



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 321 OF 2000

IN THE MATTER OF THE ESTATE OF DANIEL KIBOI NDIANG'UI (DECEASED)

RULING

0. This is a ruling on an application by the Interested Party for the Court to visit the *locus in quo* (the place in which the dispute arises) in determination of the main issue before the court whether the Interested Party has an interest in a portion of the suit property. The Interested Party claims an interest in an estate property known as **Muvuti/Kiima Kimwe/275** by way of purchase from another person who allegedly purchased a portion of the parcel of land from its original owner before adjudication and registration of the parcel.
0. The Petitioner and Objector, who are widows of the deceased herein who is shown on the Land Register as proprietor in common with another, Gichuki Mutukui, for entire parcel of land, claim the deceased's share in the whole asset by way of transmission upon the death of the deceased co-proprietor.
0. By consent of the parties, the Court directed that the question of the Interested Party's interest in the parcel of land be heard and determined before the issue of distribution of the Estate of the deceased herein is determined among the deceased's beneficiaries. The Interested Party called witnesses to prove his claim that he had purchased a portion of the asset from the original owner of the land before the whole asset was registered in the names of the deceased and the said Gichuki Mutukui.
0. The petitioner and the Objector were united in their case that the parcel of land was purchased in whole by the deceased and his co-proprietor, and that the parcel of land was in occupation of their nominee, one Kanini, who had possession of the parcel of land and cultivated thereon with their consent as an overseer. The petitioner and the Objector relied on two witnesses, the Lands Registrar who produced the Land Register indicating the registration of the parcel of land in the names of the deceased and his co-proprietor, and the petitioner herself who testified that she had witnessed the sale of the whole suit property, which measured about three quarters of an acre by her husband and his co-proprietor.
0. Upon close of the respective cases for the Interested Party and for the Petitioners and Objector, the Interested Party applied for the Court to visit the parcel of land observe the situation on the ground to help it determine the dispute between the parties. The application for the Court visit to the *locus in quo* was opposed by the Petitioner and the Objector who objected that the Interested Party had already closed his case and to grant the application for the court visit would be to open the case for the Interested Party after the respondents (the Petitioner and the Objector herein) had also closed their respective cases.
0. The Court takes the view that a visit to the site may help to resolve the apparent contradiction in evidence of the parties as to whether the deceased and his co-proprietor bought plots of 50x100 feet each, with the person who sold to the Interested Party also buying a share of the parcel of land or whether the deceased and his co-proprietor purchased the parcel of land in whole. The Petitioner asserted in cross-examination that –

“I do not know that the title is for a larger portion of land than Kiboi (deceased) and Gichuki purchased.... I have not been shown where Mugo (Interested Party) cultivates. I have never seen Mugo cultivate. I have also not seen Kiilu on the Shamba. I saw Killu in the Court. Kanini is cultivating the whole piece of land belonging to Kiboi and Gichuki. The parcel of land [Muvuti/Kiima Kimwe] 275 is about ¾ acre.”

7. On the other hand, the wife of the original owner of land, Grace Mumo wa Ndiku, who testified as Interested Party’s Witness No. 6 said that the deceased and Gichuki only purchased ‘Kalebos’ (portions of the parcel of land) and that –

“[T]he land is being cultivated by another person, a lady called Kanini Mboka in addition to another person called Mugo (Interested Party) who bought from Kiilu who had bought from Muthoka Ndiku the father to my husband. Mugo cultivates the land planting beans among other crops. Mugo cultivates the land bought from Kiilu and the land bought by Gichuki and Kiboi (deceased herein) is cultivated by Kanini, the two portions are on the same piece of land.”

