



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**E.L.C. SUIT NO. 137 OF 2012**

JOSHUA KITHINJI M'ANYUKI.....PLAINTIFF

VERSUS

PATRICK MUTHAURA MUKARIA.....DEFENDANT

**R U L I N G**

1. The notice of motion filed by Applicant/ Defendant is dated 20:08:16. Applicant prays :-

***(1) THAT this Honourable Court do visit the area of the land in question or plaintiff 's home and any other orders that this Court deems fit to grant.***

2. The grounds in support of the application are:-

***(1) THAT the Plaintiff's land is Akithii/Akithii 11/1827 which is at my boundary.***

***(2) THAT the Plaintiff's home neighbours Akithii Girls Secondary School and Limbine Catholic Parish.***

***(3) THAT the Defendants land is Akithii/Akithii/11/1138.***

***(4) THAT the Plaintiff is giving false information on papers while on the grounds it is clear.***

***(5) THAT it is in interest of justice that am requesting this Honourable Court to visit the area.***

3. The application has been opposed and the Respondent has filed a Replying Affidavit on 07.09.16 where he has deponed as follows:-

***(1) THAT he filed a suit vide Originating Summons herein for the determination of his claim of entitlement to Land Parcel No. AKITHII/AKITHII/1138 by adverse possession.***

***(2) THAT he took possession of the aforesaid land in or about 1998 and he has developed the said land extensively by building a house, a kiosk where he trades and is cultivating crops and planting trees.***

***(3) THAT defendant has been bringing up several application in order to derail this process.***

***(4) THAT further the defendant has now been visiting the Suitland making all sorts of threats and laying claim on the Suitland.***

**(5) THAT plaintiff is not opposed to a Court scene visit but instead of “jumping the gun”, the parties should be allowed to ventilate their issues in a hearing, then the Court can decide what issues are for determination and if the scene visit is required.**

**(6) THAT plaintiff is a stranger to Land Parcel No. AKITHII/AKITHI I11/1827 which the Defendant alleges is that of plaintiff and that it neighbors the suit property.**

**(7) THAT it is in clear knowledge of the defendant that plaintiff has been in possession, user and occupation of L.R. NO. AKITHII/AKITHII 11/1138 since the year 1998.**

**(8) THAT this application is an after thought , a scheme by the defendant to mislead this Honourable Court.**

**(9) THAT the application is bad in law as the Applicant has no authority to make and sign the same.**

4. Pursuant to directions given by the court on 8<sup>th</sup> November 2016, both sides have filed their submissions. The submissions of the Applicant /Defendant were filed on 21/11/16. Basically, what the applicant is saying is that the plaintiff is his neighbor and that it is necessary for the court to visit the scene to get a clear picture of the two plots on the ground.

5. The applicant is also complaining of the injunctive orders granted to the respondent on 5/7/2012 and he further says that the Respondent has never lived with his family there and has never built anything on that land.

6. The submissions of the Respondent were filed on 30/11/2016 where by the respondent states that the application is incompetent on account of the following:-

***I. That the Notice of Motion does not mention under which substantive Law or Procedure it has been brought as Order 51 of the Civil Procedure Rules mandate that such Law or Order which donates power to Court to give the orders must be stated.***

***II. The application is made by the Defendant in person yet he is represented by an Advocate. That the Advocate has not withdrawn from the case. The court has been invited to see Order 2r . 16 of the Civil Procedure Rules.***

7. Respondent avers that since the defendant is defending through an Advocate he has no capacity to sign the application.

8. The plaintiff / Respondent is also questioning the purpose of the scene visit. He, plaintiff submits that parties have to commence the hearing and it is only then would the issue of the scene visit be canvassed. Plaintiff therefore prays that the application be dismissed with costs to the Plaintiff.

9. The issues for determination are;

**a. whether the application is incompetent and,**

**b. whether the scene visit serves any useful purpose.**

10. It is noted that initially, defendant was being represented by the firm of Elijah Ogoti advocates. On 11/9/2014 Ayub Anampiu's firm of advocates came on record for defendant .Then on 4/5/2016 another notice of change of advocate was filed by John Muthomi and associates to act on behalf of the applicant in place of Ayub Anampiu. In absence of a notice to act in person , the firm of John Muthomi is still on record for the defendant.

11. Defendant has not filed any notice to act in person. However his failure to follow the rules of

procedure regarding the issue of representation is not fatal to his case see **article 159 (2) (d) ‘ justice shall be administered without undue regard to procedural technicalities’**. There is room to correct the short coming.

12. On the issue of the scene visit, plaintiff is not opposed to the same. All that the plaintiff is saying is that this is an issue to be raised during the hearing. I am in agreement with that proposition .

13. In order to bring litigation to an end, this case needs to go for full hearing more so considering that plaintiff is enjoying orders of inhibition initially issued on 5/7/2012 and reaffirmed on 19/10/2015. In light of the foregoing this court gives the following directions.

***I. The application to visit the scene is disallowed at this stage.***

***II. The issue of scene visit to be raised during the pretrial stage.***

***III. The applicant is to file and serve the notice to act in person within seven days from the date of delivery of this ruling if he intends to continue acting in person failure to do so, defendant will be considered as being represented in this suit.***

***IV. Parties are hereby directed to comply with provisions of order 11 so as to hasten the hearing of the suit.***

***V. Each party to bear their own cost of the application.***

It is so ordered.

**DELIVERED IN OPEN COURT THIS 1ST DAY OF MARCH, 2017 IN THE PRESENCE OF:-**

CA:Kananu

Rimita Miss for Plaintiff

Defendant absent

**L.N.MBUGUA**

**JUDGE**