



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C. CASE NO. 24 OF 2014**

**BERNARD MBUTI KING'OROTI.....PLAINTIFF**

**VERSUS**

**NJAGI GIKUNJU.....1<sup>ST</sup> DEFENDANT**

**LUCY WANJIKU MAGONDU.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated and filed on 22<sup>nd</sup> September, 2017 under section 3A of the Civil Procedure Act and Order 51 of the Civil Procedure Rules, the Plaintiff sought the following orders;

*a) That this honorable court be pleased to order the Deputy Registrar of the Environment and Land Court at Embu to visit land parcels numbers Mbeti/Gachuriri/1831, 1832, 1833, 834 and 1835 on such a date as the court shall direct to ascertain whether the Plaintiff is in occupation and use of and the extent of the developments by the Plaintiff on the said parcels of land and to file a report to that effect within such time as the court will order.*

*b) That costs of this application be in the cause.*

2. The said application was based upon the grounds stated on the face of the motion and supported by the Plaintiff's own affidavit sworn on 22<sup>nd</sup> September 2017.

3. The Plaintiff's claim herein is based upon adverse possession in which he seeks to be registered as proprietor of *Title Nos Mbeti/Gachuriri/1831, 1833, 1834 and 1835* which are all sub-divisions of *Title No. Mbeti/Gachuriri/30*.

4. The main reasons why the Plaintiff filed the instant application are articulated in paragraphs 7 and 8 of his supporting affidavit as follows:

*"7. That during the hearing of my case on 10<sup>th</sup> July, 2017, it was alleged by the defendants that I only occupy and utilize a small portion out of land parcel No. Mbeti/Gachuriri/30 which is not the case.*

*8. That it is necessary for the just and fair determination of the case that the court visits the suit lands to establish the developments on the said*

*lands done by me and the extend (sic) of my occupation and use of the suit lands”.*

5. The 2<sup>nd</sup> Defendant filed grounds of opposition on 2<sup>nd</sup> October 2017 which were adopted by the 1<sup>st</sup> Defendant vide his grounds of opposition dated 30<sup>th</sup> October 2017 and filed on 31<sup>st</sup> October 2017. The Defendants submitted that the Plaintiff was seeking to convert the Deputy Registrar of the court into his witness long after the close of the Plaintiff’s case. It was submitted that the Deputy Registrar did not have the expertise to determine contested issues in the suit. They considered the Plaintiff’s said application to be a complete waste of time and a delaying tactic hence it should be dismissed.

6. The court has considered the said application and the submissions of the parties herein. The court has noted that none of the parties cited any authority for or against the granting of the prayers sought. The court also has noted that the Plaintiff has closed his case and cannot seek to adduce additional evidence without first applying to re-open his case.

7. Although it was submitted by Mr Guantai for the 2<sup>nd</sup> Defendant that the Plaintiff was seeking to convert the Deputy Registrar into his witness, there is no material on record upon which such a conclusion can be drawn. It should not be assumed that if the application is granted then the Deputy Registrar can only compile a report which is favourable to the Plaintiff. It is quite possible for such a report to be favourable to the Defendants. The Deputy Registrar will be expected to remain an officer of the court and to act impartially.

8. Contrary to the Defendants’ submissions, the Deputy Registrar will not be required to determine any contested issues in the suit. He would be required to make a visit, make his observations on the ground, and compile a report for the court. The responsibility of determining the issues in controversy shall remain the responsibility of the trial court upon according all concerned parties an opportunity to adduce their evidence and to file their respective submissions.

9. The Plaintiff’s said application was brought under **section 3A of the Civil Procedure Act (Cap 21)** which preserves the inherent power of the court to make any orders for the ends of justice or for preventing the abuse of the court process. The court is satisfied that allowing the instant application will assist the court in arriving at a just decision hence serve to meet the ends of justice. There is no indication that the Defendants would suffer any prejudice by such a visit and report by the Deputy Registrar. The Defendants are yet to testify in this suit and they shall still have an opportunity to present their evidence at the opportune time.

10. The upshot of the foregoing is that the court finds merit in the Plaintiff’s notice of motion dated 22<sup>nd</sup> September 2017 and the same is hereby allowed in terms of prayer (a) thereof. The Deputy Registrar shall visit the suit properties and file his report within 45 days from the date of this ruling. All the parties shall be supplied with a copy of the said report upon filing. Costs of the application shall be in the cause.

11. The court shall fix a mention date upon delivery of this ruling to confirm compliance and to fix a date for defence hearing.

Orders accordingly.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **23<sup>rd</sup>** day of **NOVEMBER, 2017**

In the presence of Mr Okwaro for the Plaintiff and Mr Andande holding brief for Ms Wairimu for the 1<sup>st</sup> Defendant and Mr Guantai for the 2<sup>nd</sup> Defendant.

Court clerk Njue/Leadys.

**Y.M. ANGIMA**

**JUDGE**

**23.11.17**