



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 1264 OF 2013

FREDRICK KATHANZU KAVUTHI T/A

KANYUNI CONSTRUCTORS.....1ST PLAINTIFF

JAMES KYALO T/A

SECOND TRY CONSTRUCTION COMPANY.....2ND PLAINTIFF

-VERSUS -

AL HAILEE INVESTMENT LIMITED.....DEFENDANT

RULING

1. On 9th May 2019, counsel for the defendant made a request to court to visit the suit property to ascertain whether the plaintiffs were on the suit property and if they were carrying out farming activities as alleged by the plaintiffs. The request for the visit along Mombasa Road was not opposed by the plaintiff's counsel. The court then made a specific order to the effect that the Deputy Registrar of the court was to visit the suit property to ascertain if the plaintiffs were in possession and if there was any farming activities going on.

2. The plaintiffs changed their advocates. The new advocates filed a notice of motion dated 4th June 2019 in which the plaintiffs sought orders cancelling the intended site visit and for an order for pre-trial. The court declined to certify the application urgent and directed that the site visit do proceed as directed.

3. The Deputy Registrar visited the site in the company of the plaintiffs' counsel and the defendant's counsel. A report was prepared and the Deputy Registrar fixed the matter for mention today for directions on the report. In the meantime, the plaintiffs who had changed lawyers filed an application seeking disqualification of Mr. Omuga from representing the defendant. The court directed that this application be served for inter-partes hearing today.

4. When this matter was called out this morning, Mr. Omuga applied for adoption of the Deputy Registrar's report. It is after this that the plaintiffs' counsel Mr. Nyangoya applied that before the report is adopted, he required the Deputy Registrar in court for cross examination. Mr. Omuga in response submitted that there was no need for the Deputy Registrar to be cross examined as the site visit was done in the presence of the plaintiffs counsel.

5. I have perused the report of the Deputy Registrar. The site was visited on 5th July 2019. The report states that on arrival, the Deputy Registrar could not be allowed into the suit property as there was a group of young men who stood guard and told the Deputy Registrar that they were there to guard the property. One of the persons who identified himself as Mr. Sila said that he was a caretaker of the suit property.

6. The Deputy Registrar asked the plaintiffs lawyer to prevail upon the young men and caretaker to allow them in but the caretaker was adamant that he had firm instructions not to let anyone in. At this juncture the plaintiffs' advocate confirmed that he did not know the whereabouts of the plaintiffs and that the plaintiffs were not in possession of the suit property.

7. It is clear that the plaintiffs filed an application seeking to cancel the site visit because they knew that they did not want certain facts to be ascertained. I therefore do not see any basis upon which this court can order that the Deputy Registrar to be cross examined when the plaintiffs' lawyer was present during the visit. I therefore reject the request by Mr. Nyangoya and proceed to adopt the Deputy Registrar's report as part of the court record.

It is so ordered.

Dated, signed and delivered at Nairobi on this 30th day of January 2020.

E.O. OBAGA

JUDGE

In the presence of

Mr. Omuga for the defendant

Mr. Nyangoya for the plaintiffs.

Court Assistant : Waweru

E.O. OBAGA

JUDGE