REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL SUIT NO 762 OF 2017 (OS)

IN THE MATTER OF LAND REFERENCE NUMBER 209/5650 NAIROBI

AND

IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE

PLAINTIFF HAS OBTAINED OWNERSHIP OF A PORTION OF LAND

REFERENCE NUMBER 209/5650 NAIROBI BEING 0.0925 HECTARES

THEREOF BY WAY OF ADVERSE POSSESSION

BETWEEN

MAISHA MABATI MILLS LIMITED.....PLAINTIFF

AND

FARM AUTO SPARES LIMITED.....DEFENDANT

RULING

1. When this matter came up on 24/11/2021 for parties to take directions for hearing the advocate for the plaintiff made an oral application for site visit. Counsel for defendant opposed the oral application arguing that the matter is about adverse possession. The court directed that the site visit can be undertaken but this shall only be done after the case had been heard.

2. The matter was heard on two different dates on 07/02/2022 and 03/03/2022 the plaintiff and the defendants each called one witness and the parties closed their cases.

3. The matter would have then proceeded to submissions but that was not to be. The plaintiff through his advocate made an oral application that the court visits the site that constitute suit properties with a view to establishing the location of the property before retiring to write the judgment. Counsel submitted that in view of the fact that there are two plots the court will see for itself what is really on the ground and that the site visit will not be for additional evidence but a site visit for the court.

4. The application is opposed by the defendants. Counsel appearing for defendant submitted that having closed his case, there is no reason why the plaintiff should reopen his case through a site visit. Further that there was not proper basis laid for a site visit. He argued that an OS is for simple clear proceeding not for controverted proceeding. He argued that only the defendant called a surveyor and again the plaintiff had objected to production of photographs.

Brief Background

5. The suit was filed on 18/12/2017 by way of Originating Summons (OS) the prayers in the OS are:

> *a) A declaration that the Defendant's right to recover a portion of Land Reference Number 209/5650 Nairobi being 0.0925 Hectares thereof was extinguished and/or statute barred by virtue of section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya)*

b) A declaration that the Plaintiff has become entitled under section 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya) to be registered as proprietor by adverse possession of a portion of Land Reference Number 209/5650 Nairobi being 0.0925 Hectares thereof in place of its present registered owner FARM AUTO SPARES LIMITED.

c) An order directed at the Defendant ordering it to subdivide Land Reference Number 209/5650 Nairobi and excise therefrom a portion being 0.0925 Hectares thereof to be transferred and registered in the name of the Plaintiff in place of its present registered owner FARM AUTO SPARES LIMITED

d) An order directed at the Defendant ordering it to execute a transfer and all other documents and do all other acts necessary to convey a portion of Land Reference 209/5650 Nairobi being 0.0925 Hectares thereof to the Plaintiff as the rightful proprietor thereof and enable it to be registered as such and in default of compliance within 30 days of the said Order, THE Deputy Registrar shall be authorized to sign the relevant documents and do all other acts on behalf of the Defendant.

e) An order directed to the Land Registrar Nairobi ordering him to rectify the register to give effect to the declaration contained in paragraph (2) above.

f) Costs of this suit.

6. The defendant filed its Replying Affidavit on 23/08/2018.

7. The matter proceeded to hearing.

8. 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.

9. 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 about adverse possession for a portion of Land Reference No. 209/5650. 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. During the hearing a survey report was presented and the court will certainly look and consider the information when it retires to write its judgment.

10. The need for a site visit to be an occasion for receiving evidence in the nature of a hearing has been reiterated by the Court of Appeal in **Cyrus Nyaga kabute v Kirinyaga County Council [1987] eKLR** where the court stated as follows:

…*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. In* ***Fernandes v Noronha [1969] EA 506 at page 508****, Duffus V P as he then was stated. " ….. 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****."*

This decision has been followed in subsequent cases. [Emphasis supplied]

11. In the recent case of ***Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the maasai community living on land reference no.8396 (i.r 11977) situated in kedong) v Kedong Ranch Limited & 8 others [2015] eKLR***, after parties had closed their respective cases the petitioners sought to stay the delivery of the judgment and asked that the court do pay a site visit to the suit property in order to establish and confirm the position on actual occupation and the alleged violations against the petitioners. They applied to be allowed to adduce additional evidence and make more submissions. Munyao J. stated as follows:

At the outset, I need to emphasis that it is the duty of litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. If the petitioners wanted to press the fact of occupation through additional evidence, they had avenues to do so, right from the time the petition was filed, or even after receiving the responses of the respondents, who questioned whether the petitioners were actually in occupation of the suit land, especially given that in Nakuru ELC No. 21 of 2010, the court held that the petitioners, or the persons that they represent, were not in occupation. The petitioners had therefore been alerted in good time that the issue of occupation would be contested. They had time to get a land economist or surveyor to go to the ground and file a report. They did not do so. I also note that in the course of these proceedings, the petitioners sought leave to file further affidavits, which leave was granted. They should have taken advantage of this leave to put their house in order. Neither was I impressed by the ground that counsel who held brief for Prof. Ojienda, forgot to apply for a site visit or for leave to file a further affidavit.

There was no proof of such instructions, and neither was there any affidavit coming from Mr. Biko (who held brief for Prof. Ojienda at the hearing of the petition), that he had overlooked some instructions. It is a serious issue for a party to apply to call in further evidence after a matter has been heard. The greatest risk, of course, is that the other parties to the suit stand to be prejudiced, for they have already presented their case and have revealed all their cards. It will need to be an extremely exceptional case to allow a party to call additional evidence after a hearing has been closed. I can probably only fathom a situation where the applicant has come across evidence which it could not have come across, despite adequate due diligence, such as where the other party has deliberately concealed it, and which evidence is critical for the determination of the issues in the case. This court would not wish to make precedent that a party is free to apply to reopen his case merely to seal loopholes revealed at the hearing of the suit or after the submissions of the other party. It is for the above reasons that I declined to exercise my discretion and declined to allow the application by the petitioners to reopen the case.

12. In this case the plaintiff had made an application for the site visit before the hearing commenced and the court made an order granting the oral application made from the bar but it was conditional upon the conclusion of the case. The parties have subsequently proceeded to conduct their cases and closed them. No party has applied to reopen their case at this point. All that remains now is submissions by counsels after which the court retires to write its judgment. There is no more room to receive evidence. In such circumstances a site visit will be of no use. I therefore agree with the view that the earlier scheduled site visit is overtaken by events and order as follows:

i) The earlier order for site visit is now vacated.

ii) The site visit oral application made on 03/03 2022 is declined.

iii) The Plaintiff is granted 14 days from the date hereof to file their submissions, the defendant is also granted 14 days from the date of service to file its submissions. The plaintiff is granted a further 3 days if there is need to file supplementary submissions. The matter shall be mentioned on 27/04/2022 for highlighting of submissions if need be.

iv) Costs will be in the cause

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI ON THIS 16TH DAY OF MARCH 2022

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MOGENI J

JUDGE

In the presence of:

Mr. Omino for the Plaintiff

Mr. Mwangi for the Defendant

Mr. Vincent Owuor - Court Assistant