



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 78 OF 2015

MARK NAMWAMBA AKHALE.....APPLICANT

VERSUS

TOM OKORA & 2 OTHERS.....RESPONDENTS

R U L I N G

1. The application before me for determination is a Notice of Motion dated 9/4/2018 filed here on the same date. The Applicant – **MARK NAMWAMBA AKHALE** – is the Plaintiff in the suit herein filed on 31/7/2015. The three Respondents – **TOM OKORA, AMAYO OKORA** and **TAABU OKORA** - are Defendants. The application is brought under Sections 3A and 63(e) of the Civil Procedure Act (cap 21) and the following orders are prayed for:

- (1) That the County Surveyor for Busia be ordered to visit LR. NO. BUNYALA/BULEMIA/2703 and determine its boundary.
- (2) That the County Surveyor to file a report in court as to whether there is any trespass by anyone in LR. BUNYALA/BULEMIA/2703.
- (3) That parties herein be allowed to engage private surveyors to be present during the exercise.
- (4) That costs of this application be in the cause.

2. According to the Applicant, this suit is one that involves trespass and it is therefore necessary to determine the boundaries of the land in dispute. It is important then that the surveyor visits the site to determine the boundaries. Such surveyor, the Applicant stated, should then compile a report and file it in court so that this matter can be concluded as soon as possible. The Respondents are said not to be likely to suffer any prejudice as they will be present during the exercise and can even hire a private surveyor if they so wish. The Applicant was said also to be ready to pay the surveyor's fees. The Respondents therefore will not be put to expense.

3. The Applicant referred to a ruling made by this court concerning an application dated 30/7/2015 filed by him for temporary injunctive orders. In the ruling, the court declined to issue the orders for reasons, *inter alia*, that there was uncertainty regarding the boundary.

4. The Respondents responded vide a replying affidavit filed here on 18/10/2018. The Respondents averred that the application is incurably defective, frivolous, and vexatious and should therefore be dismissed. The Applicant was also accused of relying on documents relating to a different parcel namely BUNYALA/BULEMIA/4163. That land is said to be owned by one PAUL OKELLO GAUNYO who is a stranger to the suit.

5. The application was meant to be canvassed by way of written submissions. Kiboi for the Respondents opted not to file any submissions. The Applicant's counsel, M/s Maloba, filed her submissions on 17/10/2018. The submissions generally emphasise what the application contains. She pointed out that the Applicant owns land parcel No. BUNYALA/BULEMIA/2703 which shares a common boundary with land parcels Nos BUNYALA/BULEMIA/2670, 4345, 4163 and 4347. The Respondents stay on parcel No. 4163 where they should confine their activities but have encroached into the Applicant's land.

6. I have considered the application, the response made by the Respondents, and the submissions of the Applicant's counsel. True, the suit is about trespass and/or encroachment. True, this court declined to issue temporary restraining orders in an earlier application because of uncertainty surrounding the boundary. Unless the Respondents have something to hide, I do not see any good reason why the relevant office should not visit the site to determine the boundaries. It is in the interest of justice that such exercise be undertaken.

7. I note that the Respondents have not filed submissions. There is therefore no rebuttal to the Applicant's submissions. I note also that the

reasons given in the replying affidavit opposing the application are wishy-washy, unhelpful, and unconvincing. A site visit by the Surveyor will go a long way to help the court to determine the dispute herein.

8. Without much ado therefore, the application here is found meritorious. It constitutes a vital step in the process of resolving the dispute herein. I therefore allow the application. Costs will be in the cause. I would wish to add that the Surveyor should involve owners of the neighbouring parcels of the other parcels of land mentioned herein during the exercise.

Dated, signed and delivered at Busia this 5th day of December, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Present

1st Respondent: Absent

2nd Respondent: Absent

Counsel for Applicant: Present

Counsel for Respondents: Absent

Court Assistant: Nelson Odame