Kones & 582 others v Langat & 3 others (Environment & Land Case 53 of 2018) [2023] KEELC 15770 (KLR) (28 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15770 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 53 OF 2018

CG MBOGO, J

FEBRUARY 28, 2023

BETWEEN

SAMWEL KIPKIRUI KONES & 582 OTHERS ..... PLAINTIFF

AND

JOHNSTONE KIPKOECH LANGAT & 3 OTHERS ..... DEFENDANT

RULING

1. On February 9, 2023, the plaintiffs made an oral application that the court do conduct a site visit (*locus in quo*) on the suit land being Narok/Cis Mara/Ilmotiok/54 either before the close of their case or at the appropriate time as the court may deem fit. The application was made *inter alia* under order 18 rule 11 of the *Civil Procedure Rules*.

2. The counsel for the plaintiffs submitted that a similar application was made in the cases of *Masha Birya Dena v Francis Kahindi Kalume* [2021] eKLR and *Republic v Nairobi City County Government & 6 others, Ex parte Mike Sonko Mbuvi* [2015] eKLR. The counsel submitted that the plaintiffs have given evidence about the property and the purpose of *locus in quo* is to confirm whether the evidence given by the plaintiffs is in tandem with what is on the ground. While relying on the case of *Kimonidimitri Mantheakis v Ally Azim Dewji & others*, Court of Appeal of Tanzania, Civil Appeal No 4 of 2018, the counsel submitted that the other purpose that they seek by this visit is to confirm the location, boundaries and physical features on the disputed land and to clear doubt about conflicting evidence, if any, about the physical features.

3. Further, that the other purpose of site visit is that it is consistent with the rule of the *Evidence Act* that requires production of the thing itself as the best evidence. Also, that they have brought photos of the development and physical features but the best evidence are the things themselves.

4. The counsel further submitted that in land matters, courts are always encouraged to take keen interest in site visit as was in the case of *Odongo Ochama Hussein v Abdul Rajab* Civil Appeal 119 of 2018

[2021] UGHCLD 16. The counsel submitted that they are not seeking to fill any gaps on their evidence. Rather, they are seeking to ask the court to check on the evidence already given and to have that evidence particularly demonstrated. Reliance was placed in the case of *William Mukasa v Uganda* [1964] EA 698.

5. Further that the evidence that they have given includes: -

    1. The people on the suit land. The plaintiffs' evidence is that there are thousands of people on the suit land.

    2. There are developments on the suit land which include schools, trading centres, houses some of which photos were produced. There was an inference that they do not exist during cross-examination.

    3. The other evidence is with regard to a map prepared by the plaintiffs and which they have been heavily cross-examined. It shows that they occupy a part of the suit land. The court needs to confirm if that is correct as the defence will raise the issue of eviction.

6. The counsel submitted that there are other contested facts which he did not want to go into. In paragraph 43 of the witness statement of Stanley Kipsang, he talks about surrender from parcel number 54. The surrenders are in the map produced by the plaintiffs that is contested by the defendants.

7. Lastly, the counsel referred this court to look at the case of *Masha Birya Dena* (*supra*) as it is on all the four issues of this case and which the court observed that the right time is after full hearing.

8. Mr Lubullelah, the learned counsel for the 1st defendant opposed the application as it was being made orally before the court although the plaintiffs had indicated earlier on that they intended to make an application for site visit. Their understanding was that a formal application would be made setting out the provisions and the grounds upon which it is made. Further that their understanding was that order 51 of the *Civil Procedure Rules* is applicable even though the court had made a ruling on it and there was need for the defendants to have proper notice of the application. Having said that, counsel submitted that they agree that the court has jurisdiction and discretion in the right circumstances to order a site visit and it is not in every case that a site visit may be ordered by the court. The party applying for a site visit must convince the court that there are valid grounds for seeking such an order. The same must be supported by cogent evidence which cannot be given from the bar. In this particular case, the learned counsel for the plaintiffs referred to evidence extensively without producing the same in an affidavit so as to give the defendants the benefit of the same. The counsel submitted that section 107 of the *Evidence Act* is very clear on the burden of proof. The plaintiffs have the burden of proving their case before this court. They are bound to provide evidence in support of their claims and not to convert the court into a litigant by causing it to participate in fact finding which is not the role of the court.

