



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

**CIVIL SUIT NO. 190 of 2009**

**JOHN AMUKHUBU NAKHUNGU ::::::::::::::::::::::::::::::::::::::: 1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**  
**PATRICK PECHI NAKHUNGU ::::::::::::::::::::::::::::::::::::::: 2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**  
**CHRISTINE APONDO ONDIECHI ::::::::::::::::::::::::::::::::::::::: 3<sup>RD</sup>**  
**PLAINTIFF/APPLICANT**  
**CLEOPAS OKANGA NAKHUNGU ::::::::::::::::::::::::::::::::::::::: 4<sup>TH</sup>**  
**PLAINTIFF/APPLICANT**  
**BONFACE WETABA NAKHUNGU ::::::::::::::::::::::::::::::::::::::: 5<sup>TH</sup>**  
**PLAINTIFF/APPLICANT**

**V E R S U S**

**PROTUS OLUOCH MALALA ::::::::::::::::::::::::::::::::::::::: 1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**  
**JUSTINO OREMBO NAMUNWA ::::::::::::::::::::::::::::::::::::::: 2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**  
**EMMANUEL OMOTO NAMUNWA ::::::::::::::::::::::::::::::::::::::: 3<sup>RD</sup>**  
**DEFENDANT/RESPONDENT**  
**ERNEST SINGA NAMUNWA ::::::::::::::::::::::::::::::::::::::: 4<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**  
**RAMADHAN WANGA ODNIECHE ::::::::::::::::::::::::::::::::::::::: 5<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**  
**DISTRICT LAND REGISTRAR – KAKAMEGA ::::::::::::::::::::::::::::::::::::::: 6<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**  
**DISTRICT SURVEYOR – KAKAMEGA ::::::::::::::::::::::::::::::::::::::: 7<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**  
**THE HON. ATORENY GENERAL ::::::::::::::::::::::::::::::::::::::: 8<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**R U L I N G**

**1.** In the Plaintiff dated 17.12.2009, the Plaintiffs have raised the issue of alleged fraud/collusion with regard to the registration land parcels nos. **S/Wanga/Lureko/184, 185 and 186** and certain orders are sought with regard thereto.

2. Before me presently is a summons premised on the provisions of Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules as well as **section 128** and **section 136** of the Registered Land Act, Cap 300 Laws of Kenya. The specific prayers sought are;

1. ***“THAT service of this application be dispensed with, the same be certified urgent and be heard ex parte in the 1<sup>st</sup> instance.***
  2. ***THAT pending the hearing of this application interparties, there be an order restraining and or inhibiting any registration, dealings with title numbers S. WANGA/LUREKO/186 and 184.***
  3. ***THAT pending the hearing of this application interparties, there be an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, their agents, & servants from interfering, uprooting or in any other way dealing with the Applicant’s crops on Land Parcel no. S. WANGA/LUREKO/185 as it existed before 15<sup>th</sup> April 2009 and the status quo pertaining before 15<sup>th</sup> April 2009 be maintained.***
  4. ***THAT pending hearing and determination of the suit there be an order restricting and or inhibiting any registration, dealings with title numbers S. WANGA/LUREKO/186 and 184.***
  5. ***THAT pending hearing and determination of this suit, there be an order of injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents, their agents & servants from interfering, uprooting or in any other way dealing with the Applicant’s crops on Land Parcel No. S. WANGA/LUREKO/185 as it existed before 15<sup>th</sup> April 2009 and the status quo pertaining before 15<sup>th</sup> April 2009 be maintained.***
  6. ***THAT the OC.S. Mumias Police Station do ensure the compliance with these orders.***
  7. ***THAT costs of this application be provided for.”***
3. The grounds in support are that;
- (a) ***“That the survey carried out has affected people who were not parties to any suit.***
  - (b) ***That the Respondents are threatening to destroy the Applicant’s crops any time from now.***
  - (c) ***That the District Land Registrar Kakamega, the District Surveyor – Kakamega and the Respondents have colluded to alter the acreage of the suit lands herein with the view of defrauding the Applicants.***
  - (d) ***That the actions taken by the District Land Registrar and Surveyor-Kakamega are an abuse of the court process.***
  - (e) ***That the Applicants stand to suffer irreparable loss unless the orders sought are granted.***
  - (f) ***That the subject matter – LAND PARCEL NO. S. WANGA/LUREKO/185 is in the process of being wasted and there is likely to be a serious breach of peace.”***

4. In his Affidavit sworn on 17.12.2009, John Amukhubu Nakhungu has deponed that;

- i) Parties had appeared before an unnamed Land Disputes Tribunal and at the time, land parcel no.186 was said to be measuring 4.0 acres while parcel no.185 was measuring 38.8 acres.
- ii) upon the Tribunal’s decision being adopted as a decision of the subordinate court, the 6<sup>th</sup> and 7<sup>th</sup> Defendants altered the acreage of parcel no. 186 to 4.0 hectares.
- iii) the 7<sup>th</sup> Defendant on the basis of the allegedly unlawful decision taken above, proceeded to create

boundaries around title no. 186 on the erroneous size of 4.0 hectares and;

iv) the 7<sup>th</sup> Defendant altered the Map sheet to indicate the alterations made.

v) there is danger of the crops planted on parcel no. 185 being uprooted in a bid to annex parts of it to parcels nos.184 and 186 with the later intention of selling the same to third parties.

