



**Masidza v Wafula & 4 others (Environment & Land Case
46 of 2018) [2023] KEELC 17412 (KLR) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17412 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 46 OF 2018**

EC CHERONO, J

MAY 12, 2023

BETWEEN

LEAH EGAHZA MASIDZA PLAINTIFF

AND

ALICE NANJALA WAFULA 1ST DEFENDANT

BEATRICE NANJALA KHAOYA 2ND DEFENDANT

PATRICK NANDASABA KAMULANDA 3RD DEFENDANT

LAND REGISTRAR –BUNGOMA COUNTY 4TH DEFENDANT

HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. The Applicant /1st Defendant vide a Notice of Motion application dated 3rd March, 2023 seeks the following orders: -
 1. (Spent)
 2. That the District Land Registrar Bungoma County and Public Surveyor Bungoma County be ordered to fix the boundaries between Land parcel No E. Bukusu /S. Kanduyi/12919,8027 and 12920.
 3. That the Respondent has Servants, and agents, be restrained from interfering with the exercise to determine the boundaries between the parcels.
 4. That the O.C.S Bungoma Police Station be ordered to provide Security during the undertaking of the exercise.
 5. That Costs of the application be provided for.



2. The application is supported by the affidavit of Alice Nanjala Wafula, the Applicant herein sworn on even date and grounds apparent on the face of the said application.
3. By way of a Response, the 2nd and 3rd defendant through the firm of Makokha, Wattanga and Luyali Advocates filed Grounds of opposition and a Replying affidavit sworn by Beatrice Nanjala Khaoya on 15th March 2023 respectively.
4. The Plaintiff through the firm of Omundi Bw'ochiri also filed a Notice of Preliminary Objection in opposition to the said application.
5. When the said application came up for directions on 23/3/2023 the Parties agreed by consent to canvass the same by way of written submissions.

Applicants Case

6. The Applicant in her affidavit in support of the application deposed that the Plaintiff herein instituted this suit against the Defendant's seeking cancellation of Land Titles No E. BUKUSU /S. KANDUYI/12919. 12920 AND 12921 and revert to parcel No EW. BUKUSU/S. KANDUYI/8026 and further order that the transfer made on the 20/04/2004 transferring Title No E. Bukusu /S. Kanduyi/8026 from the name of the Late Clement Festus Masidza to the name of Protus Wafula Masinde be cancelled and the same revert to the name of Clement Festus Masidza .
7. The Applicant /1st defendant further stated that in its judgement delivered on 20/9/2021 this Honourable Court dismissed the Plaintiff's suit with costs to the defendants.
8. She stated that she then sought the intervention of the Land Registrar Bungoma County and Public Land Surveyor Bungoma County to go and determine the boundary for Land parcel No E. Bukusu/ S. Kanduyi/12919,8027 and 12920 while executing the judgment/Decree issued by this Honourable Court.
9. She further stated that the County Land Surveyor Bungoma County vide a letter dated 30/01/2023 invited the parties herein with a Notice of intention to ascertain and fix boundaries for land parcel No E. Bukusu /S. Kanduyi/12919, 9027 and 12920 which was to be conducted on 21/02/2023 at around 12.30p.m.
10. The Applicant also deposed that when the County Land Registrar and the County Surveyor Bungoma went to the ground to ascertain and fix boundaries for land parcel No E. Bukusu /S. Kanduyi/12929, 8027 and 12920 the Plaintiff /Respondent refused to co-operate.
11. She stated that the Plaintiff mobilized armed youths who prevented the County Land Registrar and the County Surveyor Bungoma from ascertaining and fixing the boundaries for the said parcels of land No. E. Bukusu/S. Kanduyi/12919.8027 and 12920.
12. In conclusion, the Applicant/1st defendant stated that on the basis of the matters aforesaid she had come to court seeking the bcourt's intervention to enable the County Land Registrar and the County Surveyor Bungoma to ascertain and fix the boundaries for land parcel No E. Bukusu/S. Kanduyi/12919,8027 and 12920.

2nd And 3rd Defendants

13. The 2nd defendant /Respondent on her own behalf and that of the 3rd Defendant /Respondent deposed that 1st defendant has no claim whatsoever as against him and the 3rd defendant/Respondent to warrant her bring this application against them. The deponent further stated that the 1st defendant's



application is a disguised appeal against the judgment of the Court through the back door and that the same should not be entertained.

14. In addition, the 2nd and 3rd defendants/Respondent contend that the firm of ABK Advocats lacks Locus standi to represent the 1st defendant /Appellant herein as they were never granted leave to represent the 1st defendant/Appellant in place of Lubanga and Associates who represented her during the trial of the suit upto when the judgment was delivered.
15. The 2nd and 3rd defendant's /Respondent's further contended that the District Land Registrar in Company of the County Surveyor visited the land parcel No. E. Bukusu/S. Kanduyi/12929,8027 and 12920 and ruled that there was no boundary dispute between the parties thereto.
16. The 2nd and 3rd Defendants also stated that to the best of their knowledge, the District Land Registrar visited the parcels in question accompanied by the Area Chief and Police Officers from Kanduyi Police Station and there were no armed youths as alleged by the 1st defendant/Applicant herein.
17. The 2nd and 3rd defendant/Respondents further stated that the 1st defendants/Applicants claim has always been a claim of land and not a boundary dispute as alleged in the application which clearly shows that the Honourable court lacks jurisdiction to entertain the same.
18. In conclusion the 2nd and 3rd defendants aver that the application is made in bad faith and is otherwise an abuse of the due process of the Court which greatly prejudice the and must therefore be dismissed with costs.

