



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL CASE NO. 197 OF 2010**

**GICHUKI MUCHIRI ..... PLAINTIFF**

**VERSUS**

**WASIKE WALUANDA**

**HENRY WALUANDA ..... DEFENDANTS**

**RASHID WALUANDA**

**RULING**

This ruling relates to an application dated 26/3/2014. Due to its nature, I will give some history.

A Notice of Motion dated 30/10/13, filed by the plaintiff under Section 1A, 1B, 3 & 3A of the Civil Procedure Act (Cap.21), sought the following orders -

1. **That the application be certified urgent.**
2. **That this Honourable court be pleased to adopt the Land Registrar and the District Surveyor's report to the court dated 12/2/12 as the decision of the court.**
3. **That this Honourable court be pleased to direct the O.C.S. Turbo to provide security to the applicant to enable him fence off his land parcel No. Kakamega/Sango/148 at his own cost for purposes of maintaining law and order during the exercise in full implementation of the Land Registrar and District Surveyor (report) dated 12/2/12.**
4. **That a permanent injunction restraining the defendants, their agents or assigns or servants from interfering with land parcel No. Kakamega/Sango/148 in any manner whatsoever be granted and the plaintiff's claim against the defendants be deemed settled.**
5. **That the defendants be ordered to respect the boundary planted by the Land Registrar and the District Surveyor.**
6. **That the plaintiff/applicant be awarded the costs of this application and this suit.**

The application was filed through C. O. Samba & Company advocates under certificate of urgency. There were three grounds on the face of the Notice of Motion. The main ground is that the plaintiff's claim had been summarily determined and that a judgment should be entered in his favour as per the plaint.

The application was filed with a supporting affidavit sworn by the plaintiff on 30/10/13. It was deponed, *inter-alia*, that the mutual advocates for the parties had on 11/2/11 and 12/4/11 recorded consent orders, that the District Land Registrar and District Surveyor visit the suit land i.e. Kakamega/Sango/148 and 149, to determine the boundaries. That the two Government officers had visited the suit land and filed their reports on 6/7/12. That the contents of those reports should now be adopted by the court.

The court ordered that the application be served. When it came up on 27/2/2014, only Mr. Samba for the applicant was present. Counsel informed the court that counsel for the respondent had been served. On request by counsel present that restraining orders be issued against planting, the court granted ex-parte orders as follows –

**“ (a) That a hearing date for the application be fixed in the registry on priority basis.**

**a. That in the interim, the defendants be and are hereby restrained from planting on the plaintiff's/applicant's parcel of land No. Kakamega/Sango/148 till the hearing date.”**

Subsequent to the above orders, on 6<sup>th</sup> March 2014 hearing date for the application was fixed by the Deputy Registrar for 12/5/2014.

Upon becoming aware of the above interim orders, the defendants through their advocates, Shitsama & Company on 26/3/14 filed a Notice of Motion dated the same date under **Section 1A, 1B, 3 & 3A** of the **Civil Procedure Act (Cap.21)** and **Order 10 (11)** of the Civil Procedure Rules 2010. This is the application for decision in this ruling.

The prayers in this application are as follows -

- 1. That the application be certified as urgent and heard ex-parte in the first instance.**
- 2. That the ex-parte orders granted to the plaintiff by this Honourable court on 27/2/14 be vacated and/or set aside.**
- 3. That pending the hearing and determination of the main suit, the status quo prior to 27/2/14 be maintained.**
- 4. That the main suit be listed down for hearing to be heard on its merits.**
- 5. That costs of this suit be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are *inter-alia*, that on the 27/2/14 Mr. Victor Osango, advocate for the defendants was not able to appear in court for hearing of the application because he was engaged in Eldoret Court of Appeal Civil Application No. Nbi. 230 of 2013. That the orders granted by the court on 27/2/14 were not specifically pleaded or sought in the application dated 3/10/13. That though the orders granted on 27/2/14 were meant to affect only parcel No. 148 owned by the plaintiff, he was now using the same to block, or evict the defendants from their ancestral land known as parcel No. 149.

