REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 70 OF 2006

BEATRICE NGONYO NDUNGU

CYRUS CHARLES KAMAU (SUING AS LEGAL

REPRESENTATIVES OF THE ESTATE OF FRANCIS NDUNGU

NJUGUNA (DECEASED).....….PLAINTIFF

VERSUS

SAMUEL K. KANYORO ….....……..……1ST DEFENDANT

ATTORNEY GENERAL (SUED ON BEHALF OF THE

COMMISSIONER OF LANDS)….....…2ND DEFENDANT

COUNTY GOVERNMENT OF NAKURU…...…3RD DEFENDANT

RULING

(An application that the court does a site visit; the dispute being whether there are two plots or if in fact it is one plot bearing two different numbers; the application for site visit made after parties had closed their cases and all that was pending was submissions and judgment; application opposed; held that a site visit is only useful if it is an occasion to receive evidence; parties having closed their cases there was no more opportunity to receive evidence; application dismissed)

1. When this matter came up on 29th March 2017 for further hearing, it was the 3rd defendant's turn to call witnesses. Counsel for the 3rd defendant however closed the 3rd defendant's case without calling any witnesses.

2. The matter would have then proceeded to submissions but that was not to be. The plaintiff through his advocate made an oral application that the court visits the plots or the plot that constitute suit properties with a view to establishing the location of the plots before retiring to write the judgment. Counsel submitted that in view of the fact that there are two plots bearing the same number, a site visit would enable the court to determine whether there are two plots or if in fact it is one plot bearing two different numbers.

3. The application is opposed by the defendants. Counsel appearing for 1st and 2nd defendants submitted that having closed his case, there is no reason why the plaintiff should reopen his case through a site visit. Further that the plaintiff had a chance to call witnesses including a surveyor and that if the application is

allowed there would be prejudice occasioned to the defendants.

4. Counsel for the third defendant submitted that plaintiff had not properly moved the court to visit the disputed property and that the court cannot just visit to satisfy curiosity. Such a visit needs to be based on evidence to be tendered. There is no evidence to be tendered since all the parties had closed their cases and there is no application by any party to reopen his case.

5. In a brief response counsel for the plaintiff submitted that the application for site visit had been made in good faith and with a view to assisting the court to determine the issues before it.

6. I think it is important to give a brief background of the matter and the stages it has gone through so far.

The suit was filed on 27th March 2006 through plaint dated 23rd March 2006. After some amendments, the prevailing statement of claim by the plaintiff is the Further Amended Plaint amended on 25th February 2015 and filed in court on 26th February 2015. The prayers in the said Further Amended Plaint are for:

> a. A declaration that the plaintiff is the lawful allottee of the plot No. 100 Business Jewathu site and that the court do issue a mandatory injunction compelling the 2nd defendant, his servants and/or agents to cancel title Njoro Township Block 1/1144 issued in respect of the land claimed by the plaintiff.
>
> b. Rectification of the land register to cancel the 1st defendant's proprietorship of land title Njoro Township Block 1/1144 and that the court do issue a permanent injunction restraining the 1st defendant, by himself, servant and/or agents from claiming ownership, trespassing and or otherwise interfering with the plaintiff's land i.e. plot No.100 Business Jewathu.
>
> c. In the alternative judgment against the 3rd defendant with an order that the 3rd defendant do indemnify the plaintiff for the value of plot No. 100 Jewathu and the semi-permanent house erected thereon.
>
> d. Costs and interest of the suit.

7. The defendants filed defences denying the plaintiff's claim. Additionally, the 1st defendant filed a counterclaim wherein he brought a mandatory injunction to restrain the plaintiff from interfering with legal possession of Njoro/Township Block 1/1144, an eviction order against the plaintiff and general damages and costs.

8. The matter proceeded to hearing party before Ouko J. and partly before Mshila J. The matter ultimately landed before me and by then plaintiff's and 2nd defendant's cases had been heard and closed. As already stated, 3rd defendant's case was closed before me without any witness being called.

