REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO. 02 OF 2019

NJIRU MICHENI NTHIGA (SUING AS A LEGAL REPRESENTATIVE

AND ADMINISTRATOR OF THE ESTATE OF

THE DECEASED LEONARD R.I. NTHIGA)...........................PLAINTIFF

VERSUS

THE GOVERNOR,

THARAKA NITHI COUNTY GOVERNMENT.............1ST DEFENDANT

COUNTY GOVERNMENT OF THARAKA NITHI.....2ND DEFENDANT

THE MEMBER OF COUNTY ASSEMBLY,

MAGUMONI WARD..3RD DEFENDANT

THE CHIEF OFFICER, ROADS AND INFRASTRUCTURE

THARAKA NITHI COUNTY...4TH DEFENDANT

THE CHIEF OFFICER, LANDS, PHYSICAL PLANNING AND URBAN

DEVELOPMENT THARAKA NITHI COUNTY.........5TH DEFENDANT

WESTOMAXX INVESTMENT LTD............................6TH DEFENDANT

RULING

1. This application is dated **27th February, 2020** and seeks orders:

> **1.THAT** this Honourable Court be pleased to direct the District Land Registrar Meru South to visit the Suit Land LR. MAGUMONI/THUITA/779 and furnish this Honourable Court with a comprehensive report detailing the acquisition of the Suit Land LR. MAGUMONI/THUITA/779 and whether the suit Land emanated from an allotment of the defunct Meru County Council.
>
> **2.THAT** this Honourable Court be pleased to direct the District Surveyor Meru South to visit the Suit Land LR. MAGUMONI/THUITA/779 and furnish this Honourable Court with a comprehensive Report detailing the location of the Suit Land LR. MAGUMONI/THUITA/779 as per the Registry Index Map (R.I.M) Sheet No. 12 Thuita Registration Section and whether the said LR. MAGUMONI/THUITA/779 is located on a Road Reserve.
>
> **3.THAT** this Honourable Court do make a site visit and confirm the extent of the damage caused by the Respondents/Defendants on the building on the Suit property LR. MAGUMONI/THUITA/779.
>
> **4.THAT** the cost of this application be provided for.

2. The application is supported by the affidavit of NJIRU MICHENI NTHIGA which states as follows:

SUPPORTING AFFIDAVIT.

I, NJIRU MICHENI NTHIGA of P.O BOX 3438-00100 Nairobi make oath and state as follows:-

1.THAT I am the Applicant/Plaintiff in the Instant application, hence competent to make and swear this affidavit.

2.THAT I have duly responded to the Respondents'/Defendants' Defence filed on 20th December 2019, by my Reply filed on 27th January 2020.

3.THAT the Respondents/Defendants are insisting that LR. MAGUMONI/THUITA/779 was **allocated** by the defunct Meru County Council and that it is on a Road Reserve, a fact which I have refuted in my Reply filed on 27th January 2020.

4.THAT LR. MAGUMONI/THUITA/779 **is a free hold Title** and the District land Registrar Meru South is better placed to shed more light **on its acquisition** to this Honourable Court.

5.THAT the buildings on LR. MAGUMONI/THUITA/779 are not on a Road Reserve and the District Surveyor is better placed to shed more light to this Honourable Court **on its location** as per the Registry Index Map (R.I.M) Sheet No. 12 Thuita Registration Section.

6.THAT the foregoing clearly demonstrates that the District Land Registrar and the District Surveyor ought to visit the Suit Land LR. MAGUMONI/THUITA/779 and come up with a comprehensive Joint and/or separate Reports **on the contested issues of acquisition and location** of the Suit Land, for expeditious disposal of the Instant Suit.

7.THAT the Respondents/Defendants will not be prejudiced if the Orders sought in my application are allowed.

8.THAT the contents of my affidavit are true to the best of my knowledge, belief and information.

