Too v Sitienei (Civil Appeal (Application) 222 of 2020) [2022] KECA 712 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KECA 712 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL (APPLICATION) 222 OF 2020

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MAY 13, 2022

BETWEEN

EDWIN K TOO .... APPLICANT

AND

PAUL K SITIENEI .... RESPONDENT

(Being an application for an order that the Court visits the site/disputed land and assess and confirm the buildings/houses (homestead) constructed by the appellant on the suit land)

RULING

1. Purporting to be brought under Section 3(2); 3A(1)(2) and Rule 2 of the *Court of Appeal Rules* and, for good measure, citing Article 159 of *the Constitution* and all other enabling provisions of law, the motion dated November 18, 2021 asks this Court of Appeal to conduct a site visit to Land No. Nandi/arwos/1062. It also prays that once we visit the suit land, we should confirm whether the applicant "has occupied some 2 acres of that land from 2008 with his family and has developed it over the years including planting tea crops and blue gum trees."

2. In the grounds on the face of the motion, the applicant states that he "faces imminent eviction from the suit property". He goes on to state what may be his main grouse thus;

> "2. The facts stated herein were pleaded in the appellant's application for stay pending appeal, the notice of motion application dated April 28, 2020(see pages 20,35,41 of the said application).
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> 3. In the Court's ruling dated April 23, 2021, the Court reasoned at paragraph 11 that the appellant does not occupy the suit land and subsequently, the Court proceeded to deny the applicant an order for stay pending appeal."

3. The supporting affidavit sworn by Edwin K. Too, the applicant, on November 18, 2021 is an almost verbatim reproduction of grounds. It does not annex the ruling of this Court (differently constituted) on the application for stay of execution it alludes to.

4. In written submissions filed by the applicant's counsel on record, the same point is repeated that the Court was wrong to find that he was not in occupation of the suit land and that as "it would be difficult to ascertain who between the appellant and the respondent occupies the disputed land merely from perusing the documents filed ... the Court should conduct a site visit."Citing the case of *Selle v Associated Motor Boat Co*.[1968] EA 123, counsel urged that in order for us to analyse the factual details of the case as presented before the trial court, we need to visit the site, which, according to counsel, we have 'implicit powers' to do under our inherent jurisdiction so as to achieve justice.

5. It is no surprise that the application elicited vehement opposition. In a replying affidavit sworn on February 4, 2022, the respondent Paul. K. Sitienei first asserted that the applicant failed to file an appeal within the time granted by Kiage, J.A in a ruling delivered on April 24, 2020 and that if any was filed, it was never served on the respondent as required. Thus, as there is no appeal, there would be no basis for the new evidence sought. Citing decided cases, the deponent stated that the application is frivolous, vexatious and an abuse of the process of the Court from which he prays that this Court protect him.

6. In submissions filed on his behalf, the respondent, after referring to the provisions of the rules of this Court applicant cited, that the motion before us is not grounded on Rule 29(1) which provides for the adduction of additional evidence. He also referred to case law on the subject including *Doroth Nelima Wafula v Hellen Nekesa Nelson & Paul Fredrick Nielson* [2017]eKLR; *Mzee Wanje & 93 others v A.K. Saikourt* [1982-88] KAR 462 as well the Supreme Court's decision in *Mohammed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, to make the point that the application is grounded on the wrong provisions of law and there are no exceptional circumstances to warrant admission of additional evidence in "an attempt to strengthen a non-existent appeal."

7. When the application came for argument before us, we asked Mr. Jaoko, learned counsel for the applicant to point to us what rule donates jurisdiction for Judges of this Court to make site visits. He conceded, as he had to, that there was none, but nonetheless pressed that the Court does have "implicit authority" to do so. We even suggested to him that if he had additional evidence to adduce he should have considered an application under Rule 29 of the Rules but his straight-faced, if startling, response was; "I cannot apply for adduction of further evidence before the Court goes and gets it."

8. To that position Mr. Choge, the respondent's learned counsel had a short answer; "the Court cannot go fishing for evidence on behalf of the applicant." Counsel went on to urge, though we had difficulty following the argument, that this was a second appeal as there had been an application for review made before the superior court below which was rejected.

9. With great respect to the applicant and his legal advisers, this application is wholly misconceived and a hearing it was not a useful way to spend scant judicial time. Other than a seeming attempt to protest at what he considers an erroneous finding by the Court that the applicant is not in occupation of the disputed land, we are at a loss to fathom what the application was meant to achieve. All the applicant is saying is this; "You were wrong to say I am not in possession. Come see for yourselves and bear that in mind when you have to hear the appeal proper."

10. Now, if a litigant is aggrieved by any finding of the Court there are ways to remedy that, but they do not involve a sulking invitation to the Court to go see for itself how wrong it was. Ours, moreover, is an adversarial system and courts generally act on the basis of evidence gathered by the parties, presented by the parties, and commented on by the parties in order to persuade the court one way or the other.

It is not, and it should never be, the business of courts, and certainly never of this Court of Appeal, to vacate the seat of judgment and go to the hooks and crannies of the countryside to establish the status of occupation of disputed lands. The more so when, as in this case, it is not even the deputy registrar, but for the Judges themselves, that are asked to go visit the site. We very much doubt that such a request has ever been made before, and we hope that this shall be the last.

11. In the result, this application fails and is dismissed with costs.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

....

JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APEAL

I confirm that this is a true copy of the original.

Signed

DEPUTY REGISTRAR