



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 197 OF 2010**

**GICHUKI MUCHIRI ..... PLAINTIFF/APPLICANT**

**VERSUS**

**1. WASIKE WALUANDA**

**2. HENRY WALUANDA.....DEFENDANTS/RESPONDENTS**

**3. RASHID WALUANDA**

**RULING**

1. Before me is a Notice of Motion application dated 30/10/2013 brought under **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act (Cap 21)** Laws of Kenya. Gichuki Muchiri (the applicant) has sought orders against Reuben Wasike Waluanda, Henry Waluanda and Rashid Waluanda (the respondents) as follows;

**1. ...(spent)**

**2. That this Honourable Court be pleased to adopt the Land Registrar and District Surveyors report to the court dated 12/2/2012 as a decision of the court.**

**3. That the Honourable court be pleased to direct the O.C.S., Turbo to provide security to the applicant to enable him fence of his land parcel No. Kakamega/Sango/148 at his own cost for purposes of maintaining law and order during the exercise in full implementation of the land Registrar and District Surveyor dated 12/2/2012.**

**4. That a Permanent Injunction restraining the defendants, their agents or assigns or servants from interfering with land parcel No. Kakamega/Sango/148 in any manner whatsoever be granted and the plaintiff claim against the defendants be deemed settled.**

**5. That the defendants be ordered to respect the boundary planted by the Land Registrar and the District Surveyor.**

2. The applicant has also asked for costs of the application and the suit.

3. The application is based on the ground on the face of the motion and is also supported by the affidavit by the applicant sworn on 30/10/2013.

4. The applicant has deposed that after filing the suit, the parties respective advocates recorded consent orders on 11/3/2011 and 12/4/2011 that the District Land Registrar and the District

- Surveyor visit parcels of land known as Kakamega/ Sango/148 and 149 and determine the boundary between the two parcels of land. The said officers visited the parcels of land, determined the boundary and filed a report in court on 6/7/2012.
5. The applicant deposes that no party has filed an objection to the report and therefore the report should be adopted as a decision of the court so that the adoption can give the determination of the boundary some force of law for purposes of it being respected by parties. According to the applicant, the report confirmed that the defendants had encroached onto his parcel of land (No.148) to his detriment.
  6. The applicant further deposed that even after the determination of the boundary, the defendants have continued to trespass onto his parcel of land which has necessitated the filing of the present application to bring this matter to final conclusion.
  7. The respondents have opposed the application and filed a replying affidavit sworn on 2/12/2013. The respondents depose that the Land Registrar and Surveyor visited the parcels of land on 8/2/2013 but the respondents were prevented by AP Officers from Likuyani AP Camp from participating in the exercise of establishing the boundary between the two parcels. This according to the respondent denied them an opportunity to participate in the exercise and were not aware that a report had been filed in court. They state that they are dissatisfied with the exercise.
  8. The respondents state that the report filed in court is not a true reflection of the position on the ground. They oppose the applicant's application saying that the applicant is in essence taking a short cut to have the matter concluded in his favour without evidence being tendered in court. The respondents have denied interfering with the boundary between the two parcels of land Nos. Kakamega/Sango/148 and 149. The respondents have therefore asked that the applicant's application be dismissed with costs.
  9. Parties elected to dispose of the application by way of written submissions which are on record. The applicant submitted that according to the Land Registrar and District Surveyor's report, the issue of the boundary dispute and encroachment onto the plaintiff's parcel of land has been conclusively determined. According to counsel, the report by the two officers confirmed that the common boundary had been interfered with. They identified the correct position and corrected the anomaly and asked parties to respect the boundary as restored.
  10. The applicant's counsel is of the view that on the face of the Report, the matter has conclusively been determined and therefore the application should be allowed.
  11. Counsel for the respondent has, on behalf of the respondents submitted, that the orders sought by the applicant cannot be granted through an interlocutory application but through the substantive suit which is still pending. Counsel also submitted that the court cannot grant orders that have not been sought in the substantive suit. Counsel further submitted that the respondents have filed a defence to the suit which raises serious triable issues and it is important that those issues be determined in a full hearing. They have therefore urged that the application be dismissed with costs.
  12. I have considered this application, the affidavits by parties, submissions by counsel and authorities relied on.
  13. The application seeks an order adopting the report of the Land Registrar and District Surveyor essentially as a judgment of this court, and an order directing the police to ensure compliance with the report by the Land Registrar and District Surveyor. The applicant also seeks an injunction against the respondents.
  14. The respondents have opposed this application and argued that they did not participate in the exercise of determining the boundary between the two parcels of land namely Kakamega/Sango/148 and 149.
  15. The respondents have argued that they were prevented by the police to participate in the exercise and do not recognise that report. The respondents have also taken issue with the applicant for seeking to obtain substantive orders by way of an application. They say that they want the matter heard and determined on merit.
  16. The applicant on his part argues that the issue has been conclusively and substantially determined by the report and therefore there will be no need to proceed with the main suit.
  17. The applicant has sued the respondents seeking an injunction arguing that the defendants have trespassed on to his parcel of land. The defendants have denied this.

18. Although there is a report by the Land Registrar and District Surveyor filed in court on 24/7/2012, the respondents have said that they were denied an opportunity to participate in the exercise that culminated into the report. Whether this is true or not is a matter of evidence.
19. This is a land issue and whether the respondents have trespassed onto the applicant's parcel of land or not is a fact that has to be borne by evidence. That is where the Report by the Surveyor and Land Registrar may come in. But I do not think the report should be adopted in the manner the applicant seems to suggest. The Report forms part of evidence that may be tendered in court in accordance with the rules of evidence and there is no short cut to that.
20. It is regrettable that valuable time is spent on applications instead of setting the main suit for hearing. Parties must realise that suits should be determined expeditiously either by consent of parties or through evidence unless it is too obvious that the hearing of the suit will be a waste of time.
21. Consequently, the applicant's application dated 30/10/2013 is declined and is hereby dismissed with costs.
22. Parties are hereby ordered to comply with pre-trial procedures and take appropriate steps to have the matter fixed for hearing without delay.

*Dated and delivered at Kakamega this 23<sup>rd</sup> day of January, 2015*

**E. C. MWITA**

**J U D G E**