SWORN by the said NJIRU MICHENI NTHIGA at Chuka this 27th day of …………February,…. 2020.

3. The application was canvassed by way of written submissions. The plaintiff's written submissions are reproduced in full herebelow without any alterations whatsoever.

PLAINTIFF'S SUBMISSIONS ON HIS NOTICE OF MOTION DATED 27TH FEBRUARY, 2020

My Lord, these are the Plaintiff's humble submissions on his Application dated 27th February, 2020.

The Applicant filed the Application the subject of these submissions with the following substantive prayers: -

1. THAT this Honorable Court be pleased to direct the District Land Registrar, Meru South, to visit the Suit Land **LR No. Magumoni/Thuita/779** and furnish this Honorable Court with a comprehensive report detailing the acquisition of the Suit Land LR No. Magumoni/Thuita/779 and whether the Suit Land emanated from an allotment of the defunct Meru County Council.

2. THAT this Honorable Court be pleased to direct the District Surveyor Meru South to visit the **Suit Land LR No. Magumoni/Thuita/779** and furnish this Honorable Court with a comprehensive report detailing the location of the Suit Land LR No. Magumoni/Thuita/779 as per the Registry Index Map (RIM) Sheet No. 12 Thuita Registration Section and whether the said **LR No. Magumoni/Thuita/779** is located on a Road Reserve.

3. THAT this Honorable Court do make a site visit and confirm the extent of the damage caused by the Respondents/Defendants on the building on the Suit Property **LR No. Magumoni/Thuita/779.**

4. THAT the costs of this application is provided for.

My Lord, the purpose for each of the prayers herein is:-

a. THAT the District Land Registrar, Meru South, and the District Surveyor joint and/or separate reports will shed essential light on the contested issues pertaining to the ownership and location of the Suit Land LR No. Magumoni/Thuita/779 as per the Registry Index Map (RIM) Sheet No 12 Thuita Registration Section;

b. THAT the District Land Registrar, Meru South, and the District Surveyor joint and/or separate Reports will essentially shed light whether the Plaintiff's buildings demolished by the Respondents/Defendants on LR No. Magumoni/Thuita/779 were on a Road Reserve**;**

c. THAT the District Land Registrar, Meru South, and the District Surveyor joint and/or separate reports will ultimately

dispose off the instant suit expeditiously and cut costs on the parties in the instant suit**;**

d. THAT the Respondents stand to suffer no prejudice if the orders sought are granted**.**

My Lord, the plaintiff has received the Respondents' submissions in respect to the subject application hereof and has noted the contents thereof.

Contrary to the Respondents' opposition to the application the Applicant hereby reiterates and verily believes that the prayers in the Application are meritorious, sound and pertinently essential for a well reasoned, expeditious and just determination of the issues in dispute in the suit herein.

In fact, My Lord, greatly, and to a good extent, the contents and substance of the respondents' submissions somehow and, may be obliviously, augment the case for the Applicant's Application.

The Application is informed by the fact that there are clear issues in dispute which if verified and ascertained as a matter of priority will valuably help determine and dispose the instant suit more expeditiously and satisfactorily. These issues are:

i. Whether the building, at the time it was constructed, due process was followed.

ii. Whether the building or any part thereof was, at the time it was erected, it was erected on a road reserve.

iii. Whether only the demolition was partial or the same structurally affected the whole building.

iv. Whether, if it is confirmed that the affected part, whole and/or entire building thereof the same constitute a legitimate cause of action for which the plaintiff is entitled to the damages he is claiming for.

The Applicant appreciates the following confirmations by the respondents vide their submissions hereof:

a. The acquisition of the suit property by the late Leornard Nthiga, which in effect means the same was duly, procedurally, lawfully and properly acquired. The same is not challenged.

The Respondents further in sections of paragraph 5 of their Submissions do confirm that, yes,

b. There was demolition but which they aver was of the part of the plaintiff's construction which occupied the road reserve (in "iv" of paragraph 5).

