



Chunky Limited & another v Abdikhaiya & 11 others (Environment and Land Constitutional Petition 1 of 2022) [2023] KEELC 22649 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 22649 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2022**

AE DENA, J

JULY 6, 2023

BETWEEN

CHUNKY LIMITED 1ST PETITIONER

CURLY WURLY LIMITED 2ND PETITIONER

AND

MOHAMED ABDIKHAIYA 1ST RESPONDENT

PATRICK NDUNE 2ND RESPONDENT

SAHAL AHMED DAHL 3RD RESPONDENT

KAHIA TRANSPORTERS LIMITED 4TH RESPONDENT

TRADE LEAD LIMITED 5TH RESPONDENT

MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT 6TH RESPONDENT

DIRECTOR OF SURVEY MINISTRY OF LANDS HOUSING & URBAN DEVELOPMENT 7TH RESPONDENT

CHIEF LAND REGISTRAR 8TH RESPONDENT

COUNTY LAND REGISTRAR MOMBASA 9TH RESPONDENT

NATIONAL LAND COMMISSION 10TH RESPONDENT

THE ATTORNEY GENERAL 11TH RESPONDENT

EDWARD KIGURU 12TH RESPONDENT



RULING

1. To put things into perspective I will set out a brief litigation history of the properties CR 7239/1[Plot no 909/VI/MN], CR 7964[Plot no 910/VI/MN] CR 68639[Plot No 5154/VI/MN], CR 68637[Plot No 5153/VI/MN] and CR 68273[Plot No 514/VI/MN] the subject of the application herein.
2. This petition has since been consolidated with ELCC No. 273 of 2017, ELCC No. 405 of 2017, ELCC No. 92 of 2020 and ELCC No. 202 of 2018 all relating to the above suit properties. The petitioners sought the transfer of the suit to Kwale ELC Court from Mombasa alleging the properties were situate in Kwale County. In a ruling dated 19th January 2022 Lady Justice N. A. Matheka made a finding that it is ELC Kwale that has the territorial jurisdiction to determine the petition. Appeal No E011 of 2022 is pending against the said ruling.

Application

3. The 1st Petitioner has filed the Notice of Motion dated 14/12/2022 the subject of this ruling, pursuant to the provisions of Section 173[1] of the Evidence Act, 1A, 1B and 3A of the Civil Procedure Act, Order 18 Rule 11, Order 40 Rule 10, Order 51 Rule 1 of the Civil Procedure Rules 2010 for the following orders;
 - I. Spent
 - II. That pending the hearing and determination of this application this honourable court do direct the Kwale County Surveyor and Mombasa County Surveyor to proceed and ascertain the location and boundaries of the petitioners land located in Kwale County vis a vis the location and boundaries of the respondents land located in Mombasa county and file and serve their respective survey reports.
 - III. That this honourable court be pleased to make a site visit and inspection of the suit properties being CR 7239/1[Plot no 909/VI/MN] and CR 7964[Plot no 910/VI/MN] in Kwale County and 4th and 5th Respondents properties being CR 68639[Plot No 5154/VI/MN] CR 68637[Plot No 5153/VI/MN] and CR 68273[Plot No 514/VI/MN] allegedly situated in Mombasa county.
 - IV. That this honourable court be pleased to order the said site visit shall be conducted with assistance of Kwale County Surveyor and Mombasa County Surveyor in the presence of the advocates of the parties herein.
 - V. That pending the site visit this honourable court do direct the Kwale County Surveyor and Mombasa county surveyor, at the earliest opportunity to proceed and ascertain the location and boundaries of the petitioner's land located in Kwale County and the boundaries of the 4th and 5th Respondents land located in Mombasa county and file and serve their respective survey reports.
 - VI. That the costs of this application be in the cause.
4. The application is premised upon grounds set on its face and the supporting affidavit of Harji Govind Ruda a director of the 1st petitioner. According to the deponent, the 1st and 2nd petitioners are the registered proprietors of title no CR 7239 & CR 7964[plot no's MN/VI/909 and MN/VI/910] the



suit properties. The deponent narrates how a portion of the suit properties were compulsorily acquired by the government for the construction of the Mombasa-Nairobi standard gauge railway. That the 4th and 5th respondents then filed ELC cases 273/2017 and 405 of 2017 (earlier mentioned) claiming to have an alleged boundary dispute with various parties and obtained an ex parte order staying payment of compensation duly owed to the petitioners herein. The petitioner avers they have never claimed the 4th and 5th respondent's property and that is in the interest of justice that the court do conduct a site visit to confirm the location of the 4th and 5th Respondents land.

