



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. CAUSE NO. 299 OF 2013**

**MASHA BIRYA DENA.....PLAINTIFF**

**VERSUS**

**FRANCIS KAHINDI KALUME.....DEFENDANT**

**RULING**

**I. Preliminaries**

1. On the 9<sup>th</sup> November, 2021, while in the process of confirming this matter for hearing at the virtual call over stage, the Learned Counsels for the Plaintiffs herein, Mr. Martin Tindi and M/s. Mukoya made an oral application for the court to conduct a site visit (*“Locus in Quo”*) onto the suit property during the pendency of the hearing of this case. The application was made under the provision of Order 18 Rule 11 of the Civil Procedure Rules and other enabling provisions of law and facts as stated herein below.

2. The Learned Counsels for the Plaintiffs/Applicants based their application on the grounds that there was need for court to go inspect and see where the Plaintiffs resided, the Permanent structures already construction the land, the vast area they were occupying and to get the first hand touch of the place the Plaintiffs have resided from the year 1990s vis a vis the Defendants herein. The Learned Counsels argued that, the matter in issue pertaining to what is now famously known in the Coastal region, parlance and/or jurisprudence as **“House without Land”**. In particular they to the prayer “b” pleaded by the Plaintiffs in their further, further amended Plaint dated 4<sup>th</sup> August, 2017 and filed on 2<sup>nd</sup> November, 2017. Further, the Advocates for the Plaintiffs strongly submitted that the intention for making the said application was not for the court to be perceived to be in the collection of new evidence as alleged but to have a first hand information and proper glimpse on the facts regarding the suit before it.

3. The said application was vehemently opposed by the Learned Counsels for the Defendants – Mr. Vincent Omolo and Mr. Kongere. The Advocates based their opposition to the effect that parties came to court having been ready and well armed with all the filed pleadings and adequate evidence to support their case. They argued that by that time, it was assumed all the evidence and facts had been adequately placed before the honorable court. For that reason, therefore, there would be no value added nor need for court to merely and ostensibly see the permanent structures on the land. Furthermore, it was their contention that the Plaintiffs had obtained the registration documents through fraudulent means. To them, in that case, the allegations of fraud could only be deduced in court and not by visiting the scene as the Plaintiffs were now advancing.

**II. Analysis and determination**

4. I have considered all the articulate though brief submissions by all the Counsels with regard to making the site visit (*“Locus in Quo”*) of the suit land in the pendency of hearing of the case. In order to grant a fair, just and informed decision to this very fundamental point of law, I have decided to frame up three issues. These are:-

**a. What is the legal meaning, nature and scope of the “Site Visits”?**

**b. Whether it is necessary in this case?**

**c. What are the logistics needed and who meets them?**

**Issue a). What is the legal meaning, nature and scope of the “Site Visits”?**

5. “Site Visit” is provided for under the provisions of Order 18 Rule 11 of the Civil Procedure Rules. It allows court to have broad mind on the matter in question before it and to examine the suit property in depth. The court is empowered by law – Order 18 Rule 11 of the Civil

Procedure Rules at any stage of the suit to inspect any property or thing concerning which any question may arise. the Court may occasion to visit the locus in quo with a view of gathering further evidence to assist it in decision making function.

6. This position has been supported by various courts as shown below. The Ugandan Court - *“E. Kangye – Vs – E. Bwana”, HCCC (Kampala) No. 38 of 1989* - has explained that:- *“the purpose of the practice of visiting the locus in quo is to check on the evidence of witnesses and not to fill in the gap in their evidence, lest the Court run the risk of turning itself a witness in the case* . It has been pointed out that visiting a locus in quo is not mandatory and depends on the circumstances of the case. A visit is the exception rather than the rule. *Republic – Vs – National Environmental Tribunal & 4 others – Vs – China Road & Bridges (2016). eKLR.*

It must be capable of yielding admissible evidence and the Court in session must perform judicial function and resist distraction that take away from its mission. *Court of Appeal Cyrus Nyaga Kabute – Vs – Kirinyaga County Council, Civil Appeal No. 29 of 1985.*

Where as a result, the site visit raises certain issues which were not part of the proceedings parties must be afforded opportunity to deal with the same.

#### **Whether it is necessary in this case?**

7. This application is merited. I have observed and convinced that the matter before me is an issue of interesting public interest and raises new horizons of jurisprudence. As the Advocates for the Plaintiffs/Applicants have argued that the case at hand was a matter of public interest where over 111 Parties had resided from the years 1990s to date.

I am satisfied that many people draw their livelihoods from the said parcel of land. Being a land matter and based on the provisions of section 3 of the Environment and Land Court Act 2012 it gives court the impetus and rationale to visit the land. However, the court feels the application was made rather too early before it had even gotten a clear picture of the what the substratum of the case. Parties have tried to explain that the matter is on the concept of “Land without title” which is purely a unique one at the Coast province of Kenya. This is very interesting and may want to build jurisprudence on the subject matter for our legal spectrum in Kenya. Its only 2 witnesses who have testified. Its rather two premature. In that case and the meantime, the court proposes it hears at least 7 to 10 witnesses to get the gist of the case and make a decision whether it would be really necessary to hold the site visit.

#### **What are the logistics needed and who meets them?**

8. The site visit involves a lot of logistical demands – resources time, money, human power and security. Let it be kept in abeyance at that opportune moment the court shall revisit it then for consideration. At the moment let us concentrate on crystal ball – the hearing of the case.

**IT IS SO ORDERED.**

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2021**

**HON. JUSTICE L.L. NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

**In the presence of:-**

M/s. Yumna – the Court Assistant

Mr. Tindi & M/s. Mukonya for the Plaintiffs.

Mr. Omollo for the Defendant

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