



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 59 of 2004

NORAH KEMUNTO CHACHA AND

JOSEPH NYATONDU CHACHA (suing as Legal

Representatives of the estate of

**SAMMY CHACHA NYATONDU(deceased).....PLAINTIFF
VERSUS**

GITIBA BURUNA.....1ST DEFENDANT

LAND REGISTRAR MIGORI/

KEHANCHA DISTRICTS.....2ND DEFENDANT

JUDGMENT

1.What is before me is the Plaintiffs' application by way of Notice of Motion dated 1st October, 2012 seeking an order that this court do enter judgment in favour of the Plaintiffs in terms of the award by the District Land Registrar, Kuria East/West Districts dated 20th August, 2010. The Plaintiffs' application is

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brought under Order 46, Rule 18 of the Civil Procedure Rules, 2010. This suit arose out of a dispute over the boundary of the parcel of land known as L.R.No. Bukira/Bwisaboka/738(Plot No.738) owned by **Sammy Chacha Nyatonde (deceased)** (original Plaintiff) and the parcel of land known as L.R.No. Bukira/Bwisaboka/721(Plot No.721) owned by the 1st defendant. The deceased had claimed that the 1st defendant had extended the boundary of Plot No.721 and in the process encroached into Plot No.738 by annexing a portion thereof measuring approximately 0.45 hectares. The deceased in his Plaint dated 6th April, 2004 sought an order that the 2nd defendant do carry out a re-survey of Plot No.738 and Plot No.721 for the purposes of establishing a true and accurate boundary of the two properties and thereafter to effect appropriate changes in the registers of the two parcels of land. The 1st defendant filed a defence denying the deceased's claim

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in its entirety. The 2nd defendant did not file a defence to the suit. The deceased died on 14th August, 2007. The Plaintiffs herein were appointed as his legal representatives on 23rd September, 2008 and on 9th December, 2008, they were granted leave by the court to be joined in this suit as Plaintiffs in place of the deceased.

2. On 11th May, 2010, the parties agreed by consent to refer the dispute to the District Land Registrar/Kehancha/Migori Districts for determination. It was agreed that the said Land Registrar with the assistance of the area District Surveyor should visit Plot No.738 and Plot No.721 for the purposes of re-surveying the same and establishing their common boundary. It was agreed further that the said Land Registrar should file his report in court within ninety (90) days. An appropriate order was extracted and issued by the court on 2nd June, 2010 in accordance with the said consent and served upon the said

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Land Registrar for appropriate action. The District Land Registrar, Kuria East/West Districts who was in charge of the area where the said properties are situated as at the date of the said consent order and upon whom the court order aforesaid was served acted in accordance with the said order and submitted his report dated 20th August, 2010 to court on 30th August, 2010. In his report, the said Land Registrar concluded upon re-survey of Plot No.738 and Plot No.721 that the boundary fence that was put between Plot No.738 and Plot No. 721 did not reflect the true boundary between the two plots. It was his finding that Plot No.721 had encroached into Plot No.738 with a very wide margin. While at the site, the said land registrar established the true boundary between the two plots in accordance with the relevant maps for the area and fixed the same with sisal plants. He recommended that the old boundary fence be removed so that the two plots may be separated by

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the new established boundary.

3. The Land Registrar's report aforesaid was read to the parties by **Hon. Justice Makhandia** on 2nd March, 2011. The 1st defendant was aggrieved by the said report and moved the court by an application dated 16th March, 2011 under Order 46, Rule 15 to have the same set aside. The 1st defendant's application was heard before **Hon. Justice R. Sitati** who dismissed the same with costs on 14th June, 2012. The Plaintiffs have stated in their affidavit in support of the present application that there is no other application pending challenging the said report and that the 1st defendant did not seek leave of the court to appeal against the decision of the court made on 14th June, 2011 aforesaid. It is now the Plaintiffs prayer that the matter having been referred to the Land Registrar aforesaid by the parties for arbitration and the said registrar having rendered his award (report) which a ward has

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not been reviewed or set aside, this court should proceed under Order 46, Rule 18 of the Civil Procedure Rules, 2010 to enter judgment in accordance with the said award.

4. The application herein was served upon the 1st defendant. The 1st defendant did not file any pleading in opposition to the same. Mr. Masese advocate who appeared for the 1st defendant at the hearing of the application informed the court that the 1st defendant having failed in his application to set aside the said

award could not oppose the plaintiffs' application seeking to have judgment entered in terms thereof. Due to the foregoing, I am of the view that there is no hindrance to the present application. I hereby allow the application dated 1st October, 2012 and enter judgment for the Plaintiffs against the 1st defendant as follows;

i. I declare that the boundary between the parcels of land known as BOKIRA/BWISABOKA/738 and BOKIRA/BWISABOKA/721 shall be that which was established and fixed using sisal plants by the District Land Registrar, Kuria

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East/West Districts on 16th August, 2010;

ii. the 1st defendant should forthwith and in any event within 21 days from the date hereof remove the fence that constituted the old boundary(if it has not been removed) to the new boundary referred to in (i) above failure to which the Plaintiffs shall be at liberty to do so and in this regard, the Plaintiffs may seek the assistance of the court if necessary;

iii. a copy of the decree arising from this judgment shall be served upon the 1st defendant;

iv. the Plaintiffs shall have the costs of this suit.

Signed, dated and delivered at KISII this 26th day of April, 2013

**S. OKONG'O,
JUDGE.**

In the presence of:-

Mr. Nyambati holding brief for Ombachi for the Plaintiffs

Mr. Nyawencha holding brief for Masese for the 1st Defendant

Ombasa Court Clerk.

**S. OKONG'O,
JUDGE.**

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