



Mbiuva v Cabinet Secretary, Ministry of Lands and Housing & 5 others (Environment & Land Case 81 of 2019) [2025] KEELC 3503 (KLR) (5 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 81 OF 2019**

EO OBAGA, J

MAY 5, 2025

BETWEEN

JINAANI NZIOKI MBIUVA PLAINTIFF

AND

CABINET SECRETARY, MINISTRY OF LANDS AND HOUSING 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

DIRECTOR OF SURVEYS 4TH DEFENDANT

ALEX MUEMA WAMBUA (BEING SUED AS THE PERSON REPRESENTATIVE OF JOSHUA WAMBUA MUTUNGA) 5TH DEFENDANT

JOHNSON NZUI MUKULA 6TH DEFENDANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 15th October, 2024 in which the Plaintiff/Applicant seeks the following orders:

1. Spent**
2. Spent**
3. Spent**
4. That this honourable court be pleased to conduct a site visit for purposes of better appreciating the boundary dispute between the Plaintiff/Applicant, the 5th and 6th Defendants herein vis-



à-vis the impugned accuracy of the Registry Index Map (RIM) No. 10 relating to the Nziu Registration Area which forms the basis for the suit before the court.

5. That the Plaintiff's further list of witnesses dated 4th October, 2024 and the attached witness statement for AGNES MBITHE NZIOKI be deemed as duly filed and served.
6. That the costs for this application be awarded to the Plaintiff/Applicant.
2. The affidavit in support of the application was sworn by the Plaintiff's counsel who depones that he took over the conduct of this case after the previous lawyer of the Plaintiff was appointed High Commissioner of Canada. Upon perusing the file, he noticed that there were certain issues which needed to be put in place before the case could be certified ready for hearing. As the case had been fixed for hearing, he filed a witness statement of an additional witness for which he seeks leave of court for the same to be deemed as having been properly filed.
3. The deponent states that as the case revolves around a boundary dispute, it is important for the court to visit the site in order to appreciate what is on the ground.
4. The Applicant's application was opposed by the 5th and 6th Defendants/Respondents based on grounds of opposition dated 30th January, 2025. The Respondents contend that the application is an abuse of the process of the court which is designed to scuttle the hearing of the case; that the introduction of an additional witness is not justified; that no reason has been given why the witness statement sought to be introduced could not be filed in time and that the application has been made as the Plaintiff is enjoying interlocutory injunctive orders.
5. The parties were directed to file written submissions. The Plaintiff filed their submissions dated 10th February, 2025. It was submitted that the additional witness sought to be introduced is a spouse of the Plaintiff whose evidence will be crucial. On the site visit, it was submitted that it is necessary to enable the court appreciate what is on the ground. It was further submitted that the 5th and 6th Defendants had proposed to the Plaintiff's previous lawyer to visit the site but this was not done.
6. The Applicant relied on the case of *Beatrice Ngonyo Ndungu & another -vs- Samuel K. Kanyoro & 2 others* (2017) KEEL 3025 KLR where it was held as follows:
 12. 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 on 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 VP 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.” His decision has been followed in subsequent cases. (Emphasis supplied).



7. The Respondents filed their submissions dated 31st March, 2025 in which they submit that what the Applicant was seeking was essentially a review and that the grounds for review were not shown.
8. I have considered the Applicant's application as well as the opposition to the same by the 5th and 6th Respondents. I have also considered the submissions by the parties. The only issues which arise for determination are firstly, whether the witness statement of the witness sought to be introduced should be deemed as having been duly filed. Secondly, whether the court should visit the site.
9. On the first issue, it is clear that the present counsel for the Plaintiff took over the conduct of the suit after the previous lawyer had been appointed as High Commissioner to Canada. As at the time of taking over, the case had been set down for hearing on 24th September, 2024. Counsel applied for adjournment to enable him familiarize himself with the matter. The case was adjourned to 16th October, 2024.
10. As the counsel went through the voluminous court record, he realized that it was important to file additional witness statement. He did this on 4th October, 2024. This was done because the case already had a hearing date. Subsequently, an application was filed seeking to have the statement deemed as having been duly filed. The action of the counsel is understandable. The witness sought to be introduced is a spouse of the Plaintiff. Her evidence will not prejudice the Respondents as this case is yet to take off.
11. On the second issue, I have noticed from the pleadings that the contention herein is on boundary dispute. The access road to the Plaintiff's land had at some stage been blocked and the Plaintiff had to seek court intervention. In view of this, it is important that the court visits the site to appreciate what is on the ground. I therefore find that the Applicant's application has merits. I proceed to allow it in terms of prayers 4, 5 and 6.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF MAY, 2025.

In the presence of:

Mr. Wambua for Plaintiff/Applicant

Mr. Mung'ata for 5th and 6th Respondent

Court assistant – Steve Musyoki