8. In the leading East African decision on visit to *locus in quo*, in the Court of Appeal for Eastern Africa ***Fernandes v Noronha*** [1969] E.A 506 at page 508, Duffus V P said:

“ the judge although reluctantly, did the *Locus in quo*, but unfortunately there is no report of his visit, on the record although this is mentioned in his judgment. The judge does not in this case appear to have relied on any of his own observations, **but in cases where the court finds it expedient to visit a *Locus in quo*, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them, and if a witness points out any place or demonstrates any movement to the court then this witness should be recalled by the court and give evidence of what occurred.**”

9. The decision of ***Fernandes*** was followed by the Court of Appeal for Kenya in subsequent cases including Civil Appeal No. 117 of 1985, ***CYRUS NYAGA KABUTE v. KIRINYAGA COUNTY COUNCIL***, where it was held that –

“it is established law that when magistrate or judge visits land and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes were to be relied upon in judgment.”

10. In Nairobi HC Misc. Application No. 116 of 2015, ***R. v. Nairobi City County Government and Ors. ex p. Hon. Mike Sonko Mbuvi***, Odunga, J. although declining an order for *locus in quo* visit in a Judicial Review case, following the Ugandan cases of rightly acknowledged discretion to visit locus, as follows:

“Therefore even in ordinary civil proceedings where the Court deals with the merit of the case, a visit to the *locus in quo* is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. It is therefore my view that even in civil cases, there should be special circumstances before a decision to visit the *locus in quo* is made and the court must feel that adequate material has been placed before it to show that in the interests of justice and to arrive at the truth, it is just and fair to visit the *locus in quo*.”

11. Sections 5 and 6 of the Evidence Act provide for the admissibility of evidence for proof of facts in issue and relevant facts as follows:

“5. Subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of the existence or non-existence of a fact in issue, and of any other fact declared by any provision of this Act to be relevant.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant whether they occurred at the same time and place or at different times and places.”

12. In this case, the question whether the Interested Party was in possession of a portion of the suit property is a relevant issue to the fact in issue whether the Interested Party acquired an interest in the suit property. I consider that the truth as to the relevant issue whether the Interested party is in possession of a portion of the suit property or whether the nominee of the Petitioner and Objector was in occupation of the entire portion of land is a matter that may be determined by a visit to the parcel of land in view of the conflicting testimony in Court. It is the duty of the Court to establish the truth and to determine disputes on the basis established facts. It would be a travesty of justice if the court were blindfolded to determine the case on untruthful allegations of a party when it has an opportunity to establish the truth by a visit to the locus quo.

13. The Court has discretion to visit site and to recall witnesses as recommended in *Fernades* case, supra. I am fortified in this position by analogy to rule 10 and 11 of Order 18 of the Civil Procedure Rules for the HEARING OF SUIT AND EXAMINATION OF WITNESSES – which provide as follows:

“10. The court may **at any stage of the suit recall any witness who has been examined**, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.

11. The court may **at any stage of a suit inspect any property or thing concerning which any question may arise.**”

That the visit to the site will call for reopening of the Interested Party’s case is a consequence of a quest for justice, and in accordance with the Civil Procedure Rules and authorities, the Court has power to recall witnesses in appropriate cases. See also section 146 (4) of the Evidence Act that -

“(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

14. Moreover, a visit to locus in quo is consistent with the rule of evidence that allows the production of the thing itself as the best evidence thereof rather than the oral evidence of a thing. See section 63 (3) of the Evidence Act which provides as follows:

“63 (3) If oral evidence refers to the existence or **condition of any material thing**, other than a document, the court may, if it thinks fit, require the production of such material **thing** for its inspection.”

15. Accordingly, I find that the Interested Party’s application for a visit to the disputed parcel of land is merited and the same is granted. The Court shall visit the parcel of land, and conduct proceedings thereat in accordance with the authorities, on a date to be fixed in consultation with the parties.

DATED AND DELIVERED THIS 21ST DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Musya holding brief for Mrs. Nzei for Petitioners and for

Mrs. Isika for Objectors and for Mr. Ngolya for Interested Party

Ms. Doreen - Court Assistant.