



**Masila v Ndolo (Environmental and Land Originating Summons  
E003 of 2022) [2023] KEELC 21474 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21474 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2022  
TW MURIGI, J  
NOVEMBER 1, 2023**

**BETWEEN**

**TITUS NGILE MASILA ..... PLAINTIFF**

**AND**

**ELIZABETH KAMENE NDOLO ..... DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 20<sup>th</sup> February, 2023 brought under Order 18 Rule 11 of the [Civil Procedure Rules](#), 2010 in which the Defendant/Applicant seeks the following orders: -
  1. That this Honourable Court do conduct a site visit of the suit property to establish, confirm and delineate the size of the parcel of land, if any, that is in actual occupation by the Plaintiff/Respondent before the hearing and determination of the Plaintiff/Respondent's Originating Summons dated 7<sup>th</sup> July, 2022.
  2. The costs of this application be provided for.
2. The application is supported by the affidavit of Andrew Ndola Ndolo sworn on even date.

**The Applicant's Case**

3. The Applicant averred that he is the registered holder of a Power of Attorney authorizing him to defend this suit. In brief, the Applicant disputes the size of the suit property being claimed by the Plaintiff. The Applicant averred that the Plaintiff is not in actual possession of the 60.00 acres of land being claimed. He argued that for a party to acquire land through adverse possession, they must prove actual possession of the land so claimed. The Applicant further averred that the Plaintiff has illegally built a house and done other farming activities on a small portion of the suit property.



4. The Applicant further averred that the law allows this Court to have a broad mind on any matter in question by visiting the *locus in quo* before the hearing and determination of any matter before it. That it is in the interest of justice and fairness that this Court do conduct a site visit of the suit property to ascertain the portion in actual occupation by the Plaintiff.

### **The Respondent's Case**

5. The Plaintiff filed a Replying affidavit sworn on 20<sup>th</sup> March, 2022, in opposition to the application. He averred that the Applicant has no right to cast doubt on the acreage of land in his occupation because he did not purchase the land from the Applicant but rather from the late Josiah Salvin Kaumbulu. He averred that at the time of purchase, the suit property was duly surveyed and demarcated by registered surveyors on behalf of the vendor. The Plaintiff further averred that prior to filing this suit, he engaged the services of a registered Surveyor, one Mr. Fred Akala, and a quantity surveyor, one Mr. Nzioki, who visited the suit property and prepared reports confirming the exact acreage of the land.
6. The Plaintiff contended that the Applicant should not invite the Court to become a witness in these proceedings or enter the arena of litigation since he failed to engage a registered surveyor to take measurements and file a report to dispute the acreage of his land. Finally, it was averred that the Court has no expertise in taking measurements of land and thus, there is no value in conducting a site visit.
7. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

8. The Applicant's submissions were filed on 8<sup>th</sup> May, 2023. Counsel for the Applicant identified the following issues for the court's determination: -
  - i. Whether this Honourable Court should visit the *locus in quo* before the hearing and determination of the Plaintiff's Originating Summons; and
  - ii. Who bears the costs.
9. Counsel for the Applicant submitted that Order 18 Rule 11 of the [Civil Procedure Rules](#) provides that the Court may inspect any property or thing concerning which any question may arise, at any stage of a suit. While admitting that the Court is not an expert on matters survey, Counsel contended that its lay observation of the suit property would help the court to better understand the documents produced by the surveyor and particularly the land in actual occupation by the Plaintiff.
10. Counsel further submitted that the independence and impartiality of this Court should not be in question on the basis of a site visit because it is anchored in the law. Counsel contended that it is in the interest of justice and fairness that the Court visits the site since the originating summons herein raises pertinent questions on the portion of the suit property in actual occupation by the Plaintiff. Counsel for the Applicant urged the Court to allow the application as prayed.
11. To buttress his submissions, Counsel relied on the list and bundle of authorities dated 5<sup>th</sup> May, 2023.

### **The Respondent's Submissions**

12. The Respondents submissions were filed on 20<sup>th</sup> March 2023.
13. On his behalf, Counsel submitted that it is not the duty of the Court to go on a fact-finding undertaking to gather evidence. It was further submitted that the Applicant had not presented any material evidence which would warrant a site visit by the Court. Counsel reiterated that the Plaintiff



had instructed a Surveyor to ascertain the acreage of the suit property and that the Surveyor's report was attached in evidence.

14. Counsel submitted that the application herein does not meet the requirements stated in the case of *Beatrice Ngonyo & Another v Samuel K. Kanyoro & 2 Others* [2017] eKLR. Counsel argued that the orders sought are a waste of judicial time. Accordingly, Counsel urged the Court to dismiss the application with costs.

### **Analysis and Determination**

15. Having considered the application, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the court should visit the *locus in quo*.

16. Order 18 Rule 11 of the *Civil Procedure Rules, 2010* provides as follows: -

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

17. According to the Applicant, the purpose of the site visit is for the Court to see the portion of the suit property that is in actual occupation by the Plaintiff. The Applicant asserted that the Court's lay observation of the site would help the Court to understand better the documents produced by the Surveyor and particularly the portion of land in actual occupation by the Plaintiff.

18. The purpose of a visit of the *locus in quo* was explained in Ugandan case of *E. Kangye v E. Bwana Kampala HCCS no. 38 of 1989* in which Ouma, J expressed himself as follows:

“The law relating to *locus quo*, is well settled. It is to enable witnesses clarify what they have stated in court and must do so on path... When the court goes to the *locus quo* it goes to check on the evidence given in court, and not fill in gaps. If trial court had to fill in gaps, it would run the risk of being a witness in the case, which should be avoided which did not happen in this case... the intention of visiting a locus in quo is to enable the court to clarify the evidence and to enable the court to form impressions or findings.”

19. Similarly, in the case of *Zziwa Ssalongo & Another v Kafumbe High Court Kampala CA no. 330 of 2012* it was held that:

“Visiting a *locus in quo* is not mandatory and depends on the circumstances of each case. In *Yeseri Waibi v Edisa Lusi Byandala* [1982] HCB it was held that the practice of visiting the locus in quo is to check on the evidence given by witnesses and not to fill the gap for them or [the] court may run the risk of making itself a witness in the case.”

20. A site visit can only be ordered in special circumstances. There should be special circumstances before a decision to visit the *locus in quo* is made. A visit to the *locus in quo* is the exception rather than the rule. Its purpose is primarily to make the Court understand the nature of evidence adduced by the parties rather than to collect missing evidence. The court must feel that adequate material has been placed before it to show that it is in the interest of justice to visit the *locus in quo*.

21. The Defendant/Applicant averred that the Respondent is not in occupation of 60 acres as claimed. If the Defendant is disputing the land that is in occupation of the Plaintiff, it is up to the him to adduce evidence to prove his case. He should not expect the court to assist him in gathering evidence as to do so he will be inviting the court to enter into the arena of litigation.



22. It is upon the Defendant/Applicant to avail his version of the specific size of the suit property which he contends is in the Plaintiff's actual occupation. The Court cannot undertake a fact-finding mission on his behalf. As correctly submitted, this Court does not have the technical expertise on issues related to survey of land.
23. In the circumstances, I am in agreement with the Plaintiff that a site visit will not be necessary in the present case.
24. The upshot is that the application dated 20<sup>th</sup> February, 2023 is devoid of merit and the same is dismissed with costs to the Plaintiff/Respondent.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

.....

**HON. T. MURIGI**

**JUDGE**

In The Presence Of:-

Court assistant- Mr. Kwemboi

Jemeta holding brief for Ndalila for the Respondent.

