



Barnabas East Africa v County Government of Mombasa & 2 others (Constitutional Petition 29 of 2022) [2024] KEELC 5753 (KLR) (17 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 29 OF 2022**

LL NAIKUNI, J

JULY 17, 2024

IN THE MATTER OF: THE JURISDICTION OF THE SUPERIOR COURT UNDER ARTICLE 23(1), ARTICLE 162(1), (2) (B), ARTICLE 165 (2) (D) (II) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: CONTRAVENTION, BREACH AND VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: ARTICLE 2 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

BARNABAS EAST AFRICA PETITIONER

AND

COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT

FUNDS 3RD RESPONDENT

RULING

I. Introduction

1. This brief Ruling flows immediately after the Judgment in this matter which was delivered on 12th October, 2023. When this matter came up for mention on 5th June, 2024, M/s. Nzamba Advocate for the Petitioner made an oral application seeking for the court to conduct a site visit (“Locus in Quo”)



on the suit property. From the very onset, its imperative to note that the application is not anchored on any specific provision of the law. The reasoning advanced by the Learned Counsel was that the visit would enable the Honourable Court fully appreciate the situation on the ground and it would even lead the parties to concede the matter upon seeing the site. Thus, the impression the Honourable Court perceives is that perhaps the Counsel is seeking for a review or setting aside or variation of the Judgement already delivered under the provisions Section 80 of the Civil Procedure Act, Cap. 21 and/or Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010 or any other enabling provisions of the law.

2. During this particular Court's proceedings, the 1st and 2nd Respondents who are parties in the suit were absent. Hence, the Honourable Court never got the benefit of appreciating their reaction to the impugned oral application for a site visit. On their part, the 3rd Respondent through the Learned Counsel, M/s. Mwanazumbah in quick rejoinder told the Court that on the application for conducting a site visit, the 3rd Respondent had no comment as their main concern in this matter was why they were joined in the matter. It was a case of misjoinder and they were not interested in the case at all.
3. In the given circumstances therefore, the Honourable Court will proceed to make a determination on the issues in question on its own merit thereof.

II. The proceedings of the Court on 5th June, 2024

4. Prior to arriving at fair, Equitable and informed decision on the matter at hand, its imperative that the Honourable Court makes some brief reference to the proceedings that transpired on the 5th June, 2024. It was a mention of the matter for further direction on some pending interlocutory applications filed by parties after the Judgement had been delivered. The Honourable Court having heard from the Learned Counsels directed as follows:-
 - a. That the Petitioner/ Respondent be and is hereby granted 14 days leave to file and serve replies to the Notice of Motion application dated 30th April, 2023.
 - b. That the said Notice of Motion application dated 30th April, 2024 be disposed of by way of written submissions as follows:-
 - i. The 3rd Respondent/ Applicant granted 14 days leave to file and serve further Affidavit from the new issues of law raised from the filed replies and written submissions.
 - ii. Thereafter the Petitioner/Respondent, the 1st and 2nd Respondent granted 7 days leave each to file and serve written submissions.
 - iii. The Honourable Court reserves the 18th July, 2024 to render its ruling and in the course of it on the viability and possibility of conducting or not a site visit (locus in quo) as requested under Order 18 Rule 11 of the Civil Procedure Rules 2010.
5. Subsequently, it was during this Court session that the Learned Counsel made the oral application for the Honourable Court to conduct the site visit.

III. Analysis and Determination

6. The value and purpose of a site visit in a civil case are two issues that I cannot confidently say, are well settled. The age-old arguments for and against site visits have replayed themselves before my very eyes.



The Applicants argue that it is necessary that the court conduct site visits to establish the position on the ground.

7. The concept of “Site Visit” (“Locus in Quo”) which is simply defined in the Black Law dictionary as “the place where something is alleged to have occurred” . The concept is provided for under the provisions of Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. Additionally, in accordance with the provision of Section 173 of the Evidence Act, Cap. 80, provides “inter alia”:-

173. Extended powers of court for purpose of obtaining proper evidence

- (1) A Judge or Magistrate may, in order to discover or to obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to object to any such question or order, nor, without leave of the court, to cross-examine the witness upon any answer given in reply to any such question:

Provided that judgment shall be based only upon facts which are otherwise admissible and which have been duly proved.

- (2) Subsection (1) of this section shall not authorize a Judge or magistrate-
- (a) to compel a witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under the provisions of Part II of this Chapter, if the question were asked or the document was called for by the adverse party; nor
 - (b) to ask any question which it would be improper for any other person to ask under section 157 or 158 of this Act; nor
 - (c) to dispense with the primary evidence of any document, except in the cases excepted by the provisions of this Act.

8. It follows that the Honourable Court may “Suo Moto” call for further information on the matter on its own volition to assist it in arriving at a reasonable decision. Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

While Order 40 Rule 10 (1) (a) provided to wit:-

“The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

- a. Make an order forInspection of any property which is the subject matter to which any question may arise therein.

9. Ordinarily, there ought to be the consensus of the parties for the site visit to take place. Further, it may involve the presence of experts for instance the Land Surveyors, Land Valuers, security operatives and so forth depending on the nature of the visit. The site visit are with a view of gathering further evidence on the case but to make observation on matters on the ground so as in the long run assist Court in its decision making functions and/or process. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.



