



Olonana Limited v Mara Rafiki Limited (Environment & Land Case 34 of 2021) [2023] KEELC 15816 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15816 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE 34 OF 2021
EM WASHE, J
FEBRUARY 21, 2023**

BETWEEN

OLONANA LIMITED PLAINTIFF

AND

MARA RAFIKI LIMITED DEFENDANT

RULING

1. This Ruling deals with two applications made orally by the parties herein after the conclusion of the substantive hearing of the evidence.
2. The first application was raised by Counsel of the Defendant who sought to move the Court for a sight visit to the area that was in contention between the parties.
3. The main ground for making this application was for the Court to appreciate the evidence adduced during the hearing and therefore have a true picture of the dispute before it.
4. This application by the Defence Counsel was vehemently opposed by Counsel for the Plaintiff's on the grounds that such a site visit would amount to the re-opening of the Plaintiff's case once again because such a site visit would require tendering of evidence by the witnesses once again.
5. This Court therefore is to decide whether or not it should be moved for a site visit after the conclusion of the Plaintiff's case.
6. According to the *Civil Procedure Rules*, 2010, the proviso that deals with issues of site visits is Order 18 Rule 11.
7. Order 18 rule 11 gives the Court powers to inspect any property or thing which any question may arise.
8. It is settled practice that a site visit can be applied for by the parties to the suit or the Court on its own motion (*locus in quo*).



9. In the case of *Beatrice Ngunyo Ndungu & Another v Samuel K Kanyoro & 2 Others* (2017) eKLR, the Court was of the following view:-

“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.”

10. In *Parkie Stephen Munkasio & 14 Others (suing On Their Own Behalf & On Behalf Of Their Families & All The Other Members Of The Maasai Community Living On L.R.8396 (I.R.11977) Situated In Kedong-versus- Kedong Ranch Limited & 8 Others* (2015) eKLR, the Court was faced with an application similar with the present one.

11. The Court in making its determination had the following to say; -

“At the outset, I need to emphasize that it is the duty of litigants to place material in support of their case. It is not the mandate of the court to go on a fact finding mission. If the petitioners wanted to press the fact of occupation through additional evidence, they had avenues to do so, right from the time the petition was filed, or even after receiving the responses of the respondents, who questioned whether the petitioners were actually in occupation of the suit land, especially given that in *Nakuru ELC No. 21 of 2010*, the court held that the petitioners, or the persons that they represent, were not in occupation. The petitioners had therefore been alerted in good time that the issue of occupation would be contested. They had time to get a land economist or surveyor to go to the ground and file a report. They did not do so. I also note that in the course of these proceedings, the petitioners sought leave to file further affidavits, which leave was granted. They should have taken advantage of this leave to put their house in order. Neither was I impressed by the ground that counsel who held brief for Prof. Ojienda, forgot to apply for a site visit or for leave to file a further affidavit.

26. There was no proof of such instructions, and neither was there any affidavit coming from Mr. Biko (who held brief for Prof. Ojienda at the hearing of the petition), that he had overlooked some instructions. It is a serious issue for a party to apply to call in further evidence after a matter has been heard. The greatest risk, of course, is that the other parties to the suit stand to be prejudiced, for they have already presented their case and have revealed all their cards. It will need to be an extremely exceptional case to allow a party to call additional evidence after a hearing has been closed. I can probably only fathom a situation where the applicant has come across evidence which it could not have come across, despite adequate due diligence, such as where the other party has deliberately concealed it, and which evidence is critical for the determination of the issues in the case. This court would not wish to make precedent that a party is free to apply to reopen his case merely to seal loopholes revealed at the hearing of the suit or after the submissions of the other party. It is for the above reasons that I declined to exercise my discretion and declined to allow the application by the petitioners to reopen the case.

In this case the parties by consensus abandoned the route of surveyors visiting the plots and making a report to assist the court. Parties subsequently proceeded to conduct their cases and closed them. No party has applied to reopen his case. All that remains now is submissions by counsel after which the court retires to write judgment. There is no more room to receive



evidence. In such circumstances a site visit will be of no use. I therefore dismiss the application with costs."

12. This Court wishes to fully associate itself with the sentiments and/or finding of the authority reproduced hereinabove.
13. The parties in this suit have since closed their cases and there is no procedure of taking new evidence by the Court unless a party applies to re-open its case first.
14. There being no such an application before this Court, then an order of site visit would serve no purpose and the same is therefore dismissed.
15. The second application was again orally made by the Counsel for the Plaintiff.
16. The Plaintiff Counsel after the closure of its case applied to have a number of Exhibits produced by the Defendant to be expunged from the Court record.
17. The main ground for the application to expunge those exhibits was that they had been produced and admitted without the makers attending Court and producing the same.
18. The Plaintiff's Counsel stated that in essence therefore, the production and admission of these exhibits without the makers attending Court denied them the opportunity to cross-examine them and prejudiced their Defence.
19. On the other hand, the Defence Counsel was of the view that the Plaintiff cannot force them to call any witness and had in essence slept of their rights to cross-examine the maker of the said Exhibits.
20. Indeed, the Plaintiff's Exhibit No. 19,21 and 24 were produced and admitted as evidence in this Court.
21. These exhibits form part of the proceedings and record of this Court that will assist in the preparation of the judgement.
22. The Plaintiff's decision to now challenge the admissibility and/or legality of exhibits which were admitted without any objection after the closure of the hearing of the case will in the Court's view go into affecting the final determination of the substantive suit.
23. The proper procedure is for the Defence Counsel to raise the issue in their final submissions and the Court proceeds to make its determination regarding their admissibility and/or evidential value as part of the judgement thereof.
24. In essence therefore, a decision to expunge the Plaintiff's evidence contained in the said Exhibits 19,21 & 24 separately without looking at the entire suit would greatly prejudice the Defence case and probably result to an application for re-opening of their case afresh.
25. In conclusion therefore, the Court therefore makes the following Orders in relation to the two oral application made on the 24th November 2022; -
 - A. The defendant's application for a site visit by the court be and is hereby dismissed.
 - B. The plaintiff's application to expunge the defendant's exhibits 19, 21 & 24 from the court's proceedings be and is hereby dismissed.
 - C. The plaintiff is directed to prepare, file & serve their submissions within 30 days from the date of this ruling.
 - D. The defendant is directed to prepare, file & serve their submissions within 30 days upon service of the plaintiff's submissions.



E. The matter will be mention in 60 days time to fix a judgement date thereof.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 21ST FEBRUARY 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of:

Court Assistant: Ngeno

Advocates for the Plaintiff: Keri

Advocates for the Defendant: Okira

