”
12. As the issues herein are highly contested, the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. It is therefore upto each party to this case to adduce evidence in support of their respective cases. In our legal system, which is adversarial, the court performs the role of an umpire, it does not have an inquisitorial function. It is therefore my view that the court should not descend into the arena of conflict by looking for evidence for parties in respect of contested issues. That ought to be left to the parties themselves. While appreciating that the jurisdiction of the court is unlimited



as what and when orders may be issued, the court must exercise caution especially when the orders sought may end up being an intrusion of another individual's constitutionally guaranteed rights and freedoms. That would be a violation of an individual's right to bodily integrity and privacy. However, if the orders sought are eminently needed to establish the truth and reach a just conclusion in the matter absent of any other form of evidence, the party seeking the courts assistance must lay a firm legal and factual, foundation for his application to be granted. In the instant case however, I am not persuaded that the defendant has laid a firm and factual basis to warrant the issuance of the orders sought. For instance, one of the orders sought is for the 2nd plaintiff to deposit a substantial title deed in court. However, under the provisions of Section 38 of the *Limitation of Actions Act* and Order 37 of the *Civil Procedure Rules*, where one is claiming land by the doctrine of adverse possession, he or she is only required to annex an extract of the title. I have not come across any requirement that the original be produced. This, I suppose, is because the original is presumably with the registered owner of the land who is always the defendant in such a case. In this case the plaintiffs have exhibited copies of the title for the suit properties thus complying with the requirement of the law. I therefore see no reason to order for the deposit of the substantial title deed as prayed for by the defendant. Moreover, as the registered owner of the property the defendant is the one who should be in custody of the original title deed.

13. As for the application seeking an order for the verification of the 1st plaintiff's signatures by the Director of Criminal Investigations, it is my view that besides what I have stated hereinabove, the defendant also has the liberty of ascertaining the correct factual position from the said directorate which is an agency mandated by law to carry out investigations without necessarily an order from the court.
14. As for the prayer for a site visit by the court, while I agree that the court is not an expert in the matter and that such a visit may just satisfy curiosity, the court however believes that an observation of the site may help the court to better understand the dispute, especially in a case such as the one before court and make an informed decision. The site visit, in my view, will enable the court see for itself the status of the property on the ground. To grant the said order would no doubt narrow down the issues and allow expeditious determination of the matter. Accordingly, I will allow the prayer for a site visit.
15. In the result, I make the following orders:-
 - a. Prayers 2,3 and 5 of the application dated 6th July, 2023 are disallowed.
 - b. Prayer 4 is allowed and the Deputy Registrar of this court do visit the locus in quo in the presence of the parties and their advocates and establish the status on the ground and file a report in court.
 - c. Costs of the application are awarded to the plaintiffs.
 - d. The defendant/applicant to meet the costs of the site visit.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF DECEMBER, 2023

C.K YANO

JUDGE

IN THE PRESENCE OF

Court Assistant – V. Kiragu/Lena M

Defendant/applicant present in person

Ms Gitonga holding brief for Mutuma for plaintiffs/respondents