Analysis and Decision

19. I have considered the Notice of Motion application brought under Certificate of Urgency by the 1st defendant /Applicant dated 3rd March 2023.
20. I have also considered the affidavit evidence, both in support and in opposition to the said application as well as the rival submissions and the applicable law.
21. It is not in dispute that this suit was heard and a judgment was delivered on the merits.
22. It is not also in dispute that in the judgment of this Honourable court delivered on 20.9.2021, the Plaintiff suit was dismissed with costs to the defendants while the counter claim by the 1st defendant / Applicant was also dismissed with no Order as to costs.
23. In her statement of defence and Counter Claim dated 4th September 2018, the 1st defendant Counter Claim against the Plaintiff herein sought for the following orders: -
 - A. Declaration that the 1st Defendant late husband legally bought the suit property from the Plaintiff.
 - B. The Plaintiff legally signed all necessary transfer forms in favour of the 1st Defendant's late husband.
 - C. A refund of the market value of a plot measuring 0.05 Ha initially sold to the 3rd Defendant.
24. What the 1st defendant is claiming in the present application is an Order directing the District Land Registrar and the Public Surveyor, Bungoma County to fix the boundaries between Land parcels No E. Bukusu/S. Kanduyi/12919,8027 and 12920. That claim in my view is a new cause of action not raised by the 1st defendant either in her defence and counter claim which was dismissed by this Court. I agree with counsel for the 2nd and 3rd defendants that the Claim by the 1st defendant has no basis as this Honourable Court is further officio.



25. It is trite law that boundary disputes are resolved through Boundary Dispute Mechanisms provided under Section 18(2) of the Land Registration Act No.3 of 2012 which provides as follows: _

Which provides as follows: -

“(8)(2) The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

26. It is clear from the above provisions of the Law that boundary disputes are the preserve of the Land Registrar. This Court is without jurisdiction to entertain the same and the application is without basis.

27. The 1st defendant/Applicant at paragraph 5 and 6 of her Supporting Affidavit stated that she sought intervention of the Land Registrar Bungoma County and Public Land Surveyor Bungoma County to visit the suit parcels of land No. E. Bukusu/S. Kanduyi/12919,8027 and 12920 and determined the boundary and in a letter dated 30.1.2023 the County Land Surveyor, Bungoma County invited all the parties concerned for purposes of ascertaining and fixing boundaries in the disputed parcels of land. The 1st defendant applicant further stated that when both the County Land Registrar and Public Surveyor visited the suit parcels as scheduled on 21st February, 2023 at 12.30 p.m. the Plaintiff refused to co-operate and mobilized armed youths who prevented the officers from carrying out their mandate,

28. I believe that the 1st defendant /Applicant was in the right trajectory when she asking the Land Registrar to resolve the dispute as mandated in Law and if the meeting called by the Land Registrar and the Public Surveyor was disrupted by anybody , it was incumbent upon the Land Registrar and the Public Surveyor who convened the meeting to make a report to the police or any other Law enforcement offices , There is no report by either the Land Registrar or the Public Surveyor Bungoma County complaining that their meeting on 21st February 2023 at 12.30 p.m was disrupted by any criminal elements.

29. I find the averments by the 1st defendant/Applicant without any basis.

30. The record of these proceedings also shows that the 1st defendant before judgment was represented by the firm of M/S Lubanga & Associates Advocats The 1st defendant/Applicant has brought the present application through the firm of M/S ABK Advocates LLP. There is no leave sought and obtained by the said firm of M/S ABK Advocates LLP to come on record on behalf of the 1st defendant/Applicant as required under order 9 Rule 9 CPR, 2010.

31. I have also seen that immediately after the Plaintiff through her advocates raised the issue in their Notice of Preliminary Objection dated 4th March, 2023 the 1st defendant tactfully filed a Notice to act in person dated 11th April, 2023, even then that cannot cure the anomaly as Order 9 Rule 9 CPR require leave where a party wishes to change advocates or act in person.

32. The upshot of my finding is that the Notice of Motion application dated 3.3.2023 is without merit and the same is hereby dismissed with costs.

It is so ordered.

**READ DELIVERED AND SIGNED IN THE OPEN COURT VIRTUALLY AT BUNGOMA THIS
12TH DAY OF MAY, 2023.**

HON. E.C. CHERONO

ELCL JUDGE



In the presence of

- 1. Mr. Wekesa B holding brief Mr. Makokha for 2nd and 3rd defendants.**
- 2. Leah Egehza Masudza -present**
- 3. Alice Nanjala Wafula -present**
- 4. Lusweti C/A**

