



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL CASE NO. 63 OF 2006

PETER NDERITU GATUMBI

MARGARET OTIENO

HADIJA SHIRE..... PLAINTIFFS

VERSUS

1. KHADIJA OMAR

2. ZAINABU UMAR ABDI

3. JONATHAN NYONGESA NAMULALA

4. HELLEN NAFULA KAMWERE

5. MUNICIPAL COUNCIL OF BUNGOMA

6. COMMISSIONER OF LANDS

7. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Hadija Shire, the 2nd plaintiff has moved this court under section 3, 3A & 63 (1) of the civil Procedure Act and all other enabling provisions of the law seeking the following orders;

- a. That is pleases the honourable court to order the district surveyor to visit and establish ground measurements of plots namely **BUNGOMA MUNICIPALITY 398** and 854 respectively and file a report within 30 days.
- b. That the said report to establish if there is any encroachment or at all on plot namely **BUNGOMA MUNICIPALITY 398**.
- c. The OCS Bungoma police station to provide security.

2. Her application is supported by five (5) grounds listed on the face of the motion and the supporting affidavit. In paragraph 3 of the affidavit, the applicant deposes that **“each of us has tried to get the survey report but whenever the facts are presented, we are all suspicious,”** She wishes all parties to participate in one independent process to establish the plots' true measurements and determine if the

building on plot no.854 has encroached on plot no. 398.

3. The application is opposed by the 1st – 4th defendants/respondents. The 1st and 2nd defendants/respondents through a replying affidavit sworn by Khadija Omar deposes that there was a site visit undertaken by the District Land Registrar, District Surveyor, District Physical planner, Municipal Council Engineer, the District Land Officer all of Bungoma, the applicant and himself on 27th July 2006. After this visit a report was prepared copy of which he has annexed as **K01**. He deposed further that the same report was produced by the applicant as pex. 8. He urged the court to dismiss the application. The 4th respondent also stated that they filed replying affidavit on 29th May 2014 and served upon the applicant on 3rd June 2014. However I was not able to trace it in the court file. I have noted the fact that the 4th respondent is opposing the application.

4. I have considered the submissions of the counsels for the parties and perused the pleadings filed. It is true as pleaded by the 1st defendant that there was a site visit made by the Government lands officers in the presence of both parties on 27th July 2006. The report made after that visit was produced by the plaintiff as exhibit 8 during her testimony. She has not told this court vide this application or her affidavit in support thereof what those officers failed to do during their visit on 27th July 2006 that she wants them to return to do. By producing the report, an inference is drawn that she agrees with its contents.

5. Under Sec. 21 (2) of the Registered land Act cap 300 (repealed), the registrar is mandated to determine and indicate the position of the uncertain boundary. This position is replicated in sec. 18 (3) of the Land Registration Act no. 3 of 2012. Under the repealed law which was operational when the site visit was made, section 150 provided room for parties aggrieved by such decision to appeal the decision of the District Land Registrar to the Chief Land Registrar. In this instant, no such appeal was preferred by the applicant. As a matter of fact, she seems to agree with the report hence her decision to produce it as part of her evidence. It is unconscionable for the applicant to require the land registrar to repeat the exercise without giving any reasons why.

6. The applicant still has the option to call either the District Land Registrar and surveyor as witnesses. However repeating the exercise even if the applicant undertakes to meet the costs in my view is not justified in the circumstances. Consequently I find this application as lacking in merit and proceed to order it dismissed with costs to the 1st – 4th defendants/respondents.

DATED and **DELIVERED** in Bungoma this 29th day of sept.2014

A. OMOLLO

JUDGE.