



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 11 OF 2019

AVIR KANTI SHAH.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TRANS NZOIA.....1ST DEFENDANT

ERIC WAFULA.....2ND DEFENDANT

DIRECTIONS

1. The application dated **13/12/2019** and filed in court on the same date has been brought by the plaintiff who seeks the orders:

1. That this court be pleased to order the Trans Nzoia County Surveyor to do a site visit and establish the correct position of the road and file a report on the same in this court;

2. That the costs of the application be borne by the defendant.

2. The application is brought under **Section 3A** of the Civil Procedure Act.

3. The application is supported by the affidavit of plaintiff sworn on even date.

4. Before the application could be heard the 2nd defendant filed a notice to cross-examine the deponent on his affidavit in support of the application. The notice read as follows:-

“Take notice that the 2nd respondent intend to cross-examine the plaintiff/applicant on his affidavit sworn at Kitale on 13/12/2019.

Accordingly avail the deponent in court at the hearing of the application dated 13/12/2019.”

5. The 1st respondent filed grounds of opposition to the application on **3/3/2020**. In those grounds he stated that the County Surveyor has already visited the site and made a report of his findings which is attached to the application. Therefore the site visit would be in his view a waste of time and that the matter should be scheduled for hearing and the application should be dismissed.

6. This court undertook to give directions as to whether there should be cross-examination before the hearing of the application for a site visit. The principles to be followed in determining whether cross-examination should take place are whether the person intending to be cross-examined has identified the matters in the affidavit which he intends to cross-examine on and whether he has a given appropriate notice of the same to the deponent. Various decisions illustrate this point. See the case of **R -vs- Constituency Development Fund Board & Another Ex-parte Robert Itaramwa Ochale & 5 Others [2012] eKLR, GGR, -vs- HPS [2012] eKLR.**

7. In view of the fact that no matters in the deponent’s affidavit have been identified as warranting cross-examination and no proper notice has been served upon the deponent listing those matters this court must decline the 2nd defendant’s request to cross-examine the deponent.

8. Further I have considered the application dated **13/12/2019** and found that the same being based on **Section 3A** is primarily dependent on the discretion of this court. This suit has not proceeded far enough in my view to warrant an order for a site visit. The issues requiring to be observed in site visit require to crystallize during the giving of evidence in the main suit to enable parties and the court appreciate the need for the proposed site visit.

9. Consequently under the inherent power of the court under **Section 1A and 3A** of the Civil Procedure Act I hereby direct that the prosecution of the application dated **13/12/2019** shall be held abeyance pending further proceedings in this matter. Any of the parties shall be at liberty to revive this application at any other stage of the proceedings, and preferably at the tail end of the defendants' case and the application must at least be addressed before the matter is given a judgment date.

10. These orders shall apply to **Kitale ELC No. 13 of 2019** which is related to this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 12th day of March, 2020.

MWANGI NJOROGE

JUDGE

12/3/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Khisa for plaintiff/applicant

Ms. Temba holding brief for Karani for 1st defendant

N/A for 2nd defendant

COURT

Directions read in open court.

MWANGI NJOROGE

JUDGE

12/3/2020