



**Bemadafu v Njeka & 3 others (Environment & Land Case  
64 of 2021) [2024] KEELC 5013 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 5013 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 64 OF 2021**

**AE DENA, J**

**FEBRUARY 8, 2024**

**BETWEEN**

**KOMBOZA MADAFU BEMADAFU ..... PLAINTIFF**

**AND**

**MADENI NJEKA ..... 1<sup>ST</sup> DEFENDANT**

**GURIRO LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**OFFICER KINANGO ..... 3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF LANDS KWALE ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1 This ruling is the subject of the Notice of Motion application dated 24/10/2023 by the Plaintiff. The application seeks for the following orders;-

1. Spent
2. That the evidence of the final Plaintiffs witness Mr. CHuphi Dhuha Mbui and the 1<sup>st</sup> Defendant and his witnesses be taken at the locus in quo on the date the matter is scheduled for hearing.
3. That for purpose of settling the issues of occupation to the property Plot LR. No. Kwale/ Tsunza Adjudication 136, the Honourable court be pleased to Order that the Director of Surveys Kwale County does identify the beacons of the suit property in the company of the Deputy Registrar of the Court and identify the persons that occupy plot LR. No. Kwale/ Tsunza Adjudication 136, and a report thereon be filed in court.
4. That the OCS Kinango Police Station do provide security for compliance with the orders issued by the Honorable Court.



5. That costs of this application be provided for.
- 2 The Application is supported on the grounds on its face and by an affidavit sworn by the Plaintiff and filed on 25/10/23. It is averred that his last witness Mr. Chuphi Dhuha Mbui is slated to give his evidence on 20/2/24 during the hearing of this suit. That both the Plaintiff and Defendants by way of Counterclaim have pleaded they live in LR. No. Kwale/Tsunza Adjudication 136 (suit property).
- 3 Mr. Ngonze for the 1<sup>st</sup> Defendant does not oppose the application as long as the Applicants meet the costs of the exercise. The application came up for hearing on 24/01/24 and I gave more time to 2<sup>nd</sup> Defendant to respond to the same as their counsel did not attend court. The court noted the service was effected on 11/01/24. I also requested the Applicant to liaise with Mr. Olaba for the 2<sup>nd</sup> Defendant there being no objection from the 1<sup>st</sup> Defendant. The court however reserved its ruling on the application for 8/2/24 and further directions.
4. The application is brought under the provisions of order 45, 50 and 51 of the Civil Procedure Rules and Sections 63(f) of the Civil Procedure Act. Order 45 is on review decree or order of the court. Having perused the application it is not clear which orders the court is being called upon to review. Order 50 is largely on computation of time. There is no section 63(f) however section 63 is on supplemental proceedings and whose relevance to the application has not been demonstrated. Be that as it may I will ignore the legal technicalities and look at substantial justice.
- 5 My understanding is that this application has three limbs. The first is a site visit for inspection by the Court to appreciate the suit property and its ground status as to occupation. The other limb is for the identification of the suit property by the Director of Surveys Kwale County as well as identification of the persons who occupy the same. The Plaintiff also wants the hearing to be held at the suit property.
- 6 The main issue for determination therefore is whether the orders sought in the application should issue. First I will discuss the law that guides the subject of visit to locus in quo or inspection thereof and or site visit.
- 7 Order 18 Rule 11 of the Civil Procedure Rules provides as follows;-
- Power to court to inspect;
- “ The court may at any stage of a suit inspect any property or thing concerning which any question may arise”
- 8 I will then look at how the courts have over time rendered on the issue of site visit and or inspection. In the case of Parkire Stephen Munkasio & 14 Others v Kedong Ranch Limited & 8 Others [2015] eKLR Munyao J held that the duty of the litigants in a suit is to place material in support of their cases. In Beatrice Ngonyo Ndung'u & Another V Samuel K Kanyoro & 2 Others [2017] eKLR the court was of the view that 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 visits.
- 9 In the case of Charles Mukoma Chira & 2 Others v KPLC [2022] eKLR Oguttu Mboya J in an application for visitation of the locus in quo and drawing from the jurisprudence from the Court of Appeal case of IEBC v Stephen Mutinda Mule & Others [2014] eKLR concluded as follows; -
- 19 Premised on the foregoing, it is my considered view that the visitation to the locus in quo may be carried out and or undertaken by the court, but before such visitation are undertaken, the



Applicant must place before the court special exceptional and peculiar circumstances that will warrant the Visitation.’

- 10 The Court of Appeal of Tanzania in Civil Appeal No. 4 of 2018 *Kimondidimitri Manthenkes Vs. Ally Azim Devji Ltd & 7 Others* stated that a visit to the locus in quo is undertaken only in exceptional circumstances as by doing so a court may unconsciously take a role of a witness rather than adjudicator. The visit should not be for the purpose of filling gaps in evidence.
- 11 Guided by the above jurisprudence it is apparent that a visit to site or inspection is the exception rather than the rule. If it is the exception then the Applicant must demonstrate the existence of special circumstances. It is important that this court does examine the purpose of the proposed visit to the locus in quo.
- 12 The Applicant depones that both parties claim to be in occupation and use of the same. That it will be a great opportunity to have the hearing at the site to enable the court inspect the suit property as part of primary evidence relevant to a determination of the facts in issue. That it is necessary that the occupants of the suit property be ascertained since the plaintiff is in occupation yet the defendant claims to be in occupation as well. It is stated that the visit will greatly benefit the court when writing its judgment.
- 13 The court has keenly looked at the Plaint dated 26/9/2018 and the Defence and Counterclaim and is not persuaded there are special circumstances to warrant the site visit. The fact that both parties are in occupation of the suit property and that the other is claiming they have planted trees to me are issues that are pleaded every day by litigants. This being an adversarial system I reiterate each side of the divide must meet the requisite burden of proof by placing material before court which when considered in light of the law would enable the court arrive at the desired decision See [Stephen Wasike Wakhu & Another Vs. Security Express Ltd](#) (2006) eKLR . From the reasons cited to me it appears the Applicant wants the court to assist it in proving the Plaintiffs and his extended family occupation of the suit property.
- 14 The Applicant also seeks that the Director of Surveys Kwale County does identify the beacons of the suit property in the company of the Deputy Registrar of the Court and identify the persons in occupation and to file a report. In my view this request is premature at this stage of the hearing. A decision can only be made after all the parties have adduced their evidence and before parties file their final submissions ahead of the judgment of the court. The court will make its own assessment and should it find there is need for additional evidence to assist it in meeting the ends of justice, then the court will be at liberty to invoke the provisions of section 173[1] of the [Evidence Act](#) chapter 80 of the laws of Kenya on the extended power of the court to obtain proper evidence.
- 15 The upshot of the foregoing is this court find no merit in the application dated 24/10/23. The matter shall proceed for hearing as scheduled on 20<sup>th</sup> and 21<sup>st</sup> February 2024 in open court.

Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 8<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....  
**A.E DENA**

**JUDGE.**

Mr. Mokaya holding brief for Mr. Malombo for the Plaintiff/Respondent

Mr. Ngonze for the 1<sup>st</sup> Defendant/Respondent

No appearance for 2<sup>nd</sup> Defendant/Respondent



No appearance for 3<sup>rd</sup> and 4<sup>th</sup> Defendant/Respondent

Mr. Daniel Disii – Court Assistant

