



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 161 OF 2017

VINCENT JUMA AWORI PLAINTIFF/RESPONDENT

= VERSUS =

PRISCA ANYANGO KUBADI1ST DEFENDANT/APPLICANT

LAND REGISTRAR (BUSIA KENYA)2ND DEFENDANT

RULING

1. What is before me for determination now is an application dated 24/10/2018 filed in court on the same date. It is a Notice of Motion brought under Sections 3 and 3A of Civil Procedure Act (cap 21), Order 40 Rules 1, 2 and 3 of Civil Procedures Rules, and all enabling provisions of law. The application has five (5) prayers but one of the prayers – prayer 1 – is now spent. That leaves four (4) prayers for consideration. The prayers are shown as 2, 3, 4 and 5 on the face of the application. They are as follows:

Prayer 2: That the County Surveyor, Busia County and

Land Registrar, Busia County, do visit L.R. No. SAMIA/WAKHUNGU/ODIADO/617 and fix the boundaries in line with the map and relevant records.

Prayer 3: That the O.C.S, Funyula Police Station do

assist in effecting this order.

Prayer 4: That each party to be at liberty to call his or

her private surveyor.

Prayer 5: That costs of this application be in the cause.

2. The Applicant – **PRISCA ANYANGO KUBADI** – is the Defendant in this suit while the Respondent – **VINCENT JUMA AWORI** – is the Plaintiff. The bone of contention between the two is ownership of L.R. No. SAMIA/WAKHUNGU/ODIADO/617 (“disputed Land” hereafter). The Applicant wants the boundary fixed because she is old – 80 years being her stated age – and the suit has been pending since 2017.

3. She stated too that she is the current legal owner of the disputed land and accused the Respondent of only being interested in delaying finalization of this suit. The Respondent was termed as a busybody with no ownership rights to the disputed land.

4. The Respondent opposed the application vide grounds of opposition filed on 16/11/2018. According to the Respondent, the application is premature since it raises the same issues meant to be canvassed during hearing. It was the Respondent’s position that the surveyor should not go to the site unless the issue of ownership is first determined. The Respondent urged that the hearing and determination of the suit should come first.

5. The application was canvassed by way of written submissions. The Applicant’s submissions were filed on 6/12/2018. She faulted the Respondent for not filing a replying affidavit. She submitted further that the surveyor has been willing to visit the disputed land but the Applicant has all along been an obstacle. The survey fees has been paid, she submitted, and the court therefore should grant the order sought to enable the surveyor to carry out the exercise. The Respondent’s opposition to the application was said to be ineffective, having failed to

file a replying affidavit in the first place or summon the Applicant for cross-examination.

6. The Respondent's submissions were filed on 13/12/2018. It was reiterated that it is premature to seek the order prayed for before the suit is determined. It was submitted that the boundary dispute has been in existence since 2011 and in the Respondent's view, the issue cannot be resolved by an application. He pointed out that evidence needs to be taken first. The court was urged to dismiss the application.

7. I have considered the application, the response made, and the rival submissions. I have had a look at pleadings brought by both sides including the documentation that came with the pleadings. When the Respondent filed his suit here on 15/9/2017, the Applicant here filed a defence and counter-claim thereafter. One of the prayers in the counter-claim - specifically prayer (b) - asked for a declaratory order to the effect that the disputed land is private property belonging to the family of the late CHARLES ALON KUBADI. In the same prayer, it is asked that there be **"re-establishment and replanting of a common boundary between suit land parcel No. SAMIA/WAKHUNGU-ODIADO/617 and 443"**.

8. In the application herein, prayer 2 is specifically asking for what the Applicant prayed for in her counter-claim. In other words, the second limb of prayer (b) in the Applicant's counter-claim seems to have been lifted from the counter-claim and made prayer 2 in the application. The Applicant's counter-claim, just like the Respondent's plaint, constitute a full-fledged suit that require adducing of evidence and articulation of the applicable law before a determination is made. Granting prayer 2 in the application would amount to premature and partial compromise of prayer (b) in the Applicant's counter-claim. Yet at this stage all evidence has not been adduced to enable the court weigh the merits of the prayer.

9. In law, it is also improper to seek orders of a final nature in an interlocutory application. In **RAJPUT Vs BARCLAYS BANK OF KENYA LTD & 3 others: [2004] 2 KLR 393** the plaintiff had filed an application containing a number of prayers. One of the prayers related to a declaratory order concerning ownership of the suit property. It was held that the court could not make such orders for they would be in the nature of a final order. That is precisely the problem we have here. The Applicant has made a prayer touching on the boundary of the disputed land in her counter-claim. She has then gone ahead to repeat the same prayer in an interlocutory application.

10. The Applicant is jumping the gun or, if you like, putting the cart before the horse. The orders sought cannot be granted at this stage. Her approach in the counter-claim is the correct one. Her approach in this application is wrong. Her application therefore cannot be allowed. It is hereby dismissed. No order is made as to costs. I may add that given that the Applicant has cited her age as a factor that is not in her favour, the suit herein should be made ready for hearing quickly. Both sides are urged to act with all due dispatch so that the matter can be heard and determined within the soonest possible time.

Dated, signed and delivered at Busia this 27th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff/Respondent: Present

1st Defendant/Applicant: Present

2nd Defendant: Absent

Counsel of the Plaintiff/Respondent: Present

Counsel of the 1st Defendant/Applicant: N/A

Court Assistant: Nelson Odame