My Lord, arising from the above admissions it becomes apparently desirable, fit and merited to grant the prayers made by the Applicant for the purpose of:-

1. Ascertaining nature, scope, extent and unwarranted damages occasioned by the Respondents.

2. A visit by the District Surveyor, Meru South is critically pertinent and essential to help ascertain whether or not any part of the demolished building was erected on an earmarked road reserve, and if truly there is an adjacent road reserve, the actual definitive limitations of such a road reserve because it is the Applicant's well grounded contention that the Respondents maliciously went and acted beyond their due limitations thereby unlawfully destroying the Applicant's building.

3. A scene visit by this Court to the area which is barely less than 5 (five) minutes drive within the jurisdiction of this Honorable Court will provide the Court with a first hand view and a rare but valuable opportunity to have a clear glimpse and appreciation of the wanton destruction of property and damages willfully committed by the Respondents. This is not a vain academic exercise nor will it be "***tourist to satisfy curiosities and taking photographs during the visit,"*** as the Respondents, in their most unfortunate remarks put it in paragraph 23 of their submissions. The Court must disregard this view as taken by the respondents.

My Lord, over all, we find and submit that the general content and material adduced and/or provided by the Respondent which constitute their submissions are grossly misleading and have no essential bearing and/ or relevance to support their opposition to the application by the Plaintiff. The material present is both extraneous and fatally irrelevant to successfully sustain their objection to the Application. It is of no good value.

My Lord, the Applicant's prayers are provided for under **Order 40 Rule 10 of the Civil Procedure Rules,2010** which empowers this Court to inspect any suit property so as to help determine the real issues.

We, further, rely on the following cases:-

1. High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division): Civil Case 577 of 2011: ***SHOWCASE PROPERTIES LIMITED –V- BAMBURI SPEICLA PRODUCTS LIMITED***[2013] eKLR, where the Court made the following observations and gave directions:-

5. It is now contended by the Respondents that the current application to visit the site is not a good use of judicial time, and that since the Applicant has chosen to go by expert evidence, there is no need for the court to visit the site as this would amount to duplication of effort.

***6.* Supplying a number of authorities where the court visited the site under similar circumstances the Applicant submitted that the court would appreciate the matters at hand best if it visited the site.**

***7.* I have carefully considered the application and submissions. While I agree that there is adequate expert evidence now on record, I still believe that since a court is not an expert in the matter, the courts lay observation of the site would help the court to better understand the expert evidence. It would amount, so to speak, "to looking at the demeanor of the witness in court."**

***8.* Secondly, the Applicant is the owner of the case at hand, and to the extent judicially possible, the court would grant its wish for the court to visit the site. I do not think that the site visit is a waste, or imprudent use, of the judicial time. To grant this application would to the contrary allow the parties to move faster in the suit.**

***9.* I allow the application with costs in the cause.**

***10. I direc*t that said site visit be arranged by the parties, and should be effected within the next 30 days, as time is of the essence.**

2. John K Koech v Peter Chepkwony [2019] eKLR: **IN THE ENVIRONMENT AND LAND COURT AT KERICHO:ELC NO. 32 OF 2017**

"9. The court visited the suit property on 13.7.18 in the company of the District Surveyor, Kericho in order to get a clear picture of the access road in relation to the suit property. The Surveyor then filed his report in court."

CONCLUSION

My Lord, we appreciate the endeavor by the Respondents at opposing the Applicant's well grounded and reasoned prayers which are intended to aid in ensuring expedient, cost effective and satisfactory disposal of the instant Application. However, it is clearly evident from the contents of their reply and the submissions that their opposition is nothing but a pursuit that can have no other value but promote and most potentially yield a miscarriage of justice.

The applicant Prays that, in the interest of justice, this Honorable Court finds the respondents' opposition unmerited and to thereby grant the Applicant's Prayers as sought in the Application dated 27th February,2020.

