

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 135 OF 2020

JUMA JUMA KANGA & 299 OTHERS.....PLAINTIFFS

-VERSUS-

ABDULKADIR AHMED RAHMKHAN & 9 OTHERS.....DEFENDANTS

RULING

1. This ruling is in respect of the Notice of Motion application dated 7th December, 2020 brought by the 1st – 7th Defendants. The application seeks an order for the court to conduct a site visit of the suit property to ascertain the status before the hearing and determination of the application dated 23rd September, 2020. It is the 1st – 7th defendants contention that the plaintiffs are not in occupation of the suit property save for a few licensees who are on notice to vacate, and that the plaintiffs intend to use the injunction orders, if granted, to invade the suit property and dispossess the 1st – 7th defendants of their property. The 1st -7th defendants state that the court gave clear orders on 2nd November, 2020 preventing eviction of the licensees and invasion by the plaintiffs, yet some plaintiffs have been attempting to invade the suit property without due regard to the court orders in place. That is apparent that the respondents have ulterior motives and have treated the court orders with contempt, and unless the orders sought herein are issued, the applicants are likely to suffer great prejudice, irreparable loss and damage. The application is supported by the affidavit of Salma Otunga sworn on 7th December, 2020. In their submissions filed on 22nd February, 2021, the applicants submit, inter alia, that a site visit will easily determine the extent of the allegation by both parties and facilitate an expeditious determination of the suit. That the applicants operate a fruit farm on the suit premises and have a residential house on the land contrary to the plaintiffs’ claim that ‘throughout their stay, they never knew that the suit property was private land owned by the applicants, and that they had exclusive and continuous occupation of the land for decades.’”

2. In reply and opposition to the application, the plaintiffs filed a replying affidavit by Bwire Okano sworn on 15th January 2021. The plaintiffs contend that the applicants have given the impression that they have not understood the plaintiffs case, which is whether it was an express condition for the renewal of lease that the applicants will surrender 400 acres for resettlement of squatters; whether the applicants surrendered 400 acres for resettlement of squatters, and whether the lease should be revoked on grounds that condition surrendering 400 acres was not complied with. The applicants argue that a court of law must resist distractions that take it away from its mission, adding that there was a site visit conducted in September 2010 and another site visit will be a waste of judicial time.

3. The application is also opposed by the 10th defendant through a replying affidavit of Kelvin Dzome filed on 18th February 2021. It is also their argument that another site visit will not aid this Honourable Court in gathering any new evidence, save for what has been pleaded by the parties herein. That a site visit will be a travesty of justice and will delay the matter and prevent the court from determining the real issues.

4. I have considered the application and the submissions. While I agree that in a case of this nature, there is need of an expert such as a surveyor to visit such site and file a report, I also believe that since the court is not an expert in the matter, the court’s lay observation of the site would help the court to better understand the dispute. Secondly, while the plaintiffs have by their application dated 23rd September, 2020 sought orders of injunction and the court on 2nd November, 2020 directed that status quo then prevailing be maintained, the applicants allege that some of the plaintiffs are abusing the interim orders granted by invading the suit land contrary to the said orders of court. On their part, the plaintiffs deny the allegation by the applicants. Considering these rival positions taken by the parties, in my view the site visit will enable the court to see for itself the status on the ground. I do not think that the site visit is a waste or imprudent use of judicial time. To grant this application would narrow down the issues and allow the expeditious determination of the matter.

5. Accordingly, I allow that application with costs in the cause.

6. I direct that the said site visit be arranged by the parties and should be effected within the shortest time possible on a date suitable to all the parties and the court as time is of essence. The area police commander is directed to provide adequate security during the site visit. During the visit, the parties are directed to strictly adhere to the covid-19 safety protocols. And in order to maintain and avoid crowding and to maintain physical distance, parties are directed to remain within their respective properties, whether homes or business premises. Further, only parties to the case, their advocates and security team to be present.

7. It so ordered.

DATED, SIGNED and DELIVERED virtually at MOMBASA this 26th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE