



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MIGORI

ELC MISC APPLICATION CASE NO. 15 OF 2018

SILA MURUME BUDOGO

JOSEPH OCHIENG.....APPLICANTS

Versus

MARGARET PANYAKO

SERFINA ADONGO

TOBIAS OLONGI.....RESPONDENTS

RULING

1. By a Notice of motion dated 13th July 2020 and filed on even date brought under the provisions of the law including sections 1A, 1B and 3A of the Civil Procedure Act Chapter 21 Laws of Kenya (The application herein), the 1st and 2nd applicants namely **SILA MURUME BUDOGO AND JOSEPH OCHIENG** respectively who appear in person, are seeking the following orders:-

a) Spent.

b) That this honourable court be pleased to issue an order allowing the County Director of Roads and Transport Migori County to open the road along and/or linking Ragana SDA Church and Paw Lweny Ongito road, in implementing the orders issued on the 20th December 2018.

c) That the OCS Piny Oyie in Suna West Sub-County and the area chief of Suna Ragana to oversee the exercise by so providing the security for the exercise.

d) Costs of this application be provided for by the respondents.

2. The application is premised on a nine (9) paragraphed supporting affidavit sworn on even date by the 2nd applicant for himself and on behalf of the 1st applicant. The same is also based on three (3) grounds stated on it's face which include; that the application is for implementation of this court's order issued on 20th December 2018 to serve it's purpose. The applicants claim that issuance of the orders sought in the application will serve the community.

3. The three (3) respondents **MARGARET PANYAKO, SERFINA ADONGO** and **TOBIAS OLONGI** were duly served herein as disclosed in affidavits of service sworn on 18th March 2021 and 21st May 2021 and as per the proceedings of 3rd June 2021 herein. However, they neglected to file and serve any response to the application.

4. On 14th July 2020, the application was fixed for inter parties hearing on 12th October 2020 when it was adjourned to 4th November 2020. During the latter date and by consent of parties herein, inter parties hearing of the application was fixed for 10th December 2020 when it was directed that the application be argued by way of written submissions including comments on the surveyor's report dated 21st May 2019 and filed on 17th July 2019 herein. The court extended the orders of 10th December 2020 on 14th January 2021.

5. Consequently, the applicants filed their two (2) paged submissions on 5th March 2021 and served the same on the respondents who failed to file a response and submissions as pointed out in paragraph 3 hereinabove. They submitted, inter alia, that they did concur with the surveyor's report dated 27th August 2018 which recommended a court order for determination of boundaries in respect of the suit parcels of

land, LR Nos. SUNA EAST/ WASWETA 1/20905 and 15883. They attached a copy of the report to the submissions and urged this court to grant the orders sought in the application to bring out an everlasting peace. However, none of the parties complied thus, precipitating this ruling; See Order 51 Rule 16 of the Civil Procedure Rules, 2010.

6. I have duly considered the entire application and the applicants' submissions. So, is the instant application merited?

7. The applicants are seeking the implementation of orders granted herein on 10th December 2018 and issued on 20th December 2018. It is further to Migori County Surveyor's report dated 21st May 2019, filed in court on 17th July 2019 and adopted on 16th September 2019 pursuant to a Notice of motion dated 16th October 2018.

8. The observations and findings part of the surveyor's report show that the two suit parcels of land are separated by an access road measuring 6 meter wide, but blocked by the respondents' land parcel No. Suna East/ Wasweta 1/15883. That the surveyor, Maurice Samba demarcated the access road using sisal plants an interval of 10 meter apart.

9. Thus, the conclusion and recommendation in the report read in part:-

“ The actual boundary features between land parcel No. Suna East/Wasweta I 20905 and 15883 was determined thus the dispute remains resolved.”

10. Indeed, the court adopted the report bearing in mind **section 18 (1) of the Land Registration Act, 2016 (2012) as read with section 19 of the same Act**. Clearly, the court's order issued on 20th December 2018 further to a notice of motion dated 16th December 2018 stated, *inter alia*,

“ That the County Surveyor and the County Lands Registrar Migori to proceed and determine the actual boundary features between Lands Parcel Nos: Suna East/Wasweta/20905 and 15885.”

11. In the case of **Andrew Marigwa vs Josephat Ondieki Kebati (2017) eKLR**, the court (Mutungi, J) took a stand point which I approve and he reasoned at paragraph 12 that:-

“ Recognizing the constant suit related to a boundary dispute which definitely the court lacked the technical ability to deal with the court made a reference of the matter to the Land Registrar and the County surveyor who are the persons mandate under the Act to deal with dispute relating to boundary....”

12. **Section 48 of the Evidence Act Chapter 80 Laws of Kenya** provides for evidence from expert witnesses. However, as a general rule, expert evidence is not binding on the court which is at liberty to accept or reject the same depending on the facts and circumstances of the case before it as noted in the case of **CD Desouza-vs-BR Sharma (1953) 26 KLR 41 at 42**; see also this court's decision in the case of **Registered Trustees, Legio Maria Africa Church Mission-vs-Simon Nyamweya Obwocha (2018)eKLR**, among other authorities.

13. The surveyor's report in this matter is opinion evidence. I find it sound and acceptable. I find the instant application merited as the same is targeted at implementation of the said report to the letter in order to meet the best ends of justice which is the ultimate goal of this court.

14. In the result, the application originated by way of a notice of motion dated 13th July 2020 is hereby determined in the following terms;

(a) Orders 2, 3 and 4 sought therein and as set out in paragraph 1 hereinabove, are granted accordingly.

(b) The OCS Piny Oyie and the Chief, Suna Ragana as well as the Director of Roads and Transport, Migori County as discerned in paragraph 1 hereinabove, be served by the applicants for compliance.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 29th day of JULY 2021

G.M.A. ONGONDO

JUDGE