5. Chitembwe J. on 17.12.2009 granted interim orders on the basis of the above complaints and in response, Ramadhan Wanga Ondieche 2<sup>nd</sup> Defendant the 5<sup>th</sup> Defendant filed Replying Affidavits sworn on 7.1.2011 and on 18.1.2010 respectively.

6. On his part, the case by the 2<sup>nd</sup> Defendant on his behalf and on behalf of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants is that parcel no. 184 was/is registered in the names of Christopher Namunwa (deceased) and that it measured 30.10 acres.

7. That when the 6<sup>th</sup> and 7<sup>th</sup> Defendants visited the disputed parcels of land, they merely acted to demarcate the boundaries as occupied by the parties. The 1<sup>st</sup> Applicant was dissatisfied and has waged a campaign to protest the demarcation and was arrested and charged in Mumias SRM's Court Criminal Case no. 353 of 2008 and was party to Kakamega HCCC.568 of 2008 and Kakamega CM's Court Misc. Award no. 96 of 2002 touching on the disputed parcels of land.

8. Regarding the 5<sup>th</sup> Defendant, his answer to the Plaintiff's claim is that title no.186 is registered in his names and it measures 4.0 hectares on the ground as per the 4<sup>th</sup> and 5<sup>th</sup> editions of the Map sheet. That the Mumias Land Disputes Tribunal's decision was adopted by the subordinate court on 16.6.2008 and when the 6<sup>th</sup> and 7<sup>th</sup> Defendants visited the disputed parcels of land, they found that parcel no. 186 measured 4.0 Hectares and not 4.0 Acres and the title was amended accordingly.

9. Further, that in Kakamega HC.MISC. Application no. 96/2008 the issues in contest were all determined and so the present Application is res judicata.

10. That no fraud was committed by either of the Defendants and the Application is an abuse of court process. It is also contention that the crops planted by the Applicants are intact and there is no intention to sub-divide the land as alleged. It is the 1<sup>st</sup> Applicant, it is urged, who has sold 3 acres of land to one Darius Andika and the 3 acres are in parcel no. 186 as recreated.

11. That therefore the Application should be dismissed with costs to the Respondent as it was brought in bad faith.

12. I have read the submissions by the advocates for the parties and it is clear to me that;

13. Firstly, what triggered the present suit was the action of the 6<sup>th</sup> and 7<sup>th</sup> Defendants visiting the disputed parcels of land and fixing the boundaries between them. The net result was that title no.186 was reduced in size from 4.0 hectares as was the original size to 4.0 acres. New map sheets were created to actualize that fact and the end of that action was that any interference with title no. 186 or 185 would ultimately affect titles no. 184 and 185.

14. Secondly, the Applicants made out a case to warrant a grant of an interlocutory information and have a prima facie with a probability of success? I am satisfied that they have done so because serious fraud is alleged in the Complaint and in the Application. It is urged that the 6<sup>th</sup> and 7<sup>th</sup> Defendants were party to the alleged fraud. They filed no response to the Application and so the Applicants' contentions are not contested at all. Granted, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have argued that the 6<sup>th</sup> and 7<sup>th</sup> Defendants acted lawfully but how can they speak for the latter? The latter were served, entered an appearance through the Attorney General and filed a Statement of Defence but failed to file a Replying Affidavit in answer to all these serious matters.

15. To mind, when land that measures 4.0 hectares is suddenly reduced to 4.0 acres and when fraud and collusion is alleged and the party said to have been fraudulent, fails to answer the claim, then prima facie, the party alleging fraud has made out a case that prima facie looks successful. Further, there is the risk of the party with increased acreage, disposing of parts of it and the loss to the offended party would not be adequately compensable in damages.

16. Thirdly, it is unclear to me what the reason for changing the acreage was because I have not been shown any order told that effect even though parties were before the Land Disputes Tribunal prior to the filing of this suit.

17. In the end, the balance of convenience favours the Applicants and I will exercise discretion and grant prayers 4 and 5 of the Application dated 17.12.2009.

18. The Applicants will have the costs thereof.

19. Orders accordingly.

*Delivered, dated and signed at Kakamega this 17<sup>th</sup> day of March, 2011*

**ISAAC LENAOLA**  
**J U D G E**