



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT NAIROBI

ELC SUIT NO. 682 OF 2014

SUKHDEV SINGH LALY.....PLAINTIFF

VERSUS

MAGNATE VENTURES LIMITED.....DEFENDANT

RULING

1. Before this Court for determination are two Applications. A Chamber Summons Application dated 8/03/2022 was filed under Order 1, Rule 22 of the Civil Procedure Rules 2010. The Applicant is seeking for the following Orders:-

1. THAT this Honourable Court be pleased to grant directions on the Third Party Notice issued to Joseph Elijah Kariuki of P.O. Box 9334, Nairobi.

2. THAT the costs of this application be in the cause.

2. The second Application dated 8/03/2022 was filed under Section 1A & 1B and 3 & 3A of Civil Procedure Act and Order 40 Rule 10 of the Civil Procedure Rules 2010. The Applicant is seeking for the following Orders:-

1. THAT this Honourable Court do make a site visit to the location of the Defendant's billboard and confirm the existence of a road on Title No. Nairobi Block 93/1429.

2. THAT the costs of this application be provided for.

3. On 9/03/2022, the two applications were canvassed orally in open court whereby the Defendants prayed that the same be heard on merit. The Applications were opposed by counsel for the plaintiff as the same had not been served upon them. A ruling date was reserved.

4. I have considered the oral submissions by both counsels and I in turn have had time to analyze the emerging issue herein, which is whether the Defendant/Applicant's applications are merited. I will proceed to analyze the legal and jurisprudential framework on the issue.

5. From the outset, the Court finds that the Third Party Notice is *res judicata* as the Court had previously rendered itself on the same on a Ruling delivered on 21/10/2021. Therefore, the Court will not entertain an application which on the face of it is an abuse of the court process.

6. On the issue of the site visit, I agree that 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.

7. 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 Defendant has allegedly trespassed onto the Plaintiff's property and illegally erected a commercial advertising billboard. The Defendant alleges that the suit property is presently a road and that the Plaintiff has no locus standi to proceed with the suit. 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.

8. 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.”

9. In this case the parties by consensus abandoned the route of surveyors visiting the plots and making a report to assist the court. Parties subsequently proceeded to fix the matter for hearing by consensus. All that remains now is for parties to proceed with the hearing and then filing of submissions by counsel after which the court retires to write judgment. I find that a site visit will be of no use. I therefore dismiss both applications with costs.

10. Further Order, the parties to proceed in open court for **Hearing at 10.00am today.**

It is so ordered.

DATED, SIGNED and DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2022.

MOGENI J

JUDGE

IN THE PRESENCE OF:

Mr. Alex Kimathi h/b for Mr. Obuye for the Plaintiff

Ms. Wakahia h/b for Mr. Kibara for the Defendant

Mr. Vincent Owuor Court Assistant