We humbly submit and pray.

DATED at CHUKA this ....12th .... day of ....June,.... 2020

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WAKLAW ADVOCATES

FOR THE APPLICANT

4. The 1st, 2nd, 4th, 5th and 6th defendants written submissions are reproduced in full herebelow without any alterations whatsoever:

1ST, 2ND, 4TH, 5TH AND 6TH DEFENDANTS' SUBMISSIONS ON THE PLAINTIFF/APPLICANT'S NOTICE OF MOTION DATED

27TH FEBRUARY, 2020

Part 1 – Introduction

1. Before this Honourable Court is the Plaintiff/Applicant's Notice of Motion dated 27th February, 2020. In it, the Plaintiff/Applicant is seeking the following orders –

5. THAT this Honourable Court be pleased to direct the District Land Registrar Meru South to visit the Suit Land LR No. Magumoni/Thuita/779 and furnish this Honourable Court with a comprehensive report detailing the acquisition of the Suit Land LR No. Magumoni/Thuita/779 and whether the Suit Land emanated from an allotment of the defunct Meru County Council.

6. THAT this Honourable Court be pleased to direct the District Surveyor Meru South to visit the Suit Land LR No.

Magumoni/Thuita/779 and furnish this Honourable Court with a comprehensive report detailing the location of the Suit Land LR No. Magumoni/Thuita/779 as per the Registry Index Map (RIM) Sheet No. 12 Thuita Registration Section and whether the said LR No. Magumoni/Thuita/779 is located on a Road Reserve.

7. THAT this Honourable Court do make a site visit and confirm the extent of the damage caused by the Respondents/Defendants on the building on the Suit Property LR No. Magumoni/Thuita/779.

8. THAT the costs of this application is provided for.

2. The application is brought under sections 13(1) and 19(1) and (2) of the Environment and Land Court Act, section 3A of the Civil Procedure Act, Order 51 Rules 1 and 3 of the Civil Procedure Rules, Article 159(2)(a), (b), (d) and (e) of the Kenya Constitution 2010 and all other enabling provisions of law.

3. The grounds upon which this application is brought are that –

e. the District Land Registrar Meru South and the District Surveyor joint and/or separate reports will shed light on the contested issues pertaining the ownership and location or the Suit Land LR No. Magumoni/Thuita/779 as per the Registry Index Map (RIM) Sheet No 12 Thuita Registration Section;

f. the District Land Registrar Meru South and the District Surveyor joint and/or separate Reports will shed light whether the buildings demolished by the Respondents/Defendants on LR No. Magumoni/Thuita/779 were on a Road Reserve;

g. the District Land Registrar Meru South and the District Surveyor joint and/or separate reports will ultimately dispose off the instant suit expeditiously and cut costs on the parties in the instant suit;

h. the Respondents stand to suffer no prejudice if the orders sought are granted.

4. It is support by the affidavit of the Plaintiff sworn on **27th February, 2020**.

5. It is opposed by the Defendants. **They wish to rely on the replying affidavit of Ashford Mutembei Mwiadini sworn on 19th December, 2019**. His grounds of opposition were that –

i. the suit property is owned by the late Leonard I. Nthiga and this is confirmed by the Certificate of Official Search;

ii. there is no challenge as to the acquisition of the suit property by the late Leonard Nthiga;

iii. the issue in dispute is the partial construction of the Plaintiff's building on the road reserve next to his property;

iv. the demolition was of the part of the Plaintiff's construction which occupied the road reserve;

v. the 1st, 2nd and 4th – 6th Defendants annexed to the said affidavit, a copy of the Kibugua Market Development Plan and a map prepared by the Land Adjudication Department and Survey of Kenya in 1969.

6. On **10th March, 2020**, this Honourable Court gave directions to facilitate the hearing of that application by way of written submissions. It is pursuant to those submissions that the 1st, 2nd and 4th – 6th Defendants file these submissions.