The application was filed with a supporting affidavit sworn by one of the defendants, Reuben Wasike Waluanda. It was deponed, *inter-alia*, that the plaintiff was misinterpreting the court's interim orders and threatening to evict the defendants from parcel **No. Kakamega/Sango/149**, though there was no clear boundary between that land and the plaintiff's land **Kakamega/Sango/148**. That the interim orders granted by the court be thus vacated.

The application has been opposed through grounds of opposition filed by C. O. Samba advocate for the plaintiff on 1.4.13.

On the hearing date, both Mr. Osango for the defendants and Mr. Shivega for the plaintiff made oral submissions in court. Counsel for the defendant relied on the case of **Ole Nganai –vs- Arap Bor [1983] KLR 233**. I have considered the submissions on both sides.

The facts herein are clear. There is an existing dispute on the size or boundaries between adjacent land parcels Nos. Kakamega/Sango/148 and 149. The plaintiff is the beneficial owner of Plot No. 148, while the defendants are the owners of parcel No. 149. The boundary dispute was brought to court by the plaintiff. The substantive case is still pending determination.

In the course of progress in the substantive case, counsel for the parties agreed that the Government Surveyor and Land Registrar go to the ground and determine the correct boundaries, with a view to entering a consent between the parties. This consent order was entered before **Thuranira, J.** on 25/10/2011. The reports of these Government officers I am told, were filed in court. However, no consent between the parties has been recorded as yet. In effect, the dispute as to whether any of the parties has encroached onto the others land has not been resolved.

Before the above consent order was recorded, on 12/4/11 **Lenaola, J.** had ordered that the status quo as at that date be maintained between the parties. The subsequent consent order recorded before **Thuranira, J.** on 25/10/11 did not vary the order for maintenance of status quo above.

In my view, the consent of the parties recorded on 25/10/2011 through their advocates, was only to the effect that the Land Surveyor and Land Registrar go to determine the correct boundaries between the two parcels and make a report to the court. If the reports have indeed been filed, then they have to be adopted by the court before they can become effective as orders of the court. The court has not yet adopted that reports. Therefore it cannot be said that the boundaries between the two plots have been determined, settled and are known and ascertainable.

This means that the orders obtained by the plaintiff ex-parte on interim basis on 27/2/2014 with regard to parcel 148 were premature. They will certainly be subject to misuse because what one party will think constitutes plot No. 148, will not be what the other party will construe to be the position. I fully agree with what was held in the case of **Ole Nganai –vs- Arap Bor [1983] KLR 233** that a settlement to be recorded in court must be clear on the settlement terms and cannot be left to interference. In our present case no settlement on boundaries of the two parcels has been recorded. There is no certainty on the boundaries of the two parcels of land.

As a consequent I find that the application dated 26/3/14 has merits to the extent that the orders granted by this court on 27/2/14 were premature and incapable of being enforced since the boundaries of the two parcels have not yet been settled or determined. I will therefore allow the application and set aside those orders.

Having said so, I am of the view that the application dated 30/10/13 should be set down for hearing at an early date especially with regard to the request that the reports of the District Land Registrar and Surveyor be adopted as a decision of the court. I will order that the application should be set down for hearing inter-parties on priority basis at the registry.

Since there are in effect orders made by **Lenaola, J.** on 12/4/11 which have not been vacated or varied, I hold that the same are the effective orders of the court in respect of the use and occupation of the subject two parcels of land. They will remain in force unless subsequently varied by this court.

To conclude, I allow the application dated 26/3/14 and vacate this court's orders made on 27/2/14. I order that the previous orders made by **Lenaola, J.** on 12/4/11 continue to have effect. I order that the application by the plaintiff dated 30/10/13 be fixed for hearing inter-partes in the registry on priority basis and that parties file written submissions to the said application. The costs of this present application will be to the defendants.

***Dated and delivered at Kakamega this 8<sup>th</sup> day of May, 2014***

**George Dulu**

**JUDGE**