Chira & 2 others v Kenya Power & Lighting Company Limited (Environment & Land Case 94 of 2019) [2022] KEELC 2519 (KLR) (4 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2519 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 94 OF 2019

JO MBOYA, J

JULY 4, 2022

BETWEEN

CHARLES MUKOMA CHIRA ..... 1ST PLAINTIFF

PETER NJUGUNA WANGUNYU ..... 2ND PLAINTIFF

JENIPHER MUENI MBITHE ..... 3RD PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED ..... DEFENDANT

RULING

Introduction

1. Vide a Notice of Motion Application dated 26th May 2022, the Plaintiffs'/Applicants' have approached the court seeking the following Reliefs:

> I. The Honourable Court do conduct a Site Visit to the *Locus in Quo* in order to inspect the Suit Property and make its observations, establishing the fact whether or not the Applicants are in Occupation or Possession of the Suit Property as alleged.
>
> II. The Honourable Court to carryout Inspection to establish the actual situation on the ground and the persons in occupation or possession thereof.
>
> III. The Honourable Court to establish how long they (read the people in occupation) have lived in the suit property by doing random selection/ Sampling of the occupants.
>
> IV. The Honourable Court do establish the nature of structures, if any, on the suit Property.
>
> V. Costs of the Application to abide the cause.

2. The subject application is premised and/or predicated on the Grounds alluded to in the body thereof and same is further supported by the affidavit of one, Charles Mukoma Chira, who is the 1st Plaintiff/ Applicant herein.

3. Though the application was duly served upon the counsel for the Respondent, counsel for the Defendant/Respondent did not file any response to the application.

Submissions by the parties:

4. The Application herein came up for hearing on the 29th June 2022, when same was canvased and/or ventilated vide oral submissions.

5. Briefly, it was the Plaintiffs' Counsel's submissions that though the Plaintiffs have since tendered evidence and closed their case, it is important to note that the Plaintiffs herein could not tender and/ or adduce all the material evidence before the court.

6. On the other hand, it was submitted that the suit property, which is the subject of this litigation is occupied by so many people, more than one hundred in number and yet the evidence was only tendered by two witnesses.

7. Based on the contention that the suit property is occupied by so many people, counsel for the Plaintiffs thus sought to invite the court to visit the locus in quo and while thereat, to take further evidence from such other occupants, irrespective of whether same are parties to the suit or not.

8. Further, the counsel for the Plaintiffs also submitted that it is only by visiting the locus in quo that the court will be able to appreciate and understand the true situation obtaining at the suit property and thereafter be able to render a satisfactory and all-encompassing Judgment.

9. Finally counsel for the Plaintiffs invited the court to take note and/or cognizance of the Provisions of Order 18 Rule 11 of the *Civil procedure Rule* 2010.

10. On his part, counsel for the Defendant/Respondent submitted that in the adversarial system that obtains and applies in the Kenyan jurisprudence, it is incumbent upon the Claimant/Plaintiffs herein to avail and or tender sufficient evidence to warrant discharge of the burden of proof.

11. On the other hand, counsel for the Defendant further submitted that ordinarily, it is not the duty of the court to enter into the arena and/or otherwise to undertake investigations, with a view to helping a Party to prove his/her case.

12. Other than the foregoing, counsel for the Defendant stated that if the court were to find it fit and appropriate to visit the locus in quo, then same shall oblige subject to necessary arrangements being put in place.

Issues for determination:

13. Having reviewed the Application dated the 26th May 2022, as well as the Supporting Affidavit thereto and having similarly considered the submissions rendered by the Parties, I am of the considered view that only one issue arises for determination, namely;

> I. Whether the Plaintiffs'/Applicants' had laid a basis to warrant visitation Of the Locus in Quo.

Analysis and Determination

Issue number 1

Whether the Plaintiffs/Applicants had laid a basis to warrant visitation Of the Locus in Quo.

14. Before endeavoring to address and/or evaluate the issues for determination, it is appropriate and/or imperative to underscore that the Kenyan legal system is an adversarial one, where the disputing parties are called upon to set down the issues for determination and upon doing so, to bring forth evidence to enable the court to determine the issues in dispute.

15. It is also common ground that it is the Parties to the dispute, who by their pleadings, set the stage for the adjudication and ultimate determination of the impleaded issues.

16. To underscore the nature of the Kenyan legal system and the scope of an adversarial legal system, it is imperative to refer to and restate the Hackneyed position underlined by the court of appeal vide the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & Others* (2014) eKLR, where the Honourable Court of Appeal observed as hereunder;

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves.
>
> It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

17. Flowing from the foregoing jurisprudence, it is common ground and/or settled that the burden of calling out witnesses and proving each parties case, lies at the door step of the concerned party and the Court ought not to be involved in the search for Evidence.

18. On the other hand, it is trite that it is never the duty of the court and/or judicial officer to get out of his/her way to conduct investigations and gather more evidence, whether on the basis of inspection or random selection, so as to help and/or aid a party to the dispute to prove own case.

