



Okoit (Legal Representative of Honorati Okoit Oswaro) v Osworo & 5 others (Environment & Land Case 114 of 2014) [2023] KEELC 22283 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 114 OF 2014
BN OLAO, J
DECEMBER 18, 2023**

BETWEEN

AUGUSTINE KWENDO OKOIT (LEGAL REPRESENTATIVE OF HONORATI OKOIT OSWARO) PLAINTIFF

AND

**GEORGE OSWORO 1ST DEFENDANT
JOSEPH WANJALA 2ND DEFENDANT
MOSES WANJALA MASINDE 3RD DEFENDANT
VITALIS MALALA 4TH DEFENDANT
AIBU MALALA 5TH DEFENDANT
DAVID SIFUNA 6TH DEFENDANT**

RULING

1. The dispute between the parties herein relates to the ownership of the land parcel No Bukhayo/Lupida/2420 as per the amended plaint filed herein on 3rd June 2019. The record shows that the deceased plaintiff testified before Kibunja J on 23rd July 2013 while his substitute Augustine Kwedho Okoit testified before Kaniaru J on 15th May 2019 following the demise of the plaintiff Honorati Okoit Oswaro on 21st October 2014.
2. When the matter came up on 26th July 2022 before Omollo J for the hearing of the application by the 1st, 2nd, and 3rd Defendants dated 8th June 2022, and in the presence of MR Ikapel counsel for the plaintiff and MR Nyegenye counsel for the 1st, 2nd and 3rd Defendants, the following order was recorded with the consent of both counsel:



- a. “The Surveyor shall visit the locus in quo and determine the boundaries of Bukhayo/Lupida/288 and 2420 and ascertain if there is any encroachment.”
 - b. “The surveyor to ascertain who occupies Bukhayo/Lupida/288 and who occupies L.R. 2420.”
 - c. “Parties to equally share the costs of the exercise.”
 - d. “The surveyor to file his report within 21 days of such visit.”
 - e. “Mention on 21/11/2022 for further orders.”
3. Meanwhile, following the demise of MR Ikapel, Mr Makokha came on record for the plaintiff on 14th April 2023. The court was informed that the 4th, 5th and 6th Defendants did not enter any appearances. It was not until 4th October 2023 that the report by the County Surveyor signed by Mr Titus Ojwang and dated 19th April 2023 was filed as directed by Omollo J.
 4. When the matter came up before me on 6th November 2023, Mr Makokha made an oral application that the report by Mr Titus Ojwang was not a true reflection of what is on the ground and that the plaintiff intended to get a private surveyor to conduct another survey. Mr Odera holding brief for Mr Nyengenyé for the 1st, 2nd and 3rd defendants objected and reminded the court that the report by Mr Titus Ojwang had been prepared following orders issued by Omollo J and the 1st, 2nd and 3rd defendants would object to the exercise being carried out afresh. In any case, this is an old matter filed in 2014 and Mr Titus Ojwang can be cross-examined on his report.
 5. I have considered the oral application by counsel for the plaintiff and the objection by counsel for the 1st, 2nd and 3rd defendants.
 6. It is clear from the record that the order calling for the Surveyor’s report was made by Omollo J on 26th July 2022 with the consent of counsel for the plaintiff and the 1st, 2nd and 3rd defendants. The 4th, 5th and 6th defendants have not entered any appearances in the matter as was indicated by Mr Makokha on 6th November 2023.
 7. The order issued by Omollo J on 26th July 2022 was basically a consent order. By asking this court to allow the plaintiff to engage a private surveyor to prepare another report is an attempt to vary that order which the parties had themselves agreed upon as the best route to resolve their dispute. Such an order can only be varied or set aside by consent of the parties or by the court on the same grounds which can justify the setting aside of a contract which are fraud, misrepresentation, illegality, lack of authority, collusion, or if it was obtained contrary to the policy of the court or without sufficient facts or ignorance of such facts – *Kenya Commercial Bank Ltd -v- Benjob Amalgamated Ltd & another C.A Civil Appeal No 276 of 1997 [1998 eKLR]*. Guided by the above, I see no reason to call for another report as requested by the plaintiff. In any case, the plaintiff has not given me any satisfactory reasons why I should do so.
 8. MR ODERA has submitted in opposition to the oral application, and rightly so in my view, that Mr Titus Ojwang the County Surveyor who prepared the report can be cross-examined on the contents thereof during the plenary hearing.
 9. I also note that the suit was filed in 2014. Article 159 (2) (b) of *the Constitution* demands that “justice shall not be delayed”, Section 1B of the *Civil Procedure Act* requires that proceedings be determined “timely”, while section 19(1) of the *Environment and Land Court Act* requires this court to “act expeditiously” in determining disputes under this Act. Having been filed in 2014, this case is approaching its tenth year in the shelves of this court. It should be expeditiously determined and



not in installments as is happening now. To ensure that there are no further delays, I shall be making appropriate orders shortly.

10. The up-shot of all the above is that having considered the oral application by Mr Makokha seeking to allow the plaintiff to file a separate report by a private surveyor and also having heard Mr Oderain opposition to the same, I make the following orders:
 1. The application is dismissed.
 2. This matter be listed for hearing on 16th April 2024 and the Deputy Registrar to serve all the parties herein including the 4th, 5th and 6th defendants who did not enter appearance.
 3. No orders as to costs.

BOAZ N. OLAO

JUDGE

18TH DECEMBER 2023

RULING DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF DECEMBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

