



Dubai Business Park Limited v County Government of Kilifi & 2 others (Environment & Land Case E057 of 2021) [2024] KEELC 6379 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6379 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E057 OF 2021
EK MAKORI, J
OCTOBER 2, 2024**

BETWEEN

DUBAI BUSINESS PARK LIMITED PLAINTIFF

AND

THE COUNTY GOVERNMENT OF KILIFI 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. The application dated 15th May 2024 seeks to have this matter reopened and that the Court does direct the County Surveyor Kilifi to conduct a physical inspection of the suit property, ascertain boundaries, and further ascertain whether the Kilifi Sub-County Offices have encroached on the suit property.
2. This move was made after all parties had closed their respective cases, and the matter was slated for receipt of final submissions from the parties.
3. The 1st and 2nd defendants have opposed the move, arguing that the plaintiff seeks to bridge the gaps created in its case by the opposing side and that if the Court were to allow that, it would mean that it would be reclining to one side and procuring evidence on its behalf. The decision in *Nova Holdings Limited & another v County Government of Mombasa & 2 others (Constitutional Petition 52 of 2021)*, [2023] KEELC 22026 (KLR) (5 December 2023) (Ruling), was cited in that regard.
4. The only issue I frame for this Court's decision is whether to reopen this matter and order a physical survey to be conducted by the Kilifi County Surveyor as proposed by the plaintiff.
5. The discretion to reopen a case rests with the Court, and the Court should decide that question judiciously and with fairness to all the parties litigating before it. The Court's role in maintaining



fairness and justice is paramount. In *Samuel Kiti Lewa v Housing Finance Co. Kenya Ltd & another* [2015] eKLR, the Court held thus:

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

6. In the cited case by the defendants - Nova Holdings Limited & another v *County Government of Mombasa & 2 others (Constitutional Petition 52 of 2021)*, [2023] KEELC 22026 (KLR) (5 December 2023) (Ruling), on the same point the Court held:

“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 land into the road reserve and hence issued with an Enforcement Notice still that would not be enough for them. At no particular incident or juncture that the Court should be used by litigants as a peddle to gather empirical oral and documents evidence to aid their cases. That would be a travesty of justice and a clear case of unfair hearing. It was one of placing the cart before the horse. It was a state of affairs that caused the Petitioners to move Court by filing this Constitutional Petition seeking constitutional remedy 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, 2010.”

7. I reckon there was no delay in bringing the instant application. But I will, in my view, opine that by this application, the applicant intends to fill the gaps created by the opposing; this is apparent from the averment by the supporting affidavit by one Ali Amin Hussan Othman for the applicant deposed on 15th May 2024 - paragraphs 3 to 11, significant in paragraph 8 he states:

“That in light of the defenses, witness statements, and documents filed, it is indiscernible how the Kilifi Sub-County Offices could allegedly be located within Sharian Camp, allegedly entirely different location from the suit property, and yet at the same time be squarely within the suit property as evidenced by the photographs and the Valuation Report filed by the plaintiff.

8. The Kilifi County Surveyor's going to the suit property for physical inspection is to amend the gaps created in the plaintiff's case after the Court hearing and receiving evidence from all the parties. An oral application seeking similar orders was made on 24th January 2024, when all parties had closed their respective cases. The Court declined the same. The Court will decline the same suggestion in the current application, too. That is why the application dated 15th May 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 2ND DAY OF OCTOBER 2024

E.K. MAKORI

JUDGE

In the Presence of:



Ms. Odhiambo, for the Plaintiff
Ms. Muronji for the 1st Defendant
Mr. Maruti, for the 2nd Defendant
Happy: Court Assistant