9. While relying on the case of *Parkile Stephen Mungasio and 14 others v Kedong Ranch ltd and 8 others* [2015] eKLR, the counsel submitted that the learned counsel for the plaintiffs had indicated that he wishes the court to go and confirm on the ground matters which are purportedly explained in a map produced before this court which map has not been provided by a registered surveyor in Kenya.

10. The learned counsel submitted that the purpose of the visit is for the court to go and confirm the evidence it has recorded. The evidence is on record and there's no need to go and confirm. The counsel further questioned the role of the court in a site visit where the evidence has been tendered by the plaintiffs without hearing the defendants. The counsel submitted that in his view, the plaintiffs application is an admission that there is weakness in their case.

11. The counsel further submitted that this is a learned court but the court lacks the expertise to conduct a survey of the land. Further, that this court lacks the capacity, the expertise to identify features as it is a matter for geologists and experts who deal with such features.

12. The counsel invited this court to note that the plaintiffs have not provided any evidence from any surveyor or from a land economist and the application therefore is intended to mix the court and muddle it in evidence gathering and, in the process, cloud the court's impartiality.

13. The counsel further submitted that the existence of the 1st defendant's title Narok/Cis Mara/ Ilmotiok/54 is not in doubt. That the plaintiffs acknowledge the existence of that title. It is surveyed land and a title has been issued. The location of that land is not in doubt. The parties and the court know where the land is. The 1st defendant has acknowledged in his pleadings that some of the plaintiffs are illegally in occupation of parts of that land and that is the basis for an order for eviction in the counterclaim. Therefore, the court to go and confirm that some of the plaintiffs are in illegal occupation of parts of the defendants' land is waste of judicial time.

14. The counsel submitted that from the record, the court will notice that the plaintiffs have provided some photos purporting to show that some structures and some people are on the suit property and that the counsel for the plaintiffs has seen doubts have emerged as to whether some of the people and structures are on parts of the suit property. The counsel further submitted that the amendment to the *Evidence Act* bringing Section 106 B on admissibility of electronic evidence, there is a specific requirement for electronic evidence to be supported by the certificate. That certificate is supposed to cover the deficiency that the counsel seeks to fill in. Further, that the evidence that the court has is not in compliance with the law and the site visit will not cover the evidence into that is compliant with the law and that the court should restrain itself from putting itself into the arena of litigation.

15. With reference to *Kimonidimitri Mantheakis* case (*supra*), the counsel submitted that the same is not binding on this court. The counsel went on to submit that if it was a Court of Appeal case before 1977 when we had a harmonized jurisdiction, it would have made sense.

16. The learned counsel submitted that there is a legal requirement of production of the thing as the best evidence. The counsel questioned whose duty it was to provide the best evidence. The counsel further submitted that the law recognizes that secondary evidence may be produced within the law. Further, that surrender is a legal registrable document which culminates in the change of the original title. The counsel submitted that so far, they do not have evidence indicating that the 1st defendant's title has been subject to mutation of any kind to give rise to a surrender. The counsel questioned whether by going to the site, the court will be able to see that there is a surrender.

17. Lastly, the counsel submitted that they acknowledge that the court is vested with jurisdiction and discretion to order for site visit but only in situation where the application is vested in cogent evidence. Further, that the court can decide at what stage a site visit can be undertaken.

18. Mr Menge, the counsel for the 2nd -4th defendants fully concurred with the submissions of counsel for the 1st defendant. The counsel submitted that the application is trying to fill in the inconsistences that are in the plaintiffs' case. In their defense, they raised the issue of limitation. That the 1st defendant was allocated the suit land by way of adjudication and demarcation in 1980 and the plaintiffs having slept on their rights decided to bring this case to court in 2018 which is 38 years later. The counsel submitted that this is contrary to section 7 of the *Limitation of Actions Act*.