Part 3 – The Law

Jurisdiction of this Honourable Court to Hear this Application

7. The 1st, 2nd, 4th – 6th Defendants submit that whilst the Plaintiff/Applicant has not brought his application under the correct provisions of the law, section 22 and 23 of the Civil Procedure Act provides as follows –

> 22. Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—
>
> **(*a*) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;**
>
> **(*b*) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;**
>
> **(*c*)** order any fact to be proved by affidavit.

23. Sections 21 and 22 shall apply to summonses to give evidence or to produce documents or other material objects.

8. Further, in Order 11 Rule 3(2) of the Civil Procedure Rules, it is provided as follows on case conference following the closing of pleadings,

> (d) order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case;

9. The 1st, 2nd, 4th – 6th Defendants further submit that this Honourable Court has jurisdiction to hear this application but submit that the Plaintiff is not entitled to prayers sought as shall be demonstrated below.

Whether this Honourable Court should order the District Land Registrar Meru South and District Surveyor Meru South to Furnish a Comprehensive Report detailing the acquisition of the suit land and the location of LR No. Magumoni/Thuita/779 respectively?

10. It is undisputed that –

> **a. the Plaintiff was aware of the case which he intended to bring before the court and it is to be assumed that he has evidence to support his case;**
>
> **b. the Plaintiff never raised any issues pertaining to seeking reports of the District Land Registrar and District Surveyor at the pre-trial and the suit was certified ready for hearing;**
>
> **c. there is no dispute as to the ownership and location of LR No. Magumoni/Thuita/779;**
>
> **d. the Plaintiff should have paid for a licensed surveyor to produce a report and wishes to avoid paying survey fees;**
>
> **e. the Plaintiff has not demonstrated what, if any, difficulty or challenge he has experienced in obtaining the information he is now seeking.**

11. The 1st, 2nd, 4th – 6th Defendants submit that the application of the Plaintiff is in the nature of interrogatories and is a mere fishing expedition which this Honourable Court should dismiss with costs.

12. The High Court in **Tulip Properties Limited v Mohamed Koriow Nur & Four Others** **[2007] eKLR**, had this to say of interrogatories,

> **Mulla the code of Civil Procedure Act V of 1908 sixteenth Edition. In this text the principles on interrogatories are set out between pages 2120 – 2133. They are not different from those set out in Odgers above. In summary form they are:**
>
> **1. The object and purpose of serving interrogatories is to enable a party to require information from its opponent for the purposes of maintaining the case of the adversary.**
>
> **2. Answering the interrogatories might often shorten the trial proceedings and save the time of the court and parties besides saving expenses for summoning witnesses. It should be invoked in order to shorten litigation and save the interests of justice. It is to be exercised with great care and caution so that it is not abused by any party.**
>
> **3. Every party to a suit is entitled to know the nature of his opponents case but he is not entitled to know the facts which constitute exclusively the evidence of his opponents case to avoid tempering with the opponents witnesses and manufacture evidence in contradiction to shape his cases to defeat justice.**
>
> **4. In determining whether leave should be granted, the court should consider whether it is a fit and proper case for administering interrogatories.**
>
> **5. Questions that may be relevant during cross-examination are not necessarily relevant as interrogatories.**
>
> **6. Objection to interrogatories will be upheld on the following:-**
>
> **i. Scandalous interrogatories.**
>
> **ii. Irrelevant interrogatories. No party is to be compelled to produce documents whose relevance is denied.**
>
> **iii. Not exhibited bone fide for the purposes of the suit. This arises where the interrogatory is put to serve an ulterior object beyond the scope of the suit.**
>
> **iv. Not sufficiently material at that stage. This arises where discovery may be injurious to the**

defendant and will only be useful to the plaintiff if he establishes his title to the relief.

v. On the ground of privilege such as communications from a legal adviser for purposes of obtaining legal advise.

vi. Or any other ground this. This arises where the interrogatory is prolix, oppressive, unnecessary or scandalous.

vii. Fishing interrogatories are not allowed. A fishing interrogatory is one which does not relate to definite existing and relevant circumstances but one made in the hope of discovering some flaw in the opponents case or with the object of finding a loophole.

