

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 201 OF 2010

CHARLES LUTTA KASAMANI PLAINTIFF

V E R S U S

PETER OKWOMI MBAYI & 9 OTHERS DEFENDANTS

R U L I N G

The plaintiff filed suit against the defendants seeking, *inter alia*, orders that the District Land Registrar Kakamega be ordered by the court to demarcate the boundary of the plaintiff's parcel of land in such a permanent manner as he may direct and within a specified time. The dispute between the plaintiff and the defendants relate to the determination of the boundary between parcel No. Wanga/Khalaba/892 and parcels Nos. North Wanga/Khalaba/891 and 178. Although the nine defendants have been served, it is only the 1st defendant who has entered appearance and filed a defence. Contemporaneous with filing suit, the plaintiff filed an application pursuant to the provisions of Section 3A of the Civil Procedure Act seeking orders of this court to order the Land Registrar Kakamega to demarcate the boundary of the plaintiff's parcel of land known as North Wanga/Khalaba/892. The grounds in support of the application as stated on the face of the application. The application is opposed by the 1st defendant. The 1st defendant filed grounds in opposition to the plaintiff's application. The 1st defendant, *inter alia*, stated that the grant of the orders sought by the plaintiff would tantamount to the court deciding the entire suit at an interlocutory stage.

At the hearing of the application Mr. Kasamani for the plaintiff (he is appearing for himself) and Miss Luyali for the 1st defendant told the court that they would rely on the pleadings filed in support of their respective cases. I have read the said pleadings. It is clear that the dispute between the plaintiff and the defendants relate to the creation of a road of access between their respective parcels of land and also determination of the boundary of the plaintiff's parcel of land. The issue in regard to whether the plaintiff is entitled to the order for the suit parcel of land to be surveyed so that its boundaries can be determined, is an issue that can only be determined by this court after the full hearing of the case. It was not clear from the plaintiff's application whether the plaintiff was applying for summary judgment or for the striking out of the defence filed by the 1st defendant. It was evident that the thrust of the plaintiff's application is to circumvent the legal process that requires issues in dispute to be heard and determined in a particular manner. I agree with the 1st defendant that if the court were to grant the plaintiff's application, it would have in effect determined one of the main issues in dispute between the plaintiff and the 1st defendant without the substantive hearing of the case.

The application dated 11th April 2011 cannot be granted because it would unprocedurally preempt the hearing and determination of the suit. The same is dismissed with costs to the 1st defendant.

DATED AT KAKAMEGA THIS 31ST DAY OF MAY 2011

**L. KIMARU
J U D G E**