



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC SUIT NO. 557 of 2018**

**ATEK OTECH RICHARD & 11 OTHERS.....PLAINTIFFS**

**=VERSUS=**

**STELCO PROPERTIES.....DEFENDANT**

**AND**

**M-ORIENTAL BANK LIMITED..... INTERESTED PARTY**

**RULING**

*(In respect of the Oral application by the Interested Party and the Defendant for the Court to visit the locus in quo)*

**Introduction**

1. The Advocates for the Interested Party and the Defendant made an oral application 8<sup>th</sup> February 2022, requesting the court to visit the locus in quo. Their reason for the Application was that the Plaintiffs, who have lodged a claim of adverse possession of the suit property have been busy erecting buildings and structures, some of a permanent nature in the suit property with the intention of changing the status of the suit property to their advantage. This, the Interested party and the Defendant submitted will prejudice them in the litigation. Their application therefore was that the Deputy Registrar of this court visits the suit property and makes a report.
2. The Plaintiffs through their Advocate opposed the Application on the basis that the Application by the Interested Party and the Defendant is an attempt to have the court aid them in prosecuting their case. The visit by the Deputy Registrar in the Plaintiff's opinion, is unnecessary and would be merely be a waste of the resources of the court. The court as an arbiter should not be involved in gathering evidence for any party.
3. The rejoinder by the Interested Party was that their application is not meant to aid any party. All that they are asking for is that the Deputy Registrar visits and make observations and put them in a report. Therefore, and according to the Interested Party, no prejudice will be caused to any party. Further, the Interested Party informed the court that there is a similar case (a claim of adverse possession) in relation to an adjacent parcel of land by a different group. So, the Deputy Registrar, during her visit would also establish if the new structures are being erected in the suit property or in the adjacent parcel.

**Court's Determination.**

4. The value and purpose of a site visit in a civil case are two issues that I cannot confidently say, are well settled. The age-old arguments for and against a site visit have replayed themselves before my very eyes. The Applicants argue that it is necessary that the court visits the site to establish the position on the ground. The Plaintiffs opposed and argued that the court should remain an independent arbiter in the matter and must not allow itself to be used to collect evidence to aid any party in prosecuting the case.
5. In the case of **Parkire Stephen Munkasio & 14 others Vs Kedong Ranch Ltd & 8 others (2015) eKLR**, the court while considering an application of this nature stated that it is the duty of litigants to place material in support of their case before the court. The court does not have the mandate to go on a fact finding mission.
6. In **Beatrice Ngunyo Ndung'u & another Vs Samuel K Kanyoro & 2 others (2017) eKLR**, the court stated that :-

*“If the court visits a site, it can only be for purposes of receiving evidence which will assist in 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 a site visit. A court in session must perform judicial functions and must restrict distractions that take it away from its mission.”*

7. The court went further to the state that, *“a visit to the site by a Judge who is not a survey expert and who is not armed with survey equipment would not yield anything. An expert report by a surveyor compiled with the aid of survey equipment would certainly be more useful.”*

8. In the instant case, the Application for the court to visit the site has been made even before the hearing of the case has commenced. No evidence has been presented before the court yet. The justifications given were not based on any material evidence. As I pointed out earlier, the application was made orally, from the bar.

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 (10<sup>th</sup> 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 vs BD Joshi).

10. Moreover, I do not see the essence of the Deputy Registrar of this court who is not a survey expert visiting the site. An expert report compiled by a surveyor armed with survey equipment and a camera to boot would without a doubt be more useful. Judges and judicial officials should be left to concentrate on their judicial functions without distraction. I am not convinced that a site visit is necessary at this point in time.

11. Accordingly, I disallow the application by the Interested Party and the Defendant.

12. A hearing date has already been set for this matter and I urge parties to make efforts and get ready for the hearing to have this matter concluded expeditiously. As I have variously stated, parties and their advocates have a duty to assist the court to further the overriding objective.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022.**

**M.D. MWANGI**

**JUDGE**

In the Virtual Presence of:-

Mr. Mirie for the Interested Party

Mr. Mirie holding brief for Mr. Kago for the Defendant

None appearance for the Plaintiffs

Court Assistant: Hilda

**M.D. MWANGI**

**JUDGE**