Responses To The Application

5. The 1st, 2nd and 3rd respondents opposed the application on the following grounds; -
 - I. The Motion is misconceived and incompetent in so far as it invites the honourable court to collect, gather and assemble evidence on behalf of the petitioner/applicant.
 - II. The honourable court cannot descend into the arena of conflict over disputed facts which have been pleaded and which have to be proved at the trial and hearing. The orders sought in prayers number 2,3,4 and 5 of the motion should accordingly not be entertained.
 - III. The reliefs sought in the Notice of Motion amount to seeking the honourable court to be and act as a witness of the applicant and at the same time sit to adjudicate the dispute over which it has to hear, try and determine.
 - IV. The Notice of Motion seeks and invites the honourable court to embark on an exercise in excess of legitimate jurisdiction contrary to law.
 - V. The Motion is prejudicial to the 1st, 2nd and 3rd respondents and an abuse of the due process of the court and should be declined.
6. The 4th and 5th respondents filed a replying affidavit sworn by one Osman Ahmed Kahia in addition to reiterating the grounds of opposing It is averred that the 4th and 5th respondents have 2 appeals pending in the Court of Appeal where the grounds of appeal echo the prayers sought in this application. As such no orders should issue pending the determination of the appeal. That this court cannot seat on its own appeal.
7. The applicant in further response to the 4th and 5th respondent's depositions above responded vide Further Supplementary Affidavit filed on 23/02/23. It is stated that there is no application for stay filed before the Court of Appeal. That the pending appeals were not on ownership of the properties which is the issue before this court.

Disposal of The Application

8. The application was dispensed by way of written submissions which parties filed and exchanged.

Petitioners/Applicants Submissions

9. The petitioners submit the application is pegged on the provisions of section 173[1] of the [Evidence Act](#) on the extended power of the court to obtain proper evidence; Sections 1A, 1B and 3A of the [Civil Procedure Act](#) on the overriding objective of the court, Order 18 Rule 11 of the [Civil Procedure Rules](#) on inspection of property by the court where any question arises and Order 40 Rule 10 of the [Civil Procedure Rules](#). Reference is made to the holding in [Florence Nyaguthii Muchemi v AG & 3 others](#) [2022] eKLR where the court allowed a site visit on the basis that the same was relevant to the issues in controversy.



10. It is stated that the 4th and 5th respondents claim to have a boundary dispute with the petitioners even though they have never produced any survey plan or report in proof thereof. That the said parties have further claimed that the petitioners have trespassed on their land and which claim has not been backed by any evidence. That to accurately determine these issues the court ought to have a site visit with the assistance of the respective county surveyors. Reliance is placed on the holding in *Juma Juma Kanga & 299 Others v Abdulkadir Ahmed Ramkhan & 9 Others* [2021] eKLR and several other authorities as listed and which this court has considered. The court is urged to allow the application as prayed.

1st,2nd And 3rd Respondents Submissions

11. It is submitted that the Motion is invalid for want of a resolution from the board of directors of the 1st petitioner to represent it and swear the affidavit in support of the application.
12. On the orders as sought it is submitted that orders 2 and 5 are substantially similar. That the court has no jurisdiction to dispatch the collection and presentation of evidence for a party in proceedings where the function of the court is to adjudicate and determine the dispute. It is also contended that the orders for visitation of the site are geared towards gathering evidence by the court outside its preserve.
13. Distinguishing the authorities quoted by the petitioners it is pointed that in *Florence Nyaguthii Muchemi v AG & 3 Others* and *Juma Juma Kanga & 299 Others Versus Abdulkadir Rahmkhan & 9 Others* the courts were dealing and considering ordinary suits and not constitutional petitions. That section 173[1] of the *Evidence Act* does not clothe the court with the authority to gather evidence on behalf of parties.
14. That in *Charles Mukoma Chira & 2 Others v KPLC* [2022] KLR the court quoted *IEBC v Stephen Mutinda Mule & Others* [2014] eKLR where the Court of Appeal emphasised it was not the duty of the court to enter upon any inquiry into a case before it other than to adjudicate upon the specific matters in dispute which the parties have raised in the pleadings. The same position was held in the case of *Beatrice Ngonyo Ndungu & Another V Samuel K Kanyuru & 2 Others* [2017] eKLR. The respondents reiterate the contents of the grounds of opposition and seek that the motion is dismissed with costs.

