



Kwamboka v Water Resources Authority; Oasis Park Self-Help Group Suing Through John Mutinda & another (Interested Parties) (Environment & Land Case 128 of 2019) [2024] KEELC 4170 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 128 OF 2019
CA OCHIENG, J
MAY 22, 2024**

BETWEEN

SKEETER KWAMBOKA PLAINTIFF

AND

WATER RESOURCES AUTHORITY DEFENDANT

AND

**OASIS PARK SELF-HELP GROUP SUING THROUGH JOHN
MUTINDA INTERESTED PARTY**

SYOKIMAU RESIDENTS ASSOCIATION INTERESTED PARTY

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 9th October, 2023 where she seeks the following Orders:-
 - a. Spent
 - b. That the Plaintiff/Applicant be granted leave to call the Government Surveyor to give testimony regarding the original land map outlining the riparian reserves in question in this case.
 - c. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Skeeter Kwamboka. She explains that she had testified and during the hearing, she cited the issue of the original map indicating the true position of the riparian reserve. She denied that her houses are situated in the riparian reserves. She is desirous of calling a Government Surveyor who is an expert to interpret the map



to court, for clarity purposes. She contends that she sought for the topographical map of the Sabaki Stream from the Defendant, but the Defendant informed her, that this was within the purview of the Survey of Kenya. She reiterates that since the dispute herein revolves around public and private interest regarding riparian reserves as well as home owners' rights, it is in the interest of justice, if the instant application was allowed. Further, no prejudice will be suffered by the Defendant and Interested Parties' if the Government Surveyor is summoned in court to provide a detailed interpretation of the original map and show the natural flow of the Sabaki Stream.

3. The Defendant opposed the instant Application by filing a Replying Affidavit sworn by Robinson M. Kimari, its Sub Basin Area Coordinator based at Nairobi Basin, where he highlighted the proceedings herein and contended that the Plaintiff filed her List of Documents in 2019 and did not allude to the Government Surveyor and the Map/Surveyor's report respectively, which she seeks to introduce after the hearing had begun. He avers that, the Respondent did not contemplate the Government Surveyor being a witness in this matter, neither did it contemplate additional document being sought to be introduced by the Plaintiff. He explains that, during cross-examination of the Plaintiff, the Defendant and Interested Parties' poked holes on the Plaintiff's case and the instant Application is an attempt by the Plaintiff to patch up those holes. Further, that the instant Application was filed three years after close of pleadings, is an afterthought and an attempt by the Plaintiff to strengthen her case. He reiterates that, should the Application be allowed, the Defendant will be highly prejudiced to it.
4. The 2nd Interested Party opposed the Application by filing a Replying Affidavit sworn by John Mutinda as well as Grounds of Opposition dated the 30th November, 2023 where it insists that, the said Application is hopeless, incompetent and devoid of substance. It contends that the Plaintiff is delaying the suit and the Application has been filed late, without sufficient reason. It argues that the instant Application has no basis in law and neither has any party sought to recall a witness. It insists that the Plaintiff having testified and closed her case cannot purport to reopen it, through the backdoor. Further, that the instant Application is prejudicial to it, as it will not have an opportunity to respond, considering the matter had already proceeded for hearing. It reiterates that the instant application has no probative value since there is no change of circumstances to warrant it. Further, the Government Surveyor was there, when the Plaintiff first filed the instant case in 2015 being Nairobi Environment & Land Court Case No. 1037 of 2015: Skeeter Kwamboka v Water Resources Authority & 2 Others.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, Grounds of Opposition as well as the rivalling submissions, the only issue for determination is whether the Plaintiff should be granted leave to call the Government Surveyor to give testimony regarding the original land map, outlining the riparian reserves in question, in this case.
7. The Plaintiff in her submissions reiterated her averments as per the Supporting Affidavit and insisted that the court has inherent powers as per the provisions of Article 159 of *the Constitution* as well as Section 3A of the *Civil Procedure Act* to grant the orders as sought. She further submitted that she has not closed her case to warrant re-opening. Further, that all she sought is for the Government Surveyor to come and demonstrate the natural flow of the river and proximity to her land. She claimed she reached out to the Defendant vide her letter dated the 3rd May, 2023 seeking to obtain the topographical map of the Sabaki Stream and it is the Defendant who informed her, that the documents are with the Survey of Kenya. To buttress her averments, she relied on the following decisions: *Susan Wavinya Mutavi v Isaac Njoroge & Another [2020]* eKLR and *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & Another [2015]* eKLR.