A copy of that decision is attached to these submissions.

13. In declining the application for interrogatories before the court in that suit, the court held as follows,

In conclusion all the interrogatories filed and sought to be served herein have been disallowed because:-

1. For the reasons indicated against each

2. Though a some were necessary, answering them would not assist in shortening the proceedings and cutting on costs as they require evidence to be adduced on them. where forgeries are alleged they call for expert opinion from 3rd parties.

3. Most of them could be answered in cross-examination and they will be answered in crossexamination anyway.

4. Others could easily be answered through discovery by asking the parties to file and serve copies of the documents they intend to rely on both in court and in the opposite party.

5. Some went to test the credibility of the witnesses which is not allowed.

6. Others were in criminating in nature.

7. Those targeting none payment of rent and rates are not relevant as none payment of those dues cannot be used to fault the title being contested over. More so when the Plaintiff is not litigating on behalf of those Agencies. Further those Agencies have their own procedures for recovering them.

In view of what the court has stated above the way forward is that since pleadings are closed and parties have partially complied with discovery by filing lists of documents they intend to rely on, they should each file and serve on the other side copies of the documents within a specified time to be agreed upon in court and thereafter take priority dates to have the case heard and determined to establish the ownership of the suit property and put the matter to rest.

(2) The Respondent to the application for interrogatories will have costs of the application.

14. In this case, the Plaintiff has shown that the Defendants object to the interrogatories as it serves an ulterior object beyond the scope of the suit, not sufficiently material at that stage and is a fishing interrogatory in which the Plaintiff is hoping to discover some fault in the Defendants case or with the object of finding a loophole. He further has not demonstrated that he has approached those government offices and they have refused, neglected and/or declined to provide information sought.

15. The 1st, 2nd, 4th – 6th Defendants further submit that in **Mwahima Mwalimu Masudi v Independent Electoral and Boundaries & 3 Others [2017] eKLR**, the High Court in declining to allow an application for scrutiny of votes cited with approval the following cases,

29. It should also be noted that an order of scrutiny is not issued as a matter of course. The party making the application should establish a basis for the scrutiny. This has been the position in numerous decisions. In the case of Philip Osore Ogutu vs. Michael Aringo & 2 other, Busia High Court Election Petition No. 1 of 2013 the court held:

"There would be several reasons why scrutiny should not be ordered as a usual course. First, there is a need to guard against an abuse of the process. I would agree with Mr. K'opot that a party must not be allowed to use scrutiny as a fishing expedition to discover new or fresh evidence. It would be expected that a party filing an Election Petition is, from the outset, seized of the grounds, facts and evidence for questioning the validity of an election. And where the evidence is unclear then a party can, on application to court, seek and obtain better particulars of that evidence from its adversary. But it would be an abuse of process to allow a party to use scrutiny for the purpose of chancing on new evidence."

In the case of Richard Kalembe Ndile vs. Patrick Musimba Mweu, Election Petition No. 7 of 2013, Majanja J

held:

> **"…all that is necessary is for the petitioner to establish sufficient basis for the court to be satisfied that it must engage time and resources to ascertain the validity of the vote through scrutiny. The scrutiny exercise is part of the forensic process available for the court to do justice in the case."**

A copy of that decision is attached to these submissions.

16. Similarly, in this case, the Plaintiff was required to, from the institution of the suit, to be properly seized of the grounds, facts and evidence for questioning the validity of the road reserve claim particularly as he was aware that since 2014, the 2nd Defendant/ Respondent intended to demolish any structures that stood on the road reserve. It further did not file an application seeking to obtain better and further particulars of the evidence from the Defendants. He also has not shown, what, if any, steps he had taken to obtain the information he is now seeking to adduce. It is a fishing expedition to see if more evidence to support his claim will emerge.

