



**REPUBLIC OF KENYA.**  
**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 52 OF 2013.**

**SILVESTER OKUMU ..... PLAINTIFF**

**=VERSUS=**

**AMBROSE OSALO**

**PASKAL OJIAMBO OSALO..... DEFENDANTS.**

**R U L I N G.**

**JOACHIM OUMA OSALO** and **PASCAL OJIAMBO OSALO**, hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> Applicant respectively through M/S. Wanyama & Co. Advocates filed the notice of motion dated 24<sup>th</sup> March, 2014 with six prayers marked (a) to (f) respectively. Prayers (a) and (b) have already been spent leaving prayers (c) to (f) which are the subject of this ruling. The prayers are as follows;

“ a).....

(b).....

(c) That the County Land Registrar and the County Surveyor do visit land parcel numbers Samia/Budongo/1699 and Samia/Budongo/245 with a view to establishing the boundary between the said parcels of land and determine whether the portion of land cultivated by the defendants and which prompted the suit herein falls within which of the two parcels and that the parties be at liberty to employ their private surveyor to oversee the exercise.

(d) That the County land Registrar and County Surveyor do file their report within 60 days which shall form part of the evidence for the case.

(e) That the costs of the County Land Register and the County Surveyor shall be paid by the Applicants.

(f) That cost s of this application be provided fair (sic).”

The application is based on five grounds marked (1) to (5) respectively and affidavits of Joachim Ouma Osalo sworn on 24<sup>th</sup> March, 2014 and 4<sup>th</sup> July, 2014.

The application is opposed by the Respondent, Sylvester Okumu Okello through the replying affidavit sworn on 9<sup>th</sup> April, 2014 and filed through M/S. Maloba & Co, Advocates.

During the hearing of the application on 28<sup>th</sup> October, 2014, Mr. Wanyama and M/S. Maloba for the

Applicants and Respondent respectively made submissions.

The court has carefully considered the grounds on the application, the submissions by counsel, pleadings filed, contents of the supporting, supplementary and replying affidavits and come to the following conclusions;

1. That the Respondent's main prayer in the plaint dated 12<sup>th</sup> July, 2013 is for;

**“ (a) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendant (Applicants), either by themselves, their agents, servants and or anyone acting under them from farming, planting, tilling, using and or in any other way interfering with the plaintiff's L.R. No. Samia/Budongo/1699.”**

The prayer is based on the Respondent's averments that the Applicants had on 8<sup>th</sup> and 9<sup>th</sup> July, 2013 illegally and unlawfully entered onto the said land. This claim is however denied by the Applicants in their statement of defence annexed to their statement of defence annexed to this application and dated 24<sup>th</sup> March, 2014. The Statement of defence is already formally on record following the granting of prayer (b) by consent. The averments by the Respondent and the Applicants show that there is a dispute as to whether or not the portion of land in dispute is on land parcel Samia/Budongo/1699 which is the suit land.

2. That in view of the court's order dated 6<sup>th</sup> May, 2014 in Nairobi H.C.C. suit No. 6695 of 1992, the ownership of land parcel Samia/Budongo/245 is now in dispute contrary to the period of 23<sup>rd</sup> October, 2013 when this court made its ruling on an application dated 12<sup>th</sup> July, 2013 by the Respondent.

3. That the gist of the Applicants' application is to bring in the experts to assist the court in determining on what parcel of land the disputed portion lies. The court is aware that it is the responsibility of the party alleging a fact to offer proof. The following provisions of the Evidence Act, Chapter 80 of the Laws of Kenya are clear on this issue;

**“ 109. The burden of proof as to any particular fact lies on person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**

**112. In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

**116. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”**

The involvement of the Land Registrar and Surveyor will not lift the burden of proving their respective positions from the parties herein. It will only assist the court in coming or arriving to a decision on the location of the disputed portion of land without much delay which is in line with the provision of Article 159 (2) (b) and (d) of the Constitution.

4. That none of the parties herein stand to be prejudiced by the involvement of the Land Registrar and Surveyor in confirming the boundaries of the two parcels of land and the location of the disputed portion of land.

5. That for reasons set out above, the Application dated 24<sup>th</sup> March, 2014 is allowed in terms of prayers (c) (d) and (e) with costs in the cause.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON...13<sup>th</sup> DAY OF NOVEMBER, 2014. IN THE PRESENCE OF;  
PLAINTIFF ....P.I.P**

**1<sup>ST</sup> DEFENDANT.....N/A**

**2<sup>ND</sup> DEFENDANT.....N/ACOUNSEL FOR PLAINTIFF – MR. OMONDI FOR MALOBA.  
COUNSEL FOR DEFENDANTS.....N/A**

**JUDGE.**