



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 131 OF 2000

JOSEPH WANDERA OWIDI.....PLAINTIFF

RAILI OWIDI.....PLAINTIFF

VERSUS

MESHACK WAFULA SITIALO.....DEFENDANT

RULING

1. This is a protracted, chequered suit characterized by a multiplicity of applications. I need not belabour their nature since the voluminous file speaks for itself. Courts have time again been condemned for delaying suits yet in balancing the competing interests, parties must be heard in full so as to discharge justice. The earlier ruling dated **30/5/2017** in this suit summarized the history of this dispute. It need not be replicated herein. This court must however emphasize on the doctrine of finality. This court anticipates that owing to the nature of this application, there shall be a final outcome of this matter in certain terms. It is in that spirit that the ruling herein is made.

2. The Notice of Motion dated **3/4/2019** is brought under **Section 3A and 34** of the **Civil Procedure Act**, seeking the following orders:

(a) ...spent

(b) **THAT this Honourable court be pleased to issue Summons to Mr. Protus Muindi the County Surveyor Trans-Nzoia County to personally attend this Honourable Court and show cause why he should not comply with the Order issued by this Honourable Court on 16/2/2017;**

(c) **THAT the said exercise be carried out under the supervision of the Deputy Registrar of this Court with the security being provided by the OCS Kitale Police Station;**

(d) **That costs of this application be provided for.**

3. The application is based on the grounds that: the Honourable Court on **16/2/2017 (Hon. D. Wangeci, DR)** directed that the **County Surveyor** does establish the boundaries of land parcels **Trans-Nzoia/Makutano/47** belonging to the Defendant/Judgment-debtor and **Trans-Nzoia/Makutano/31** belonging to the Plaintiffs/ Decree-holders as well as confirm the respective acreage of both these parcels on the ground to correspond with the acreage on the title deed; that the said directions have never been set aside or appealed against and are still in force, an application by the Decree - holders challenging the same having been dismissed by this court vide its ruling of **30/5/2017**. In the latter ruling, this court held that the said orders of the Deputy Registrar and the subsequent orders extracted were lawful and served on **Mr. Protus S. Muindi, the County Surveyor**, who issued a Notice to all to attend the exercise on **27/7/2017**, but the said exercise has never taken place to date; that the said directions still stand and should be enforced, otherwise it will be an affront to the court's authority and the rule of law; that the said order has never been reviewed or overturned by a higher court, hence it is in force and should be obeyed and complied with; that the suit was a boundary dispute and ascertainment of the actual amount of acreage in order for the common boundary to be ascertained is important; hence it is in the interest of justice that the sizes of the land parcel belonging to the plaintiffs and that belonging to the defendant be ascertained ensure that the land each party occupies on the ground is equivalent to that on the title deed. It is averred that the ascertainment of acreage as directed by the court on **16/2/2017** is necessary for the implementation and enforcement of this honourable courts' decree herein, as had been ordered pursuant to an application they had filed under **Section 34** of the **CPA** dated **2/12/2013**.

4. The application is supported by the supporting affidavit of **Meshack Wafula Sitialo** sworn on the same date and filed on **4/4/2019**. The affidavit expounds the grounds on the face of the application.

RESPONSE

5. The application is opposed by way of a Replying affidavit of **Khisa Ronny** Advocate of the High Court of Kenya who is seized of the conduct of this matter on behalf of the Respondent dated **11/6/2019**. The Respondent has also filed Grounds of Opposition dated **11/6/2019**.

In opposition, it is averred that the application is misconceived, vexatious, frivolous, lacks merit, made in bad faith and an abuse of the due process and ought to be dismissed with costs; that to the best of his knowledge, investigations into one **Protus S. Muindi** revealed that he is not the County Surveyor- Trans-Nzoia and the orders sought against him in that capacity cannot legally obtain; that the orders of the court were directed at the office of the County Surveyor and none other and in so far as the said **Protus S. Muindi** is not the County Surveyor, he lacks the *locus* and capacity to implement the said orders of this court; that vide an order issued and dated **10/3/2017**, the Deputy Registrar ordered *inter alia* that the County Surveyor does visit and establish the boundaries of the land parcels **Trans-Nzoia/Makutano/47** belonging to the Applicant herein and **Trans-Nzoia/Makutano/31** belonging to the Respondent to confirm the exact acreages; that there is no proof that the proper and actual County Surveyor - Trans-Nzoia County has ever been served personally with the orders of this court and he has failed to execute the orders; that they received a letter dated **18/7/2017** from the Ministry of Lands and Physical Planning authored by one Protus S. Muindi to the effect that he would be visiting the suit land on **27/7/2019** to implement the court order, (he annexes the order as **Exhibit RO 2**); that following receipt of the letter dated **26/7/2017**, through their firm, they wrote to the County Surveyor Trans-Nzoia County conveying their displeasure with one Protus S. Muindi conducting the exercise because of likelihood of bias; (he annexes a letter as **Exhibit RO3**); that their position in respect to the above letter has not changed and thus they maintain the position that the said Protus S. Muindi should be barred from involvement in the matter since according to them and in the knowledge of the public, the said Protus S. Muindi is not the County Surveyor as alleged by the Applicant herein.

SUBMISSIONS

6. Parties' agreed to dispose of the Application by way of written submissions. The Applicant's written submissions were filed on **27/01/2021** while those of the Respondent were filed on **18/05/2021**.

ANALYSIS, ISSUES AND DETERMINATION

7. I have carefully considered the Application, the Supporting Affidavit, the annexures thereto, the Replying Affidavit and Grounds of Opposition as well as the rival submissions.

8. What the Applicant seeks is that this Court compels one Mr. Protus S. Muindi to comply with the Orders of **16/02/2017**. I will reproduce them in part thus:

(a) THAT the Trans-Nzoia County Surveyor be and is hereby directed to visit the site in the presence of both parties and their respective Counsel;

(b) THAT the parties are at liberty to involve their privately appointed surveyors to witness the exercise which should be carried out within 30 days;

(c) THAT parties to share costs equally;

9. The Applicant is of the belief that the said **Mr. Protus S. Muindi** is the County Surveyor based on the authored previous report. It is apparent from the response and submissions of the Respondent that it is not disputed that a survey needs to be conducted. The only dispute and reservation the Respondent raises at present is that **Mr. Protus S. Muindi** is likely to be biased. This suspicion is evinced in **RO3** letter dated **26/07/2017**.

10. A perusal of the proceedings of **28/10/2019** reveal that the said **Mr. Protus S. Muindi** was the County Surveyor then. It is not known whether this position has changed.

11. To balance the competing interests and in the interests of expeditiously disposing of this matter, this Court deems it prudent to have the survey conducted by any other surveyor from the County Surveyor Trans-Nzoia County other than Mr. Protus S. Muindi. Optimistically, this will bring this matter to a close. The Court therefore makes the following orders in furtherance of the Orders issued on **16/02/2017** as follows:

(1) A Surveyor from the Trans-Nzoia County Surveyor's office other than Mr. Protus S. Muindi shall conduct the survey within the next 21 DAYS in accordance with the Orders of court made on 16/02/2017.

(2) The parties shall bear the survey expenses equally and in default of payment by any party of his share of those fees which may delay the process, the other party shall pay and the same shall if not refunded within 14 days be executed on as would costs of a suit.

(3) The OCS Kitale Police Station shall provide security on the day of the survey.

(4) The surveyor shall file a report before this court on the 20/7/2021 when the matter will be mentioned before me for further orders and directions.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE, 2021.

MWANGI NJOROGI

JUDGE, ELC, KITALE.