19. To my mind, even if the court and/or the concerned Judicial officer were to proceed to the Locus in Quo and carryout random sampling, in the manner proposed by the Plaintiffs, whatever information that would be gathered would remain intrinsic in the court and same can not find their way into the court proceedings, unless the judge and/or judicial officer becomes a Witness in respect of the subject matter to enable the information to flow and thereby form part of the court record.

20. Premised on the foregoing, it is my considered view that 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.

21. Despite the foregoing, it is appropriate to point out that the failure of either party to bring forth and/or adduce sufficient evidence to help in proving his/her case, cannot be a basis to invite the court to undertake a visitation.

22. Simply put, the court shall not be converted into and or be constituted as an investigation forum, to be used by either Party, whenever a Party believes that same has not availed and / or procured sufficient Evidence in a matter.

23. In view of the foregoing, I beg to point out that this court is not keen to engage in and indulge in the controversy, leading to the mounting and/or filing of the subject suit and that the court shall be content and satisfied with the totality of the evidence adduced by the Parties.

24. To buttress the observation that visitation to the locus in quo by a court of law ought not to be carried out unless there exists special circumstances, it is appropriate to take cognizance of the holding in the case of *Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the maasai community living on land reference no.8396 (IR11977) situated in Kedong) versus Kedong Ranch Limited & 8 others* [2015] eKLR, where the court observed as hereunder;

> 25. At the outset, I need to emphasis that it is the duty of litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. If the petitioners wanted to press the fact of occupation through additional evidence, they had avenues to do so, right from the time the petition was filed, or even after receiving the responses of the respondents, who questioned whether the petitioners were actually in occupation of the suit land, especially given that in Nakuru ELC No. 21 of 2010, the court held that the petitioners, or the persons that they represent, were not in occupation. The petitioners had therefore been alerted in good time that the issue of occupation would be contested. They had time to get a land economist or surveyor to go to the ground and file a report. They did not do so. I also note that in the course of these proceedings, the petitioners sought leave to file further affidavits, which leave was granted. They should have taken advantage of this leave to put their house in order. Neither was I impressed by the ground that counsel who held brief for Prof. Ojienda, forgot to apply for a site visit or for leave to file a further affidavit.

25. Other than the foregoing decision, the issue of when to carryout and/or conduct a visit to the Locus in Quo was also deliberated upon in the case of *Beatrice Ngonyo Ndungu & Another v Samuel K Kanyoru & 2 Others* (2017)eKLR, where the court observed as hereunder;

> 10. From time to time it becomes necessary for the court to visit a site with a view to helping it reach a just decision in a matter. It must however be remembered that all decisions of the court are based on an interpretation of facts and the law. Facts are to be presented before the court as evidence whether oral or written. Evidence is the sole route through which parties introduce their version of facts before the court. In an adversarial system the burden of proof is always on he who alleges and the court never goes out to seek facts on its own. It is always incumbent on parties to adduce sufficient evidence to prove the facts which they assert. On the other hand the law can be cited by parties in pleadings or submissions. The court can access the law on its own. Needless to state, parties are free to urge the court to interpret the law one way or the other.
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> 11. If the court visits a site, it can only be for purposes of receiving evidence which will assist it make a just decision. 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 visit. A court in session must perform judicial functions and must resist distractions that take it away from its mission. The dispute herein is whether the property known as plot No. 100 Business Jewathu site is the same one also known as Njoro Township Block 1/1144 or whether they represent two different parcels on the ground.
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> A visit to the site by a judge who is not a survey expert and who is not armed with survey equipment wouldn't yield anything. An expert report by a surveyor compiled with the aid of survey equipment would certainly be more useful.

26. Having taken cognizance of the foregoing decisions, all I wish to add is that a trial court and/or judicial officer should remain a decision maker and therefore impartial. In this regard, a trial judge should not be sent into the arena where his/her vision and/or mindset may become clouded, blurred and diminished by the dust arising from the controversy and/or conflict.

27. In the premises, I do not find any basis as to why this court should degenerate into the arena of controversy and to proceed to and visit the locus in quo for purposes of doing random sampling and site seeing, same being tasks for which the court was neither trained for nor schooled, for whatever it takes.

Conclusion:

28. Based on the foregoing analysis and being alive to the adversarial nature of the Kenyan legal system, it is imperative to underline and/or underscore that it is the duty of the Parties to prove their respective case.

29. In the premises, I do not find any reasonable and/or any legitimate basis to warrant visitation to the Locus in Quo, particularly, on account of the fact that the subject dispute turns on, or revolves on ownership and/or title to the disputed property.

30. Consequently, the Notice of Motion Application dated the 26th May 2022, is devoid of Merits and same be and is hereby Dismissed.

31. Costs shall awaits the outcome of the suit.

32. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS* 4TH DAY OF JULY 2022.

HON. JUSTICE OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Grace Abalo for the Plaintiffs/ Applicants.

Mr. Ogari h/b for Mr. Muyuri for the Defendant/ Respondent.