



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 100 OF 2014.

PANGRASIO MUKHWANA OKANA.....PLAINTIFF/APPLICANT.

=VERSUS=

JESSE NDUBI NAKHUMWA.....1ST DEFENDANT

PAUL ONYANGO MKADO.....2ND DEFENDANT

R U L I N G .

The Applicant, **JESSIE NDUBI MUKHWANA**, filed the application dated 5th February, 2015 against the Respondent, **PANGRASIO MUKHWANA OKANA**, seeking to have the plaint struck out and the suit dismissed for being an abuse of the court's process in view of the Land Registrar's report dated 20th August, 2014. The application is supported by the affidavit of Francis Omondi, counsel for the Applicant, sworn on 5th February, 2015.

The Respondent opposed the application and filed the replying affidavit sworn on the 31st March, 2015. The application came up for hearing on 5th May, 2015. Mr. Omondi for the Applicant and the Respondent presented their submissions.

The court has considered the grounds on the application, contents of the supporting and replying affidavits and submissions and find as follows;

1. That the Respondent commenced this suit through the plaint dated 6th May, 2014 praying for;
 - a. The Defendants be enjoined against encroaching onto land parcel South Teso/Angoromo/920.
 - b. That the County Surveyor be ordered to rectify the common boundaries between land parcels South Teso/Angoromo/920, 7786 and 8474.
 - c. Costs.
2. That the Respondent then filed the notice of motion dated 20th June, 2014 seeking for temporary injunction against the Defendants pending the hearing and determination of this suit. When the application came up for hearing, inter partes on 3rd July, 2014, the parties were represented by counsel and a consent referring the matter to the County Land Registrar and Surveyor to visit parcels South Teso/Angoromo/920, 7786 and 8474 and confirm their boundaries was entered into. It was also agreed that each party be at liberty to appoint a survey witness the exercise.
3. That the Land Registrar and Surveyor carried out the exercise on 20th August, 2014 and

forwarded their report through the letter dated 5th November, 2014. The reports shows that the boundaries to the three parcels were clearly marked on the ground and after measurement, parcels South Teso/Angoromo/920, 7786 and 8474 were found to be 0.1, 0.05 and 0.02 hectares respectively. The Land Registrar therefore came to the conclusion that;

“ There is no evidence of change of boundaries to warrant a boundary dispute. The acreages for each

Parcel has been confirmed to be proper as originally registered. Each party ordered to maintain the boundaries as currently established.”

4. The consent order referring the matter to the Land Registrar and surveyor effectively meant prayer (b) of the paint dated 6th May, 2014 had become spent albeit before the taking of oral evidence. It is therefore not among the prayers that the court would consider to grant even if matter was to continue to taking of oral evidence.
5. That the Land Registrars report dated 5th November, 2014 settled the question of the common boundaries between the three named parcels. There was no evidence of encroachment noted or established amongst the three parcels and in view of the provisions of section – of Land Registration Act 2012, that position is not likely to be changed by the parties oral evidence.
6. That as the report from the Land Registrar dated 5th November, 2014 shows that the Defendants have not encroached onto the Plaintiff’s land, there would be no basis of injuncting them as prayed in prayer (9) of the plaint. There is therefore no basis of this suit getting oral evidence taking as no triable issues remain between the parties. The Plaintiff/Respondent should have taken the step of seeking to withdraw the suit after the Land Registrar’s report but did not. The application dated 5th February, 2015 therefore has merit and is allowed and the following orders issued;
 - a. That plaint dated 6th May, 2014 is hereby struck out.
 - b. The Plaintiff’s suit is dismissed with costs to the Defendants.

It is so ordered.

S.M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 27TH DAY OF MAY, 2015.

IN THE PRESENCE OF;

PLAINTIFF/RESPONDENT..... PRESENT.....

1ST DEFENDANT/APPLICANT.....ABSENT.....

2ND DEFENDANT..... ABSENT.....

COUNSEL..... ABSENT.....

JUDGE.