



**Republic v County Land Registrar - Kakamega; Wafula (Interested Party);
Kwova (Exparte Applicant) (Environment and Land Miscellaneous Application
1 of 2022) [2023] KEELC 21347 (KLR) (7 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2022
DO OHUNGO, J
NOVEMBER 7, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR - KAKAMEGA RESPONDENT

AND

**LEONARD WECHULI WAFULA ALSO KNOWN AS WECHULI
WAFULA INTERESTED PARTY**

AND

IDI OPANDA KWOVA EXPARTE APPLICANT

RULING

1. On 8th November 2017, the parties herein recorded a consent pursuant to which the ex parte applicant’s Notice of Motion dated 19th December 2016, pursuant to which he sought an order of mandamus to compel the respondent “to determine the boundary dispute between the ex parte applicant and the interested party in respect of land parcel Nos. Bunyala/Namirama/411 and Bunyala/Namirama/931” was allowed with costs in the cause.
2. Since Notice of Motion dated 19th December 2016 was the substantive case before the court, the consent in essence concluded the case. Subsequently, I made an order on 8th March 2023 that in view of the orders made on 8th November 2017, the case had been concluded. Needless to state, that is not the same as ordering the file closed.
3. By Notice of Motion dated 31st May 2022, the ex parte applicant is seeking the following orders:



- a. That orders issued herein on 8th March, 2022 marking this matter or file as closed or settled be reviewed, set aside, varied and/or vacated and this matter be reviewed.
 - b. That this Honourable Court be pleased to issue a Notice to Show Cause against the respondent to show cause why contempt of court proceedings should not be commenced against the respondent and why he/she should not be punished for contempt of court and/or for blatant disobedience of this Honourable Court's orders of mandamus issued herein on 14th November, 2017.
 - c. That this Honourable Court be pleased to find upon hearing of the Notice to Show Cause that the respondent - the County Land Registrar Kakamega is in contempt of court and/or blatantly disobeyed this Honourable Court orders of mandamus issued on 14th November, 2017 and to proceed to mete out the requisite punishment for the said contempt.
 - d. Cost of this application be provided for.
4. The application is supported by an affidavit sworn by Iddi Opanda Kwova in which he deposed that following the orders made on 8th November 2017, the Kakamega County Land Registrar and by extension the County Surveyor were required to determine the boundary dispute. That a surveyor by the name of Dr Billy E. Nyoje then visited the site and determined through a report dated 20th May 2021 that the interested party had encroached into 0.14 hectares of the ex parte applicant's land.
 5. He further deposed that when the Kakamega County Land registrar and Surveyor visited the two parcels, they did not mark the boundaries but instead advised the parties to adopt and maintain existing boundaries, yet they were meant to mark out and plant the correct boundaries.
 6. In response, Leonard Wafula Wechuli filed a replying affidavit which he swore on 4th July 2022. He deposed that the application is an abuse of the court process since the land registrar and the surveyor in compliance with the orders of the court visited the parcels and established that boundaries had not been interfered with and that there was sisal and trees setting out boundaries thus making it not necessary to mark and plant fresh ones.
 7. The application was canvassed through written submissions which both the ex parte applicant and the interested party filed. I have considered the application, the affidavits, and the submissions.
 8. The ex parte applicant contends that the order of 8th November 2017 required the respondent to mark out and plant the boundary between the two parcels. That is certainly not the accurate position. The consent between the parties required the respondent

“to determine the boundary dispute between the ex parte applicant and the interested party in respect of land parcel Nos. Bunyala/Namirama/411 and Bunyala/Namirama/931”.

If the parties wanted the respondent

“to mark out and plant the boundary between the two parcels,”

nothing would have been easier than to put it expressly so in the consent. It seems to me that the ex parte applicant wants to stretch the consent beyond what it stated. A consent is equivalent to a contract and parties are deemed to have fully and consciously weighed every provision in it.

9. The ex parte applicant concedes that the respondent and the district surveyor attended the site on 14th November 2018 and filed a report dated 8th February 2019. I have perused the report. It states that there was an existing boundary between the parcels which was clearly defined by live fences. Although



ground measurements showed that both parcels were smaller by 10 metres compared to the map, it must be remembered that the registry index map is not an authority on boundaries and that the ground position takes precedence especially where boundary features are well defined, as was the case herein.

10. I am persuaded that the respondent discharged his mandate as per the order of 8th November 2017. The ex parte applicant who was present during the site visit on 14th November 2018 seems to be unhappy with the respondent's report. Perhaps his discontent was triggered by the report dated 20th May 2021, which was prepared by Dr Billy E. Nyoje, a private surveyor. I note that Dr Billy E. Nyoje had absolutely no role to play in the implementation of the order of 8th November 2017. His report and the ex parte applicant's discontent arising from those circumstances cannot be valid reasons for ordering a fresh report. Further, no valid reason has been given to justify filing the present application almost four years after the site visit.
11. I find no merit in Notice of Motion dated 31st May 2022 and I therefore dismiss it with costs to the interested party. I do not award any costs to the respondent since he did not respond to the application.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Wanyonyi holding brief for Mr Akwala for the Ex Parte Applicant

No appearance for the Respondent

No appearance for the Interested Party

Court Assistant: E. Juma

