



**Leah v Alushula & another (Environment & Land Case 46 of 2017)
[2023] KEELC 22124 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22124 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 46 OF 2017
DO OHUNGO, J
DECEMBER 6, 2023**

BETWEEN

KHAYOMBE MERCY LEAH PLAINTIFF

AND

WYCLIFF OMOTO ALUSHULA 1ST DEFENDANT

MARGARETE ANZETSE OMOTO 2ND DEFENDANT

RULING

1. By Notice of Motion dated 11th May 2023, the Plaintiff seeks the following orders:
 1. [Spent]
 2. That this Honourable Court be pleased to order the Kakamega County Surveyor and the Kakamega County Land Registrar to visit Land Title Numbers Butsotho Shibeye/2730, Butsotho Shibeye/2731 and Butsotho Shibeye/751 in the presence of the parties or their representatives and re-establish the boundaries of the said parcels of land and file in this Honourable Court a report showing who is in occupation of each of the said parcels of land.
 3. That the costs of the survey be shared equally by the parties to this suit.
 4. That the parties be at liberty to have their private surveyors present during the survey.
 5. That the Officer Commanding Eshisiru Centre Police Station to provide security during the survey.
 6. That the costs of this application be in the cause.



2. The application is supported by an affidavit sworn by the plaintiff. She deposed that she is the registered proprietor of and land parcel numbers Butsotso Shibeye/2730 and Butsotso Shibeye/2731 and that pursuant to the orders of the court, the Kakamega County Surveyor prepared a report dated 19th October 2018. That she instructed a private surveyor to assist her ascertain the boundaries of the said parcels and that the said surveyor prepared a report dated 24th July 2020 which indicated that the defendants had encroached on the said parcels. She added that the defendants are in unlawful possession of the whole of land parcel number Butsotso Shibeye/2731 and a portion of Butsotso Shibeye/2730. That in view of the recommendations in the Kakamega County Surveyor's report dated 19th October 2018, a new survey involving land parcel numbers Butsotso Shibeye/2730, Butsotso Shibeye/2731 and Butsotso Shibeye/751 should be carried out as sought in the application.
3. The defendants opposed the application through a replying affidavit sworn by the first defendant. He deposed that the defendants are the registered proprietors of land parcel number Butsotso Shibeye/751. That besides the Kakamega County Surveyor's report dated 19th October 2018, which was filed following an order of the court, the court also made an order by consent of parties on 28th September 2020 that the Land Registrar and the District Surveyor revisit land parcel numbers Butsotso Shibeye/2731 and Butsotso Shibeye/751 to determine the boundary and file a report. He added that the two officers visited the parcels, and that the plaintiff was involved as an interested party at the time. That the plaintiff has been filing applications with an intention not to proceed with the hearing of this matter.
4. The application was canvassed through written submissions which both sides duly filed. I have considered the application, the affidavits, and the submissions.
5. The record herein shows that this suit is partly heard, and that the plaintiff testified on 21st September 2022, long after the claim by Peter Kalerwa Lutta had been withdrawn on 1st March 2022. Although the plaintiff became the sole plaintiff following the withdrawal by Peter Kalerwa Lutta, her presence and participation in the suit started much earlier when she swore an affidavit on 8th August 2019 in support of an application through which she sought to join the suit. She was ultimately admitted into the suit as a second plaintiff on 30th April 2020. The survey report that she is referring to is dated 24th July 2020, long before she testified.
6. The record shows that prior to her testimony on 21st September 2022, the plaintiff's counsel told the court that she was ready to proceed with the hearing. The mere fact that the plaint has been amended is no reason to warrant new survey orders when in fact there exist on record survey orders made on 25th June 2018 and 28th September 2020. It is noteworthy that the order of 28th September 2020 was made when the plaintiff was already a party to the case.
7. I find no merit in Notice of Motion dated 11th May 2023 and I therefore dismiss it with costs to the defendants.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Akwala holding brief for Mr Bisonga for the Plaintiff

Mr Mondia holding brief for Mr Atulo for the Defendants

Court Assistant: E. Juma