10. Hence, Court explains to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.
11. It allows court to have broad mind on the matter in question before it and to examine the suit property in depth. The court is empowered by law – Order 18 Rule 11 of the *Civil Procedure Rules*, 2010 at any stage of the suit to inspect any property or thing concerning which any question may arise. The Court may occasion to visit the locus in quo with a view of gathering further evidence to assist it in decision making function.
12. In the case of “*Parkire Stephen Munkasio & 14 others v Kedong Ranch Limited & 8 others* [2015] eKLR”, the court while considering an application of this nature stated that it is the duty of litigants to place material in support of their case before the court. The court does not have the mandate to go on a fact finding mission.
13. I reiterate that the nature and purpose of a site visit at this juncture was well stated in the case of “*Beatrice Nyongo Ndungu & Others v Samuel K. Kangoro, the Attorney General & the County Government of Nakuru* ELC 70 of 2008”, the court observed that while from time to time it may be necessary for the court to visit a site with a view to helping it reach a just decision, it cautioned that it must 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 key 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 to seek facts on its own. It is always incumbent upon parties to adduce evidence to prove the facts which they assert...”

In summary the following information constitutes conducting a site visit:-

- a. It is by the consensus of the parties.
- b. It involves all the parties and experts.
- c. It is for inspection, finding out and establishing of the facts on the ground and where the disputes is alleged to take place.
- d. It is not an evidence gathering nor investigation mission but making observations by parties.
- e. It has to be undertaken during the proceedings of the case unless otherwise stated.
- f. It is recorded in form of a report to be used in the final decision making of the case.

From the foregoing expose, what is critical for conducting a site visit is the timings. The law envisages that it may take place any time but at least before the Court has made any pronouncements on the matter. Once the Court has delivered the final Judgement, it becomes “functus Officio”. My understanding is that a court is “functus officio” when it has performed all its duties in a particular case. The *Black Law Dictionary* defines the term - “functus Officio” to mean:-

“Having performed his or her office. Without any further authority or legal competence because the duties and functions of the original commission have been fully accomplished”.



In my own understanding of the law, then the Court has no more business on the matter unless otherwise stated. This includes conducting a Site visit.

14. In the instant case, this Court is being requested to visit the locus and see the occupation. The background of the case is as follows on 25th July 2022 the Petitioner/Respondent herein filed a Petition against the Applicant in the Environment and Land Court at Mombasa claiming that the Applicant had infringed on his constitutional rights by creating an access road on his private property known as CR: 2283/1 Plot No VIMN/809 a private property. The Petition was responded to by the Applicant vide a Replying Affidavit dated 11th November 2022. Vide a judgment delivered on 12th October 2023 the Environment and Land Court (Naikuni, J.) awarded the Petitioner/Respondent a sum of Kenya Shillings Twenty Seven Million One Hundred and Fifty Thousand (Kshs. 27,150,000/-)
15. The Court as it is already determined and concluded on the dispute between the parties through its Judgment delivered on 12th October, 2023 therefore it would not make any judicial sense to go visit a property it already made a determination on and concluded the matter on. In all fairness, I find this application quite valuable and significant as it certainly would have assisted the Court and the parties to arrive at a reasonable decision only that it was made at the wrong time. The Petitioner should have taken advantage of the pretrial stage to meet these objectives and after all the judgment delivered on 12th October, 2023 was in favour of the Petitioner therefore the Court does not understand why the same petitioner seeks to have a site visit. It seems to be coming at the tail end of these proceedings after the party is already over and the horse has already bolted the stable. In as much as the application for orders for a site visit was not contested surely I find that this was an afterthought on the part of the Counsel for the Petitioner. As indicated at the beginning, should this application be intended to review, set aside, vary or discharge the Judgement of this Court (which I highly doubt taking that its wholly in favour of the Petitioner) and in as much as the Learned Counsel confidently states that its from the visit that the other parties may be persuaded to concede on the contrary the visit may turn against the Petitioner to the chagrin of the already earned fruits from the Judgement. Honestly, this Visit is major risk and may be a disservice to the Petitioner as well. As the English adage goes, I would rather as the English adage goes:- “Let the Lions lie”.
16. Therefore, in the given circumstances, this matter was already concluded and the Honourable Court having made its pronouncement under the provision of Section 25 of the Civil procedure Act, Cap 21 which states thus:-

“The Court, after the case has been heard, shall pronounce Judgement, and on such Judgement a Decree shall follow” . Subsequently, I reiterate that after the delivery of the Judgement, the Court has become “functus officio” on issues touching on the suit property; the Honourable Court can only give orders concerning the execution of the Judgment and any other issue surrounding the final disposition of the suit. To this end the application seeking to have the Court conduct a site visit is hereby declined.

IV. Conclusion and Disposition

17. In the long run, having intensively and thoroughly deliberated on all the framed issues herein, this Honorable Court arrives at the finding that the Petitioner has not succeeded and the Court therefore pronounces itself as follows:-
 - a. That oral application made by the Petitioner on 5th June, 2024 seeking for the Honourable Court to conduct a site visit on the suit property be and is hereby declined.



b. That this Honourable Court having rendered itself on a final decision on this matter through the Judgment delivered on 12th October, 2023 remains “functus officio” unless it’s an issue to deal with the execution of the Judgment on record, it will tantamount to re – opening of the case afresh.

c. That each party to bear their own costs.

It is so Ordered Accordingly.

RULING DELIVERED THROUGH MICROFT TEAMS VIRTUAL MEANS SIGNED AND DATED AT MOMBASA THIS 17TH DAY OF JULY 2024.

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HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Ruling delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant

b. No appearance for the Petitioner.

c. No appearance for the 1st , 2nd and 3rd Respondents.