9. The record also shows that on 3rd November 2009, parties recorded a consent before Ouko J. that the District Surveyor Nakuru to visit the plots in the company of the parties and thereafter to file a report together with any maps not later than 17th November 2009. The Surveyor was required to ascertain the actual location of the two plots and he was to be accompanied by a surveyor from the County Council of Nakuru. For some reason, the surveyor did not carry out the exercise and the parties recorded another consent on 5th May 2010 in which they vacated the consent order of 3rd November 2009. By implication therefore, parties abandoned the initial plans to have surveyors visit the plots and subsequently present a report before 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.

12. The need for a site visit to be an occasion for receiving evidence in the nature of a hearing has been reiterated by the Court of Appeal in **Cyrus Nyaga kabute v Kirinyaga County Council [1987] eKLR** where the court stated as follows:

> *…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****."*
>
> *This decision has been followed in subsequent cases.* [Emphasis supplied]

13. In the recent case of **Parkire Stephen Munkasio & 14 others (suing on their own behalf and behalf of their families and all the members of the maasai community living on land reference no.8396 (i.r 11977) situated in kedong) v Kedong Ranch Limited & 8 others [2015] eKLR**, after parties had closed their respective cases the petitioners sought to stay the delivery of the judgment and asked that the court do pay a site visit to the suit property in order to establish and confirm the position on actual occupation and the alleged violations against the petitioners. They applied to be allowed to adduce additional evidence and make more submissions. Munyao J. stated as follows:

> *25.At the outset, I need to emphasis that it is the duty of litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. If the petitioners wanted to press the fact of occupation through additional evidence, they had avenues to do so, right from the time the petition was filed, or even after receiving the responses of the respondents, who questioned whether the petitioners were actually in occupation of the suit land, especially given that in Nakuru ELC No. 21 of 2010, the court held that the petitioners, or the persons that they represent, were not in occupation. The petitioners had therefore been alerted in good time that the issue of occupation would be contested. They had time to get a land economist or surveyor to go to the ground and file a report. They did not do so. I also note that in the course of these proceedings, the petitioners sought leave to file further affidavits, which leave was granted. They should have taken advantage of this leave to put their house in order. Neither was I impressed by the ground that counsel who held brief for Prof. Ojienda, forgot to apply for a site visit or for leave*

to file a further affidavit.

26. *There was no proof of such instructions, and neither was there any affidavit coming from Mr. Biko (who held brief for Prof. Ojienda at the hearing of the petition), that he had overlooked some instructions. It is a serious issue for a party to apply to call in further evidence after a matter has been heard. The greatest risk, of course, is that the other parties to the suit stand to be prejudiced, for they have already presented their case and have revealed all their cards. It will need to be an extremely exceptional case to allow a party to call additional evidence after a hearing has been closed. I can probably only fathom a situation where the applicant has come across evidence which it could not have come across, despite adequate due diligence, such as where the other party has deliberately concealed it, and which evidence is critical for the determination of the issues in the case. This court would not wish to make precedent that a party is free to apply to reopen his case merely to seal loopholes revealed at the hearing of the suit or after the submissions of the other party. It is for the above reasons that I declined to exercise my discretion and declined to allow the application by the petitioners to reopen the case.*

14. In this case the parties by consensus abandoned the route of surveyors visiting the plots and making a report to assist the court. Parties subsequently proceeded to conduct their cases and closed them. No party has applied to reopen his case. All that remains now is submissions by counsel after which the court retires to write judgment. There is no more room to receive evidence. In such circumstances a site visit will be of no use. I therefore dismiss the application with costs.

Dated, signed and delivered in open court at Nakuru this 27th day of April 2017.

D. O. OHUNGO

JUDGE

In the presence of:

..... for the plaintiffs

..... for the 1st defendant

..... for the 2nd & 3rd defendants

Court Assistant: Gichaba