



**Nova Holdings Limited & another v County Government of Mombasa & 2 others
(Environment & Land Case 52 of 2021) [2022] KEELC 2662 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 52 OF 2021**

**LL NAIKUNI, J
JULY 21, 2022**

BETWEEN

NOVA HOLDINGS LIMITED 1ST PETITIONER

ASHOK LABSHANKER DOSHI 2ND PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA & 2 OTHERS RESPONDENT

RULING

I. Preliminaries

1. On 21st July, 2022, this Honourable Court in the presence of all the parties pronounced that it would be providing directions with regard to the request on the land Surveying exercise to the suit property – Mombasa/Block XLVIII/157 (Hereinafter referred to as “The Suit Properties”). However, in the course of deciphering through the pleadings filed, the Court decided to proceed and provide a full fledged but brief ruling instead. Thus, what is before it for determination is the Notice of Motion application dated 20th April 2022 which was filed by the County Attorney on the 27th April 2022 filed by the 1st and 2nd Respondents herein.
2. The application was brought under the dint of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya, Order 51 Rule 1 and Order 45 Rule 1 of the Civil Procedure Rules. It seeks for the following orders:
 - a. That this Honourable court be pleased to issue an order allowing the 1st Respondent’s surveyor, to carry out a survey over the parcel of land known as XLVIII/157 in order to assist this Honourable court to derive at a just decision.
 - b. That the costs of this Application be provided for.



II. The 1st & 2nd Respondent's Case

3. The application is supported by an 11 Paragraphed affidavit sworn on 20th April 2022 by Paul Manyala, a Chief Physical Planner of the 1st Respondent herein. The grounds on the face of the application and the supporting affidavit are that the Application has been made in the interest of the general public. He informed Court that he was the Chief Physical Planner for the 1st Respondent hence privy to the facts pertaining to the case. As such, he was competent to swear this Affidavit. He stated that, while taking the directions on the hearing of the application for the Petitioners, the Respondents' Advocate consented to them being granted interim orders in order to fast track the disposition of the main Petition.
4. Unfortunately, the Deponent held that the Respondents' Land Officer had not carried out a full survey and had since been locked out. Indeed, he deponed that upon the Office of the County Attorney requested them for supporting documents in order to support the issuance of an enforcement notice by ourselves and assist in defending the present Petition, that they directed the County Surveyor to undertake a ground survey. Unfortunately upon visiting the site, he was denied access and informed that there was a court order. He could not undertake any survey. Upon facing this setback, they immediately informed the Advocate on record for the Respondent who confirmed the existence of the Court Order. But before the issuance of the enforcement notice, they had carried out in investigation and confirmed that the Petitioner had encroached on public access road.
5. According to him, the investigations were done using an aerial view. However, it did not expressly bring out the measurements and extent of the encroachment and if any demolition was to be carried out it would be at the expense of the Petitioner. They attached the aerial report Marked as "PM – 1". He further informed Court that investigations were carried out using survey maps. According to the Deponent, it was and it was not in contention that the Petitioner had encroached and/or blocked public access road. He held that the only challenge was to establish the extent of the encroachment and blockage if at all this Honorable Court agreed with the Respondents that indeed the Petitioners was at fault.
6. He asserted that the Petitioners herein very well knew that they had blocked off an access road for the benefit of the general public and that was the very reason they were objecting to a proper survey from being carried out. He averred that the Respondent's actions were for the benefit of the general public and to protect the interest of the general public. The Respondents had identified that there is a blockage of a public access road by the Petitioner and a current survey report would easily highlight the encroachment by the Petitioners.
7. Finally, he opined that there would be no prejudice which would be occasioned upon the Petitioner if this Application was allowed and that the greater importance shifted in favor of the general public.

III. The 1st & 2nd Petitioner's Case

8. On on 20th May 2022, in response to the application filed by the 1st and 2nd Respondents, the 1st and 2nd Petitioners filed a 16 Paragraphed Replying Affidavit. It was sworn by Ashok Labshanker Doshi, the 2nd Petitioner and Director of the 1st Petitioner. He informed Court that he had been authorized by the 1st Petitioner to swear the Replying Affidavit. In his affidavit he deponed that the Petitioners strongly oppose the application and that the application is just a ploy to fish for evidence to justify their illegal actions and to fill the gap in their case.
9. The Deponent asserted that the Applicants were merely fishing for evidence to justify their illegal actions and to fill the gap in their case. He stated that In the Enforcement Notice served upon the



Petitioners and annexure and marked as “AD - 7” at page 67 of his Supporting Affidavit it was alleged that they blocking the same. The same accusation was also made in Count Two as could be seen in the Charge Sheet as annexure and marked as “AD -12” at Page 82 of his Supporting Affidavit where they were accused of developing structures on a road. He opined that for for the Respondents to have known or concluded that the Petitioners had encroached on a road reserve and that where they were building was not part of their property but a road reserve, they must have known where the boundaries of the suit property were.

