



**Seva & 441 others v Criticos & 5 others (Land Case Petition E002 of 2024)
[2024] KEELC 7112 (KLR) (Environment and Land) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
LAND CASE PETITION E002 OF 2024
EK WABWOTO, J
OCTOBER 31, 2024**

BETWEEN

JUMA SEVA & 441 OTHERS & 441 OTHERS & 441 OTHERS PETITIONER

AND

HON BASIL CRITICOS 1ST RESPONDENT

HE MAMA NGINA KENYAT'TA 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

**THE DIRECTOR LAND ADJUDICATION & SETTLEMENT ... 4TH
RESPONDENT**

THE CHIEF LAND REGISTRAR 5TH RESPONDENT

THE HON ATTORNEY GENERAL 6TH RESPONDENT

RULING

1. On 12th March 2024 this court gave directions in respect to the hearing and disposal of the pending main petition herein. This court directed that the same be canvassed by way of affidavit evidence and written submissions. The court further proceeded to set the matter for 8th May 2024 upon which parties were to highlight their written submissions.
2. The Petitioners have now moved this court vide their application dated 3rd July 2024 seeking for the following reliefs: -
 - a. ... spent.



- b. That in view of the conflicting evidence availed by the parties herein in their affidavits, this Honourable Court directs the Petition herein be heard by way of viva voce evidence.
 - c. That in view of the conflicting evidence availed by the parties herein in their affidavits, this Honourable Court be pleased to order that a site visit be conducted on all that property known as Land Reference No. 10287/7 hereinafter referred to as (the ‘Suit Property’) and a further site visit on Land Title Number Taveta/Lake Jipe Settlement scheme/1394 to ascertain the factual status of the properties.
 - d. That costs of the application be provided for.
3. The application is premises on the grounds on its face and the Supporting affidavit sworn by Juma Seva on the 2nd July 2024.
 4. During the plenary hearing of the application, Learned Counsel Mr. Bwire made oral submissions on behalf of the Petitioners while Learned Counsel Mr. Obok submitted on behalf of the 1st Respondent. The Petitioner and 1st Respondent also filed written submissions in respect to the said application. The Petitioner filed written submissions dated 3rd October 2024 while the 1st Respondent filed written submissions dated 14th October 2024. No written submissions were filed by the other parties.
 5. The Petitioners submitted on the following issues: -
 - i. Whether the Petition should be heard by way of viva voce evidence.
 - ii. Whether a site visit is necessary for the just determination of the dispute between the parties herein.
 6. Citing Rule 20(3) of Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules (Mutunga Rules) and the cases of Singh =Versus= Canada (Minister of Employment and Immigration) (1985) 1 SCR 177, R. =Versus= Higher Education Funding Council, Exparte Institute of Dental Surgery (1994) 1 All E.R. 651 (Q.B) at p. 667, Republic =Versus= Nairobi City Council & Another Exparte Premier Food Industries Limited (2016) eKLR, Re Estate of Joseph Mapesa Nakuku (Deceased) (2019) eKLR and S =Verus= J. Sibanda (Judgment No. CCZ 4/17 Const. Application No. CCZ 14/15) (2017) ZWCC 4 (17th March 2017). It was submitted that courts in determining whether or not to allow viva voce evidence ought to be guided by the following: -
 - a. The importance of the decision to the application and any other affected parties.
 - b. Whether the court will be required to make a significant finding on credibility of the witness (es).
 - c. Whether important facts are disputed or they are real, substantial and material disputes of facts.
 7. It was argued that upon considering the issues raised in the 1st Respondent’s Replying Affidavit dated 3rd July 2024 it was evident that viva voce evidence will allow meaningful participation of the parties. It was argued that the credibility of the 1st Respondent on whether they donated the suit property and whether signed the letter dated 18th March 1997, letter dated 2nd August 2013 and the affidavit sworn on 10th November 2015 can only be tested by way of cross-examination.
 8. In respect to the site visit, it was submitted that the site visit is necessary to enable the court arrive at just determination and ascertain whether the Petitioners are genuine squatters on the suit property or illegal squatters as alleged, whether there are public schools and health centres on the suit property and