19. In rejoinder, the counsel for the plaintiffs submitted that the defendants have misapprehended the application before court as the 2nd to 4th defendants have argued a preliminary objection. Further, that

they are not asking to fill a gap in their evidence and what the defendants have succeeded in doing is to state their view. The counsel submitted that the *William Mukasa* case (*supra*) stated the purpose of a site visit is to check the evidence already given. Further, that the issue of photos and section 107 of the *Evidence Act* are neither here nor there as this is a case of public interest. In this case, the defendants are seeking to evict thousands of people on the ground and that the circumstances exist for the court to order for a site visit.

20. I have considered the application and the submissions made by the counsel on record for the parties herein and the issue for determination is whether this court, in the circumstances of this case, ought to conduct a site visit.

21. I would wish to point out that in our adversarial system of the law, parties are bound by their pleadings and it is therefore incumbent for a party to place before the court, evidence that best supports its case. This is done by engaging in thorough research, collecting and collating cogent evidence and finally, proper drafting to ensure that the facts and evidence have a place in the law supporting the particular case. In this case, the plaintiff made an oral application seeking that this court conducts a site visit. The question then is, what is the purpose or what would be the purpose of this site visit?

22. In the case of *Beatrice Ngonyo Ndungu & another v Samuel K Kanyoro & 2 others* [2017] eKLR, the court had this to say of the object of site visits by the 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.
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> 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. (Emphasis added)

23. In this case, the plaintiffs prayed that the court visits the suit property to see whether the evidence is in tandem with what is on the ground and to clear doubt about conflicting evidence. Respectfully, I am not in agreement with this prayer for the reason that it is premature as the defendants have not yet presented their case and testified. Also, this court does not need to go to the ground to confirm whether the evidence is in tandem with the facts. That is not the role of this court. It is the plaintiff

to present evidence that best support its case. This court will not assume a role that it is not tasked with. In addition, and without prejudice, I do note that the County Surveyor is a party to this case, if at all there is need to confirm the position on the ground, the 3rd defendant may at the directions of this court, file a report.

24. While I adopt the above position, I wish also to rely on the case of *Chira & 2 others v Kenya Power & Lighting Company Limited* (Environment & Land Case 94 of 2019) [2022] KEELC 2519 (KLR) (4 July 2022) (Ruling) where Oguttu Mboya J had the following to say:-

> " 20. Premised on the foregoing, it is my considered view that visitation to the locus in quo, may be carried out and/or undertaken by the court, but before such visitation are undertaken, the Applicant must place before the court special, exceptional and peculiar circumstances that will warrant the Visitation.
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> 21. Despite the foregoing, it is appropriate to point out that the failure of either party to bring forth and/or adduce sufficient evidence to help in proving his/her case, cannot be a basis to invite the court to undertake a visitation.
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> 22. Simply put, the court shall not be converted into and or be constituted as an investigation forum, to be used by either Party, whenever a Party believes that same has not availed and / or procured sufficient Evidence in a matter.
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> 23. In view of the foregoing, I beg to point out that this court is not keen to engage in and indulge in the controversy, leading to the mounting and/or filing of the subject suit and that the court shall be content and satisfied with the totality of the evidence adduced by the Parties."

25. Arising from the above, I find no reasonable ground to allow the application. It is necessary for the parties at this stage to focus on expediting the matter. The oral application for an order for site visit made on February 9, 2023 by counsel for the plaintiffs is hereby dismissed. Costs in the cause. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY ON THIS 28TH DAY OF FEBRUARY, 2023.

CG MBOGO

JUDGE

FEBRUARY 28, 2023

In the presence of: -

CA:Chuma

Mr Gacheru Njanja for the plaintiffs

Mr Lubulellah for the 1st defendant

Mr Menge for the 2nd,3rd and 4th respondents