10. They could not therefore be seeking an order of court at this stage to and conduct a survey of the suit property. If they did not know the boundaries of the suit property, then on what basis did they accuse them of encroaching on a road reserve. He deponed that the Respondents now wanted to go and carry out a survey after they had already accused them of encroachment and which was an issue that was pending before this Honorable Court. He felt that for the Respondents to have charged and accused them of encroaching on a road reserve, they ought have conducted a survey to know where the boundaries of their property were so as to form an opinion that there they were building on was not part of our property but a road reserve. They could not purport to want to conduct a survey now. Based on the advise by their Advocates on record, legal system in Kenya was adversarial and the court should not aid any party to do their case. The Respondents should table evidence including the survey reports which they had in their possession and through which they arrived at the conclusion that the Petitioners had encroached, developed and built structures along the road reserve. He deponed that they could not purport to be looking for that evidence now by requesting to be allowed to carry out survey, yet their conclusion that there was encroachment by the Petitioners was made way before this suit was filed.
11. He averred that if the order allowing the Respondents to carry out a survey was allowed, then this Honorable Court shall have permitted the Respondents to fill the gap in their case and justify their decision to charge and accused the Petitioners of encroachment way after that decision had been made. He was of the view that it was now clear that the Respondents levelled baseless charges against the Petitioners and now wanted to fill the gap in their case by carrying survey long after the act. He specifically pointed out at the the baffling averments at made out at Paragraphs 3 and 4 of Mr. Manyala’s Supporting Affidavit where he had expressly admitted that he directed the County Surveyor to conduct survey only after the County Attorney had requested for documents to support the issuance of the Enforcement Notice. This clearly showed that the Enforcement Notice was issued without supporting documents which they now wanted this Honorable Court to held them fish for. According to him, it was only logical that the survey should have been conducted before issuance of the Enforcement Notice and not after the same had been challenged in this court. The upshot of all this was that he urged the court to dismiss the application with costs to the Petitioners.

IV. Analysis and Determination

12. After keen consideration of the application filed by the 1st and 2nd Respondents herein, the supporting affidavit, the Replying Affidavit, the relevant provisions of *the Constitution* of Kenya and the Law, in order to arrive at a fair, just and reasonable decision, this Honourable Court has condensed two (2) for its determination. These are:
 - a. Whether the grounds and relief sought from the filed Notice of Motion application dated 20th April, 2022 by the 1st & 2nd Respondents herein seeking for orders to allow their Land Surveyor, to carry out a survey over the parcel of land known as XLVIII/157 after the Petition had been filed was justiable, reasonable and fair.
 - b. Who will meet the costs of the application.



Issue No. a) Whether the grounds and relief sought from the filed Notice of Motion application dated 20th April, 2022 by the 1st & 2nd Respondents herein seeking for orders to allow their Land Surveyor, to carry out a survey over the parcel of land known as XLVIII/157 after the Petition had been filed is justiable, reasonable and fair.

13. Under this sub – heading, this Court wishes to point out an issue of concern. The Respondents have moved Court seeking for the following two prayers to wit:-

i. That this Honourable court be pleased to issue an order allowing the 1st Respondent’s surveyor, to carry out a survey over the parcel of land known as XLVIII/157 in order to assist this Honourable court to derive at a just decision.

ii. That the costs of this Application be provided for.

From the face of the orders, its very easy for any person to misconcrue this to mean a request for a Site Visit (“Locus in Quo”) as envisaged under the provision of Order 18 Rule 11 of the Civil Procedure Rules, 2010. Nay! It is not. Far from it. The Order provides:-

“ The Court may at any stage of the suit inspect any property or thing concerning which any question may arise.”

The law dictates that such a visits takes place arising from two reasons:

a) For conducting an inspection – for fact ascertaining as they are on the ground. It not for gathering of new evidence. No other activity such as examination in chief nor cross examination of witnesses is allowed. and

b) where any question may arise.

