



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 337 OF 2013

ELIAB IMBIAKHA MUSHA.....PLAINTIFF

VERSUS

RODGERS ORATA KWEYU.....1ST DEFENDANT

ERNEST OLUMU WAMACHE.....2ND DEFENDANT

HARRISON MASSANGA MUTOBERA.....3RD DEFENDANT

RULING

1. Judgment was delivered in this matter on 27th June 2019. The court ordered as follows:

1. The County Land Registrar and County Surveyor to visit Land Parcel No Butsotso/Shikoti/1814, Land Parcel No. Butsotso/Shikoti/5147, Butsotso/Shikoti/5146 and Butsotso/Shikoti/1767 to establish the boundaries and reopen the access road and file their report in court within the next 60 days.

2. Each party is to bear its own costs.

2. Subsequently, the plaintiff filed Notice of Motion dated 10th May 2021. The following orders are sought in the application:

a) [Spent]

b) [Spent]

c) THAT there be permanent orders of injunction restraining the Defendant/Respondent by themselves, their servants and/or agents and/or any other person whatsoever acting on their behalf trespassing onto, entering into, demarcating, surveying or in any other way dealing or interfering with the Plaintiff/Applicants land known as BUTSOTSO/SHIKOTI/1814.

d) THAT costs of this application be borne by the Defendant/Respondent.

3. The application is supported by an affidavit sworn by the plaintiff. He deposed that following the judgment, the County Land Registrar and County Surveyor to visited the suit properties on 18th September 2019 and a report dated 1st October 2019 made by the deputy county surveyor. That he later received a notice from the land registrar of an intended visit on 12th May 2021 and that despite seeking reasons for the visit, none had been given by the registrar. He added that he believes that the visit has been instigated by the 1st defendant for the purpose of having an access road curved out of the plaintiff's land and that he stands to suffer irreparable damage if that is done.

4. The 1st defendant responded to the application through a replying affidavit in which he deposed that following the judgment and orders made by the court on 20th February 2020, the land registrar was to visit the suit properties on 12th May 2021. He added the judgment herein has not been stayed, varied or set aside and that the present application ought to be dismissed.

5. In a supplementary affidavit the plaintiff deposed that he has no objection to the survey exercise so long as the defendant bears the costs.

6. Although parties were ordered to file written submissions, only the 1st defendant filed submissions. I have considered the application, the affidavits and the submissions.

7. There is judgment in this matter. The judgment has not been set aside or stayed. The judgment required the County Land Registrar and County Surveyor to visit Land Parcel No Butsotso/Shikoti/1814, Land Parcel No. Butsotso/Shikoti/5147, Butsotso/Shikoti/5146 and Butsotso/Shikoti/1767 to establish the boundaries, to reopen the access road and file their report in court. So far, that aspect of the judgement has not been complied with. Notice of Motion dated 10th May 2021 runs contrary to the judgment and the plaintiff who is the applicant seems to have abandoned it as can be seen in his supplementary affidavit.

8. Permanent injunction is a final relief which can only be granted upon hearing and final determination of a matter. Judgment having delivered herein, the court is *functus officio*. See **Raila Odinga & Others vs. IEBC & Others [2013] eKLR**. Litigation in this court on the parties' respective cases came to an end with the judgment. I do not have jurisdiction to reopen the case with a view to determining whether a permanent injunction should issue. A suit or application filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**.

9. In view of the foregoing, Notice of Motion dated 10th May 2021 is truck out. In line with the trial court's order in the judgment as to costs of the suit, each party shall bear own costs of the application.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 16TH DAY OF NOVEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Plaintiff/Applicant present

1st Defendant/Respondent present

2nd Defendant/Respondent present

3rd Defendant/Respondent present

No counsel present

Court Assistant: E. Juma