4th & 5th Respondent's Submissions

15. The 4th and 5th respondents submitted that the application was tantamount to moving the court to collect evidence for the applicant. That the petitioners cannot deviate from its earlier position that the suit property is located within Kwale County relied upon to have the suit transferred to ELC Kwale. It is emphasised that the court ought not to be involved in the search for evidence and that the burden of calling out witnesses and proving each parties case lies with the concerned party. Reliance is placed in *IEBC v Stephen Mutinda Mulee and Beatrice Ngonyo Ngungu (supra)*, *Chira & 2 Others v KPLC* [2022]KLR and *Njiru Micheni Nthiga v Governor Tharaka Nithi County Government & 5 Others* [2020] eKLR.
16. It is contended that in asking for the Kwale and Mombasa County surveyors to ascertain the boundaries of the petitioners land situated in Kwale and the respondents land situated in Mombasa, the action becomes a boundary dispute and which the court did not have jurisdiction pursuant to Sections 18[2] and 19 of the *Land Registration Act* No 3 Of 2012. The court is referred to the holding in *Ratilal Ghela Shah & 2 Others v Menkar Ltd* [2018] eKLR boundary disputes are within the land registrar's mandate. Other case cited are *Henry Kosgey versus Brian Cuthbert & another* [2019] eKLR, *Azzuri Limited v Pink Properties Limited* [2018] eKLR and *Estate Sonrisa Ltd & Another v Samuel Kamau Macharia & 2 Others*.



17. On whether this court ought to visit and inspect the site, it is submitted that the prayer presupposes the court to be an expert which it was not. The parties submit that the instant application is an abuse of the court process and ought not to be disallowed by the court.

Discussions And Determination

18. Having considered the application, responses, submissions and the authorities cited the main issue that commends determination is whether the applicant warrants the grant of the orders sought.
19. There is a preliminary issue that I must dispense with at this early stage. It has been urged that the Motion is invalid for want of a resolution from the board of directors of the 1st Petitioner to represent it and swear the affidavit in support of the application. Let me state that this is not fatal to the application. Am guided by the dictum in the case of *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR where Odunga, J was in agreement with the decision of Kimaru J in the case of *Republic v. Registrar General and 13 Others* Misc. Application No. 67 of 2005 [2005] eKLR where the court stated: -

“...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”

20. The applicant relies on various provisions of the law namely Section 173[1] of the *Evidence Act*, 1A, 1B and 3A of the *Civil Procedure Act*, Order 18 Rule 11, Order 40 Rule 10, Order 18 Rule 11.
21. Order 18 Rule 11 is on power of court to inspect any property or thing concerning which any question may arise at any stage of the suit. The provision therefore anticipates the visit by the court to the locus in quo. But it is the purpose of the visit that in my view should be interrogated. A visit to site is the exception rather than the rule. It therefore means there must be special circumstances that would compel such a visit. This was aptly and persuasively stated by my brother Oguttu Mboya J in the case of *Charles Mukoma Chira & 2 Others v KPLC* [2022] KLR where upon drawing from the jurisprudence from the Court of Appeal case in *IEBC v Stephen Mutinda Mule & Others* [2014] eKLR in an application for visitation of the locus in quo 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.’