17. The 1st, 2nd, 4th – 6th Defendants submit that in **Onesmus Kamau Mungai v Phares Mwangi Kamau & 2 Others [2019] eKLR**, this Honourable Court declined to make such orders in a suit where it found that it lacks jurisdiction to determine a boundary dispute. In part, the law is stated as follows,

> **The main issue herein is whether the Court has jurisdiction to determine this matter given that it is a boundary dispute.**
>
> **This Court has carefully considered the rival written submissions and the pleadings in general. The Court has also considered Section 18(2) of the Land Registration Act which provides:-**
>
> > **"The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this Section".**
>
> **The above provisions are coached in mandatory terms and as was held in the case of Ratilal Ghela Shah & 2 Others…Vs…Menkar Ltd (2018) eKLR,**
>
> > **"It means that any issue relating to a dispute as to boundaries are within the Land Registrar's mandate."**
>
> **The Court will also concur with the findings in the case of Willis Ocholla…Vs…Mary Ndege (20160 eKLR, where the Court held that:-**
>
> > **"In terms of Section 18(2) of the Land Registration Act, proprietors of registered land with a boundary dispute are obligated to first seek redress or solution from the Land Registrar before moving or escalating the dispute to this court. That where such a party fails to do so and comes to court without first seeking redress from the Land Registry, the court being a court of law has to remind such a party that he/she has moved the court prematurely. That the provisions of Section 18(2) of the Land Registration Act shows clearly that the court is without jurisdiction on boundary dispute of registered land until after the Land Registrar's determination of the same has been rendered."**
>
> **Equally in this matter, the Court finds that since the parties herein had invited the District Surveyor over confirmation of this boundaries once dissatisfied with the Surveyors Report, they ought to have escalated the matter to the Land Registrar and not to rush to court.**
>
> **The Court of Appeal had this to say in the case of Geoffrey Muthinja Kabiru & 2 Others….Vs….Samuel Munga Henry & 1756 Others (2015)eKLR, where it stated that:-**
>
> > **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews… The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the court….. This accords the Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."**
>
> **This Court therefore finds that the Plaintiff jumped the gun and failed to adhere to the procedure provided by the Statute on how to address any grievances related to boundary dispute. The Court finds that it is divested by jurisdiction by virtue of the provisions of Section 18(2) of the Land Registration Act.**

A copy of that decision is attached to these submissions.

18. The 1st, 2nd, 4th – 6th Defendants further submits that if it is a boundary dispute, as early as in 2014 when the first enforcement notices were issued by the 2nd Defendant/Respondent to jointly have a surveyor's report which deals with the boundary dispute and thereafter, if dissatisfied with that report, appeal to the Land Registrar in accordance with section 18 (2) of the Land Registration

Act.

19. The 1st, 2nd, 4th – 6th Defendants urge this Honourable Court to dismiss this application.

Whether the court should undertake a site visit to view the extent of the damage on the building on LR No. Magumoni/Thuita/779?

20. It is undisputed that the Plaintiff is to file a valuation report to demonstrate the extent of the alleged damage to the building which will contain photographs of the extent of the damage and how much would be payable for the alleged damage.

21. The Court of Appeal in **Cyrus Nyaga Kabute v Kirinyaga County Council [1987] eKLR**, held as follows on the law of site visit,

> **On the point of law in this appeal which attacked the wrong procedure adopted by the trial magistrate, it is established law that when magistrate or judge visits land and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes were to be relied upon in judgment. In Fernandes v Noronha [1969] EA 506 at page 508, Duffus V P as he then was stated.**
>
> > **" ….. the judge although reluctantly, did the Locus in quo, but unfortunately there is no report of his visit, on the record although this is mentioned in his judgment. The judge does not in this case appear to have relied on any of his own observations, but in cases where the court finds it expedient to visit a Locus in quo, the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them, and if a witness points out any place or demonstrates any movement to the court then this witness should be recalled by the court and give evidence of what occurred."**

A copy of that decision is attached to these submissions.

