



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC MISC. APPL. NO. 15 OF 2020**

**ANDREW AYUKA AMUNZE.....APPLICANT**

**VERSUS**

**BEN MUTENYO ADONGO.....1<sup>ST</sup> RESPONDENT**

**ELIZABETH ADONGO.....2<sup>ND</sup> RESPONDENT**

**JACKSON ANGAINE.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. By an application dated **8/10/2020** and filed in court on the same date. The application is supported by sworn affidavit of the applicant. It is brought under **Section 3A** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules**. The applicant seeks the following orders:

**(a) This application be certified urgent and service be dispensed with and the same be heard on priority basis.**

**(b) The Honourable Court be pleased to direct that Andrew Ayuka Amunze be provided security to enable do fencing on LR No. KOLONGOLO/KOLONGOLO BLOCK 2/BIKETI/206.**

**(c) The Officer in Charge Kwanza Police Station be directed to assist in the enforcement of this order.**

**(d) The costs of this application be provided for.**

2. The grounds on the face of the application are that the process of fencing the applicant's piece of land has become potentially dangerous after the County Surveyor pointed out the proper positioning of the boundary and the respondents have threatened to violently stop the fencing of the applicant's piece of land; that the applicant has faced lack of cooperation from the respondents even after the County Surveyor had pointed out the proper position of the boundary; that there are higher chances that if the applicant is not granted security the respondents will cause a breach of peace in the process of the applicant fencing his piece of land and that the applicant stays on **LR. No. Kolongolo/Kolongolo Block 2/Biketi/206**.

3. The applicant filed supplementary affidavit dated **10/11/2020** on **13/11/2020**. The 2<sup>nd</sup> respondent filed sworn replying affidavit dated **14/10/2020** on **16/10/2020**. The 1<sup>st</sup> respondent filed sworn replying affidavit dated **14/10/2020** on **16/10/2020**. The 3<sup>rd</sup> respondent filed sworn replying affidavit dated **30/10/2020** on **4/11/2020**.

4. The applicant filed his submissions on **17/11/2020**. The respondents did not file any written submissions.

5. I have considered the application, the response and the filed submissions.

6. The application appears to have arisen out of a boundary dispute between the parties. The applicant appears to have caused the Lands office to visit the site for a survey whereupon some boundary marks arising from the said survey fell beyond what had been perceived to be the boundary between the applicant's and the respondent's parcels of land.

7. This court is of the view that the applicant having material in his possession upon which he can obtain legal advice as to whether it can sustain a claim by way of a suit by any of the recognized methods of commencement of suit, should consider whether to commence an action or not. The instant application is not a suit and however attractive it may seem to expeditiously determine the application on its merits, its legal underpinnings are unsatisfactory, it being based only on **Section 3A** of the **Civil Procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**.

8. **Section 19** of the **Civil Procedure Rules** provides as follows:-

**“Every suit shall be instituted in such a manner as may be prescribed by the Rules.”**

9. **Order 3 Rule 1** of the **Civil Procedure Rules** provides that:-

**“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed”.**

10. In the case of **Geoffrey Ndungu Theuri -vs- Law Society of Kenya 1998 eKLR** the court stated as follows:-

**“...The order specifically refers to a suit which is defined under Section 2 of the Civil Procedure Act in these terms: ‘suit’ means all civil proceeding commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 39 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction”**

11. In the case of **Peter Kwema Kahoro -vs- Benson Maina Githethuki [2005] eKLR** the court stated as follows:-

**“....the only objection which has caused me anxiety is the one directed at the manner in which the applicants have originated these proceedings. Section 19 of the Civil Procedure Act provides as follows:-**

**“19. Every suit shall be instituted in such manner as may be prescribed by rules”.**

**And Order IV Rule 1 of the Civil Procedure Rules reads:-**

**“1. Every suit shall be instituted by presenting a plaint to the Court or in such other manner as may be prescribed”.**

**The Civil Procedure Rules provide other modes of instituting proceedings. These include matters that may be instituted by way of Originating Summons or Motions, Applications for Judicial Review and proceedings under Advocates Act.**

**In the light of the above, I am not persuaded that the Applicants were entitled to institute these proceedings by way of a Chamber Summons in a miscellaneous application. Being of this persuasion I find and hold that the application dated 2nd February, 2005 and filed on 4th February, 2005 in incompetent and it struck out with costs”.**

12. Notwithstanding the foregoing defects in the instant application, this court has favourably considered the fact that the relevant offices have been involved by the applicant in his attempt to establish the proper boundaries to his land and he is unlike a trespasser who wakes up one morning and decides to invade his neighbour’s parcels of land without any cause. Attempts to verify the proper boundaries of one’s real property through the offices vested with the proper mandate to do such verification are not illegal, and instead of erecting blunt opposition to the process, the neighbours of such a person should, as a matter of common sense, co-operate to the maximum to maintain amity and to reduce the chances of litigation and raise legal objections only when they are faced with breach of established procedure or dissatisfactory or unreasonable results.

13. For the foregoing reasons this court has no option but to strike out the application dated **8/10/2020** with each party being required by this order to bear their own costs of the application.

**Dated, signed and delivered at Kitale via electronic mail on this 8<sup>th</sup> day of December, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**