- whether the Petitioners have been in occupation of the suit property for considerable time and whether the suit property is sparsely populated as alleged.
9. The cases of *Murithi & Another =Versus= Kigia (2023) KLR*, *E. Kangye =Versus= E. Bwana Kayala HCCS No. 38 of 989* and *Zziwa Ssalongo & Another =Versus= Kafumbe High Court Kampala CA No. 330 of 2012* and Order 18 Rule 11 of the Civil Procedure Rules were cited in support.
 10. The court was urged to allow the said application and grant the orders sought.
 11. The 1st Respondent in opposition to the said application submitted on the following issues: -
 - i. Whether the Petitioners have established a legitimate basis for the court to depart from its earlier directions that the Petition shall be determined by way of affidavit evidence and written submissions.
 - ii. Whether the Petitioners view that there is conflicting evidence in the matter meets the threshold for the court to form a view that there is a genuine need for the proposed site visit and whether such a visit will be of any assistance in the disposition of this matter.
 12. It was argued that there is no application before this court for review on setting aside of the orders issued by this court on 12th March 2024.
 13. It was contended that the main issue in this Petition is whether the 1st and 2nd Respondents surrendered the suit property to the government and not who is in occupation of which property. It was further contended that the Petitioners have not demonstrated that the legal documents exhibiting the purported surrender of the suit property are in custody of someone or are located at the suit property and that it is necessary to compel their production through calling of witnesses to be examined. It was further contended that no cogent reasons have been adduced to warrant this court to proceed by way of viva voce evidence.
 14. In respect to the site visit, it was argued that the Petitioners have not alleged that a site visit will disclose further instruments of surrender and that the same will not serve any useful purpose to this court. The cases of *Beatrice Ngonyo Ndungu & Another =Versus= Samuel K. Kanyoro & 2 Others (2017) eKLR* and *Atek Otech Richard & 11 Others =Versus= Stelco Properties, M-Oriental Bank Limited (Interested Party) (2022) eKLR* were cited in support.
 15. The court has considered the application, written submissions filed and oral submissions made by the parties and the following issues arise for determination:-
 - i. Whether the Petitioners have made a case to warrant the Petition be heard by way of viva voce evidence.
 - ii. Whether this court should direct a site visit to be undertaken herein.
 16. The Petitioner contends that the need to have the Petition be heard by way of viva voce evidence was necessitated by the response that was filed by the 1st Respondent to the main Petition after the court had given its directions as to the hearing and disposal of the Petition.
 17. Rule 20(1)(a) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of *the Constitution*) Practice and Procedure Rules (Mutunga Rules) provides that the hearing of the Petition shall be by way of affidavits and oral submissions unless the court directs otherwise.
 18. In the instant case, the court has considered the Petitioners averments that there is need for a viva voce evidence for the reasons that the 1st Respondent has disputed the letters dated 18th March 1997, 2nd



August 2013 and affidavit sworn on 10th March 2015 and as such it is necessary for the same to be tested on cross-examination to enable the court arrive at a just determination of the matter.

19. This court is also guided by Article 50(1) of *the Constitution* which provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.
20. The hearing of the Petition is yet to commence and there will be no prejudice suffered by the 1st Respondent if the Petition is heard by way of viva voce evidence and in the circumstances the request for the Petition to be heard by way of viva voce evidence is for granting.
21. In respect to the site visit, it is worth noting that 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.
22. In the instant case, 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. See Ohungo J. in the case of Beatrice Ngonyo Ndungu & Cyrus Charles Kamau (Suing as legal representatives of the estate of Francis Ndungu Njuguna (Deceased) v Samuel K. Kanyoro, Attorney General (Sued on behalf of the Commissioner of Lands) & County Government of Nakuru (Environment & Land Case 70 of 2006) [2017] KEELC 3025 (KLR) (27 April 2017) (Ruling).
23. Similarly, in the case of Parkire Stephen Munkasio & 14 others Vs Kedong Ranch Ltd & 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.
24. In the circumstances, it is the finding of this court that the site visit may not serve any useful purposes and the said request is declined.
25. In the end, the Petitioner's application dated 3rd July 2024 is disposed of as follows:-
 - i. The orders issued by this court on 12th March 2024 are hereby varied to allow the main Petition to be canvassed by way of viva voce evidence.
 - ii. The Petitioners are hereby directed to file and serve their list of witnesses, witness statements and bundle of documents within 21 days from today.
 - iii. The Respondents are equally granted 21 days upon service to file and serve their list of witnesses, witness statements and bundle of documents.
 - iv. The request for a visit of the locus in quo is declined.
 - v. The matter shall be mentioned virtually in the next term to confirm compliance and further directions.



vi. Each party to bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 31ST DAY OF OCTOBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

N/A for the Petitioners.

Mr. Obok for the 1st Respondent.

N/A for the 2nd Respondent.

N/A for the 3rd Respondent.

N/A for the 4th Respondent.

N/A for the 5th Respondent.

N/A for the 6th Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