8. The Defendant in its submissions relied on the averments in its Replying Affidavit and highlighted the proceedings in court. It insisted that the Plaintiff sought to patch up holes, in her case. It argued that no good reason has been tendered on why, the instant Application was filed late, yet pleadings were closed in the year 2020. To support its arguments, it relied on the following decisions: *Raila Odinga & Others v IEBC & 3 Others Supreme Court of Kenya Presidential Petitions No. 3, 4, 5/2013 [2013]* eKLR; *Johana Kipkemei Too v Hellen Tum [2014]* eKLR; *Alfred Baya Msanzu v Kenya Ports Authority [2020]*eKLR; *Mansukhalal Jesang Maru v Frank Wafula [2021]* eKLR and *Alois Oceano D'sumba v Rajnikant Narshi Shah & Another [2017]* eKLR.
9. The Plaintiff has sought to call the Government Surveyor to present a map of the Sabaki Stream/River, which the Defendant and Interested Parties have vehemently opposed. They claim the Plaintiff seeks to patch up holes in her evidence and they will be prejudiced if the Government Surveyor was called to present a report. From the court record, I note the Plaintiff had not closed her case as claimed by the 2nd Interested Party. Further, on perusal of the pleadings herein, it is evident, the fulcrum of the dispute herein revolves around identification of the riparian reserve along the Sabaki River/Stream. Further, it is trite that it is the Survey of Kenya that is the custodian of all the maps, and it is only the Government Surveyor who can interpret the map and identify the said riparian reserve. It emerged that the Plaintiff had sent a letter dated the 3rd May, 2023, to the Defendant, seeking for a map of the Sabaki River/Stream but, the Defendant referred her to the Survey of Kenya.
10. The Defendant and Interested Parties claim they will be prejudiced if the Government Surveyor is called to present the map of the Sabaki River Basin including the riparian reserve, but the said prejudice has not been demonstrated, since the Plaintiff is yet to close her case. I note the authorities mainly cited by the Defendant and Interested Parties revolves around late filing of documents as well as recalling of a witness, which is not the position herein.
11. Section 3 of the *Environment and Land Court Act* stipulates that:-
 - “(1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act. (2) The Court shall, in the discharge of its functions under this Act give effect to the principal objective in subsection (1). (3) The parties and their duly authorized representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.”
12. While section 3A of the *Civil Procedure Act* provides that:-
 - “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.” Emphasis Mine
13. Insofar as the Defendant and Interested Parties have opposed the calling of the Government Surveyor to give testimony regarding the original land map outlining the riparian reserves in question, in this case, I have had a chance to peruse the court record and I opine that this is not prejudicial to them as claimed. Further, in the interest of justice, while relying on Article 159 (2) (d) of *the Constitution*, I find the Plaintiff's explanation on the need for a Government Surveyor to present the map outlining the riparian reserves of the Sabaki River/stream, plausible. It is my considered view that it is pertinent if the map of Sabaki River/stream Riparian reserves is presented in court to assist the court in dealing with the dispute herein. I opine that since the Government Surveyor will come in as an expert witness,



all parties will benefit. Further, the Defendant and Interested Parties will have a chance to peruse the maps and cross-examine the said Government Surveyor. In the foregoing, while relying on the legal provisions cited above, I will exercise my discretion and allow the Plaintiff to call the Government Surveyor to give testimony regarding the original land map outlining the riparian reserves in question.

14. Further, the Defendant and Interested Parties can have a chance to file further documents including different maps, if need be.
15. In the circumstances, I find the instant Notice of Motion Application merited and will allow it.
16. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mukonyi for Plaintiff

Ms. Makori for Defendant

Gikonyo and Waweru for Thuita for 1st Interested Party

No appearance for 2nd Interested Party

Court Assistant – Simon/Ashley

