



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

JUDICIAL REVIEW NO. 1 OF 2014.

*IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI*

*AND*

*IN THE MATTER OF THE ORDER OF PRINCIPAL MAGISTRATE BUSIA OF 14<sup>TH</sup> AUGUST, 2013 IN BUSIA P.M.C.C. NO. 68 OF 2006, BETWEEN JOHN OUMA WANJALA –VS- ALEXANDER OLABA WANJALA AND TOM OLABA) ORDERING THE DISTRICT SURVEYOR, BUSIA DISTRICT TO VISIT THE SUIT PARCELS AND IDENTIFY THE BOUNDARY BETWEEN L.R.NO.BUNYALA/BULEMIA/3622 AND L.R.NO. BUNYALA/BULEMIA/337 AND RESTORE THE SAME.*

BETWEEN

**REPUBLIC**

**THE PRINCIPAL MAGISTRATE.....RESPONDENT**

**ALEXANDER OLABA].....EXPARTE APPLICANTS**

**TOM OLABA ]**

**JOHN OUMA WANJALA.....INTERESTED PARTY**

**J U D G M E N T.**

**ALEXANDER OLABA WANJALA** and **TOM OLABA**, hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Applicant respectively, through M/S J.V. Juma & co. Advocates, filed the notice of motion dated 28<sup>th</sup> February, 2014 for an order of certiorari to call into this court for quashing the Principal Magistrate's order of 14<sup>th</sup> August, 2013 directed to the District Surveyor to identify and restore the boundary between L.R. No. Bunyala/Bulemia/3622 and 837. They also pray for costs. Filed together with the notice of motion is the statement of facts and two verifying affidavits sworn by the 1<sup>st</sup> Applicant on 14<sup>th</sup> February, 2014.

The Application is opposed by John Ouma Wanjala, hereinafter referred to as Interested Party, through the replying affidavit sworn on 28<sup>th</sup> May, 2014 and filed through M/S. Ashioya and company advocates.

When the matter came up for hearing on 1<sup>st</sup> October, 2014, Mr. Juma and Ashioya advocates for Applicants and Interested Party respectively agreed to file written submissions. The counsel for the

Applicant's filed their submission dated 16<sup>th</sup> January, 2015 on the same date while counsel for the Interested Party filed theirs dated 3<sup>rd</sup> February, 2015 also on the same date.

The court has carefully considered the grounds on the statement of facts, contents of the verifying and replying affidavits and submissions by both counsel and find as follows:-

1. That the application is primarily based on the fact that the lower court that issued the impugned order of 14<sup>th</sup> August, 2013 had become functus officio upon issuing the orders of eviction and injunction on 13<sup>th</sup> September, 2006 in Busia PMCC. NO. 68 of 2006 and therefore should not have issued that order. The court concurs with the Applicants counsel's submission that a court that has given its final decision on a matter cannot have a second or subsequent bite on the same issue. This is the essence of the doctrine of functus officio which is clearly captured in the Supreme Court of Kenya decision in *Raila Odinga –vs- The I.E.B.C & OTHERS Petition* No. 5 of 2013 which referred, with approval, to the case of *Jersey Evening Post Limited –vs- Al Thani* [2002] JLR 542 at 550 where the court stated;

*“ A court is functus when it has performed all its duties in a particular*

*case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”*

The principle does not stop the court to correct errors, review or set aside the decision so long as that is done in accordance with the law. It however stops the same matter being brought before the same court for another bite once its final decision has been rendered.

2. That the order of 14<sup>th</sup> August, 2013 arose from the notice of motion dated 28<sup>th</sup> November, 2011 whose prayer was different from those in the plaint dated 20<sup>th</sup> February, 2006. The eviction orders in the judgment of 13<sup>th</sup> September, 2006 had been executed and the application dated 28<sup>th</sup> November, 2011 seeking to have the boundaries of the parcels Bunyala/Bulemia/3622 and 837 can only be understood to be a desirable process to confirm that Applicants have indeed been evicted from all that portion of land parcel Bunyala/Bulemia/3622 that they had occupied. The Lower court was not being asked to decide on the issues it had already decided on. The court was therefore not functus on the issue of identifying and restoring the boundary between the two parcels. The issue may have been commenced through a fresh suit, but I see no prejudice suffered by any of the parties by filing the application in the same suit where the issue of injunction and eviction had been decided in, as it was part of the process of executing the final orders of 13<sup>th</sup> September, 2006.
3. That the authority on identifying and vesting boundaries vest with the Land Registrar who inevitably works with the Land Surveyor and it is for the benefit of both parties that their common boundary be identified and or restored for posterity.
4. That prerogative orders are resorted to where the other statutory remedies would not suffice. From the facts presented before this court, the orders of 13<sup>th</sup> September, 2006 and 14<sup>th</sup> August, 2013 have not been challenged though review and or appeal which were among the statutory remedies available to the Applicants. There are also no materials presented by the Applicants to this court to show that the due process of the law was not followed in the issuance of the order of 14<sup>th</sup> August, 2013. As this court cannot deal with the issue of merit of that decision though judicial review process, I find the application has no merit and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 11TH DAY OF MARCH, 2015.**

**IN THE PRESENCE OF.....N/A.....APPLICANTS**

**Present .....INTERESTED PARTY.**

**Mr. Jumba for Exparte Applicants/COUNSEL.**

**Mr. Ashioya for Interested Party.**

**JUDGE.**