22. This Honourable Court in **Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 Others [2017] eKLR**, had this to say of the object of site visits by the court,

> **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.**
>
> **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. 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. (Emphasis added)**

23. In this case, the Plaintiff wishes that the court visits the suit property to see the extent of the damage to the building which is incapable of yielding any evidence as the court will be no better than a tourist satisfying curiosities and taking photographs during the site visit. The court is more likely to benefit from the report of a valuer.

Who should bear the costs of this application?

24. The 1st, 2nd, 4th – 6th Defendants submit that costs of the suit are awarded at the discretion of the Court or Judge and whilst the court has an absolute and unfettered discretion to award or not award them, that discretion must be exercised judicially. Please see **Jasbir Singh Rai and 3 Others v Tarlochan Singh Rai and 4 Others [2014] eKLR.** The Supreme Court further held that the awarding of costs is not to penalize the losing party but is a means for the successful litigant to be recouped for the expenses to which he has been put in fighting an action. A copy of that decision is attached to these submissions.

25. The 1st, 2nd, 4th – 6th Defendants further submit that other principles to be considered in the awarding of costs are as stated by Justice Odunga in **Republic v Communication Authority of Kenya and another ex – parte Legal Advice Centre aka Kituo Cha Sheria [2015] eKLR** in which he held as follows:-

> **In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation. See Hussein Janmohamed & Sons vs. Twentsche Overseas Trading Co.**

Ltd [1967] EA 287 and *Mulla (12th Edn) P. 150.*

A copy of that decision is attached to these submissions.

26. The 1st, 2nd, 4th – 6th Defendants submit that this application is brought by the Plaintiff as he failed to fully consider the suit he intended to file. As seen above, if it is a boundary dispute which he is claiming, he ought to have first brought it to the attention of the Land Registrar under section 18 (2) of the Land Registration Act. Further, as seen above, where the court finds that the interrogatories are objectionable, it awards costs to the Respondent. As for the prayer that the court visits the suit property to see the extent of the damage, when the Plaintiff is going to file a valuation report. It is clear that this application lacks merit and the 1st, 2nd, 4th – 6th Defendants are entitled to costs of the application.

Part 4 – Conclusion

27. For the foregoing reasons, the 1st, 2nd, 4th – 6th Defendants urge this Honourable Court to dismiss the Plaintiff's Notice of Motion dated 27th February, 2020 and grant the costs of this application.

DATED at NAIROBI this ....13th ...... day of ....March,….2020

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KAMAU KURIA AND COMPANY

ADVOCATES FOR THE DEFENDANTS

5. I have considered the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. All the authorities are good in their facts and circumstances. However, no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances.

6. When a party files a suit, it is expected that the party should proffer apposite evidence to support his/her case. Courts cannot be used to allow the parties to ferret out evidence on their behalf. The way prayers 1, 2 and 3 in the application are crafted, allowing those prayers will amount to the court looking for evidence which the plaintiff will rely upon. It is the plaintiff's responsibility to adduce that evidence orally and through apposite documents. He is not precluded from calling government officers to give evidence on his behalf.

7. In the circumstances, I find that the best option is to have the suit heard expeditiously which hearing should be supported by the parties. The following orders will issue:

a. This application is dismissed.

b. Costs shall be in the cause.

Delivered in open Court at Chuka this 21st day of October, 2020 in the presence of:

CA: Ndegwa

Kirimi Muturi for the plaintiff

M/s Mutegi h/b Munyori for 1st, 2nd, 4th, 5th and 6th defendants

P. M. NJOROGE,

JUDGE.