By and large the visit which is a judicial court process and proceedings is Court driven – controlled, managed and supervised by it. It is fully bilateral and participatory where all the parties are fully involved. During the session experts such as Land Surveyors are involved for the scientific leadership on land economic aspects. Thereafter a Site visit report containing the parties present, location, the purpose, the procedure applied, observation and conclusion by Court is prepared and shared to be admitted and relied on while making the final determination of the case.

14. In support of this legal reasoning, I have relied on the decision of “Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 others [2017] eKLR, had this to say of the object of site visits by the court,

10. 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.

11. 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 property known as plot No. 100 Business Jewathu site is the same one also known as Njoro Township Block 1/1144 or whether they represent two different parcels on the ground. 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. (Emphasis added)

15. In the instant case, certainly this was not an application requesting for site visit as envisaged by law. On the contrary, it is done requesting Court to grant them an order to enter into the suit land currently occupied by the 1st and 2nd Petitioners on their own. Three things Come to fore. Firstly, they are not requesting Court to supervise the entry nor have all parties to be present as they enter the suit properties. Secondly, the orders sought is to conduct a land Survey and hence obtain information regarding the measurements of the land and also ascertain the allegation of encroachment into the reserved land and finally, they are requesting for this order after they had already served the Enforcement notice upon the Petitioners and charged them on the allegation of the encroachment onto a road reserve. Despite all the thorough investigation using aerial devices and Survey Maps and the information gathered by them which made them conclude indeed the Petitioners had encroached onto the suit properties into a road reserve and hence issued with an Enforcement notice still that would not be enough for them. At no particular incident or juncture that this Court should be used by litigants as a peddle to gather empirical – oral and documentary evidence to aid their cases. That would be travesty of justice and a clear case of unfair hearing. It was one of placing the cart before the horse. It was this state of affairs that caused the Petitioners to move Court by filing this Constitutional Petition seeking Constitutional remedies on the basis of the ostensible violation, denial, threat and infringement of their fundamental rights as well safeguarded under the Bill of Rights of *the Constitution* of Kenya including other several provisions such as the property rights.
16. Additionally, the 1st and 2nd Respondent have cited the provisions of Section 80 of the *Civil procedure Act*, cap 80 and Order 45 Rules 1 of the Civil Procedure Rules, 2010. The provisions presupposes that the Applicant wishes to cause for the review, setting aside or variation of this Courts order having been issued on error apparent on the face of it or mistake or on new discovery. Unfortunately, this Court wishes to stated from the very onset this citation must have been forgotten immediately it was placed at the heading of the application. The Court says so as firstly no Court order having been issued by this Court that the Applicants intended to review or set aside or vary was attached or even referred to at all. Secondly, the ingredients of these provisions as stated herein were never set out at all.
17. For these reasons the Court is left out to conclude this was a mere non starter and the best alternative is to surpass it as a moving sky cloud. Definitely, the 1st and 2nd Respondents are not at all entitled to the relief sought from the application and for these reasons it must fail outrightly.

ISSUE No. b) Who will meet the costs of the application.

18. It is now settled that issues of Costs are at the discretion of the Court. Costs mean the award granted to a party involved in and at the conclusion of any legal action, proceeding or process. The proviso of the Section 27 of the *Civil Procedure Act*, Cap. 21 provides that Costs follow the event. By the event here it means the results of any legal action, proceeding or process thereof.



In the instance case, the results of this application as the legal action is that the same has not been successful. Thus, for that reason the Petitioners should be awarded Costs to be borne by the 1st and 2nd Respondents herein.

VII. Conclusion & Disposition

19. In the final analysis of the deliberations of the two issues framed herein, on preponderance of probability, the Honourable Court proceeds to make the following just determination of the matter:-
- a. That the Notice of Motion application dated 20th April, 2022 by the 1st and 2nd Respondents herein be and is dismissed for lack of merit.
 - b. That for expediency sake this Petition be heard and determined within the next one hundred and eighty days from the date of this ruling. There be a mention on 11th October, 2022 for a Pre – Trial Conference session for purposes of direction and fixing a hearing date.
 - c. That the 1st & 2nd Respondents herein to bear the costs to be awarded to the 1st & 2nd Petitioners.
20. It is ordered accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JULY 2022

HON. JUSTICE (MR.) L.L NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT MOMBASA

In presence of:-

- a. M/s. Yumna Hassan, Court Assistant.
- b. M/s. Ongijo Advocate holding brief for Mr. Oluga Advocate for the 1st & 2nd Petitioners.
- c. Mr. Tajbhai Advocate for the 1st & 2nd Respondents.