22. It is alleged that following the compulsory acquisition of some portions of the suit property a boundary dispute arose with the 4th and 5th respondents yet the petitioners have never claimed the said respondent’s property. The applicant states in the grounds in support of the application that:-

‘The petitioners are in possession of their two properties situated in Kwale County and the claim by the 4th and 5th Respondents is a well disguised attempt to lay claim over the Petitioners land and the same are a tactic to abuse the court process by attempting to legitimize their land grabbing and unlawful acquisition of the Petitioners property’.

23. It is further stated that the 4th and 5th respondents have insisted that their lands are in Mombasa County and that the petitioners have always maintained that their land is located deep in Kwale County. Consequently, the court was called in the interest of justice visit the locus in quo to confirm the location of the 4th and 5th Respondents and whether there is a legitimate dispute between the parties.



24. Is there anything extraordinary in the above to necessitate the court should step out of the normal court proceedings ordinarily conducted in court virtually or by physical attendance of the parties and their witnesses and visit the properties? To me they are the normal allegations/averments and claims made by parties every day in the numerous pleadings filed in the ELC. The Petitioners have not set forth with precision the purpose of the site visit and what the same is to achieve. It is stated that the same is for inspection of the suit properties, the same begs the question inspection for what? I'm not impressed neither I'm I persuaded that this calls for such visitation by this court. Let the parties put their best feet forward and meet the appropriate burden of proof in the normal manner.
25. In addition to the above, I have noted the numerous authorities cited by the respondents in opposition to the present application which underscore the foregoing position. Clearly the courts have frowned upon site visits and the reasons have been well elucidated and there is no need in my view to reinvent the wheel. See *Charles Mukoma Chira & 2 Others v KPLC* (*supra*), *Parkire Stephen Munkasio & 14 Others Versus Kedong Ranch Limited & 8 Others* [2015] eKLR Munyao J held *interlia* that the duty of the litigants in a suit is to place material in support of their cases. Yet again 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.
26. I have read the ruling in the case of *Florence Nyaguthii Muchemi Versus AG & 3 others* [2022] eKLR and I think the circumstances of the present case are different to the extent that in the former the location of the properties was not in dispute. With regard to *Juma Juma Kanga & 299 Others Versus Abdulkadir Ahmed Ramkhan & 9 Others* [2021] eKLR the court agreed that it was not an expert in matters survey but wanted to understand the status on the ground surrounding the abuse of interim orders that had been granted by the court. Moreover, the ruling doesn't disclose there was more than one property involved unlike in the present case.
27. Counsel for the petitioners submits that though the said respondents claim to have a boundary dispute they have not produced any expert report to prove that a boundary dispute exists or the alleged trespass. For this reason, the court has also been invited to have a site visit with the assistance of the respective county surveyors to accurately determine this issue. To me the party who alleges a fact to exist then must prove it actually does, this should be left to the hearing and the courts determination thereafter. Even in the presence of the surveyors this court is at a loss over what its role would be as a layman in matters survey of land and as rightly observed in the case law cited by the respondents.
28. Tied to the above is the submission that the petitioner places the dispute under the jurisdiction of the Land Registrar having confirmed there is a boundary dispute. That they should first take the steps contemplated under Section 18(2) of the *Land Registration Act* 2012. This is the petitioner's choice provided that the court shall not overstep its mandate upon considering all the facts when finally rendering its decision.
29. I think I have said enough to demonstrate why the present application cannot be allowed. My discussions also speak to the applicability of Section 173(1) of the *Evidence Act* to the circumstances of this case and the reasons advanced by the petitioner in justification of the prayers herein.
30. I have noted the arguments raised by the respondents surrounding the petitioner's application dated 12/10/2021 for transfer of the suit from Mombasa to Kwale for want of territorial jurisdiction and which application was allowed on 19/01/22. I find it necessary to keep off this issue which parties and the court will have an opportunity to revisit at the substantive hearing of the matter if at all.



31. Accordingly, I disallow the application dated 14/12/2022 by the Petitioner with costs to the respondents.

32. It is so ordered.

Leave to appeal this ruling is granted if required.

The matter shall be set down for Mention for further directions on 26/07/23.

DELIVERED AND DATED AT KWALE THIS 6TH DAY OF JULY, 2023.

A.E. DENA

JUDGE

Ruling delivered via email with consent of the parties.

