



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

MISC. APPLICATION NO. E012 OF 2025

JAMES MANYURU ONYANGO

APPLICANT

= VERSUS =

THE LAND REGISTRAR-BUSIA 1ST

RESPONDENT

THE COUNTY SURVEYOR-BUSIA 2ND

RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD

RESPONDENT

RULING

1. Vide a notice of motion dated 12th August 2025, the applicant herein seeks: -

- a) An order directed at the 2nd respondent to re-establish the boundary between land title number Bukhayo/Bugengi/4364 and Bukhayo/Bugengi/2715;
 - b) An order directed to the 1st respondent to accompany the 2nd respondent and oversee the re-survey and re-establishment of boundary process;
 - c) Costs of the application be provided for.
2. The application is premised on the grounds on its face and supported by the affidavit of the applicant sworn in support thereof in which the grounds on its face are reiterated.
 3. The grounds taken up in support of the application are that the applicant is the legal and registered owner of the parcel of land known as Bukhayo/Bugengi/4364; that the said parcel of land borders the parcel of land known as Bukhayo/Bugengi/ 2715 which belongs to the interested party herein; that there has been a boundary dispute between the interested party and the applicant over the said properties; that on 18th July 2025, the 1st respondent issued a

report concerning the boundary dispute in which report, he *inter alia* established that the boundary over the subject properties was determined and marked by his predecessor and the surveyor as per the report dated 27th July 2016; that despite the boundary having been established, the applicant and the interested party are not agreeable on the exact location of the boundary and that whilst the report of the 1st respondent dated 27th July, 2027 intimates that the then Land Registrar did plant a boundary (sisal), the applicant contends that there are no boundary features on the ground.

4. Explaining that he is desirous of having the boundary dispute settled by having the 1st and the 2nd respondents conduct a survey and re-establish the boundary, based on the report of 1st respondent dated 18th July 2025 to the effect that the re-establishment of the boundary can only be done through an order of this court and claiming that the application has been brought in good faith and devoid of any ulterior motive, the applicant depones that it is in the interest of justice that the orders sought be granted as he is desirous of having the

boundary dispute between him and the interested party resolved legally, amicably and conclusively.

5. In the affidavit sworn in support of the application, the applicant has annexed the report of the Land Registrar dated 18th July 2025 among other documents. In the report, the Land Registrar, Busia has inter alia stated as follows: -

“The boundary was planted by the Land Registrar as per the report but on the ground there’s no boundary features on the ground therefore not possible to reinstate the boundary. Our visit is intended to reinstate the boundary as was determined and marked by the Land Registrar and surveyor as per report dated 27th July 2016. However, both parties are not agreeable on exact marks that are presently on the ground. The respondent is opposed to the entire exercise of carrying out a re-survey. Indeed, the legal

position is that once the boundary dispute has been determined as was in this case, the same exercise cannot be repeated not unless is on grounds of appeal, referred to the Chief Land Registrar or vide a Court order.

In the circumstances parties are advised to seek redress from court to enable the County Land Registrar and the Land Surveyor to repeat the exercise and re-establish the boundary...”.

6. In reply and opposition to the application, the interested party filed the replying affidavit sworn on 30th October, 2025 which he has *inter alia* deponed as follows: -

“The surveying and establishment of the boundaries of land registration No.

BUKHAYO/BUGENGI/4364 and BUKHAYO/BUGENGI

/2715 was done and a report dated 15th October

2018 prepared...; from the said report, it was

established that the applicant had trespassed on

my parcel of land, land registration BUKHAYO/BUGENGI/2715; the dispute between the applicant and myself over land registration BUKHAYO/BUGENGI/4364 and BUKHAYO/BUGENGI/2715 is a matter that has been litigated in Busia CMCC NO. 391 of 2016 and BUSia ELC Civil Appeal No.E002 of 2021 and determined in favour of the plaintiff...; as such this matter is res judicata and the same should be dismissed.”

7. The interested party has further deponed as follows: -

“The applicant is basically seeking to overturn the judgment of Busia ELC Civil Appeal No. E002 of 2021 through the backdoor by filing this miscellaneous application seeking to re-do an exercise that was already done; the applicant has approached this Honourable Court with unclean hands because he has not settled the decree in Busia ELC Civil Appeal No. E002 of 2021 and recently filed an application to seek stay of

execution of the decree which application was dismissed with costs;...if the application is granted I shall be prejudiced because I will incur expenses for resurveying; that from 15th October 2018, when Busia County Surveyor prepared his report to date, the applicant has never challenged that report as such the instant application is a tactic to delay settlement of decree and costs of Busia CMCC No. 391 of 2016 and Busia ELC Civil Appeal No. E002 of 2021.”

8. The application was disposed of by way of written submissions.
9. In his submissions dated 29th November 2025, the applicant has identified two issues for determination. These are;
 - i) Whether there was a previous survey and boundary demarcation in respect of plot No. Bukhayo/Bugengi/4364 and Bukhayo/Bugengi/2715;
 - ii) Whether his notice of motion is *res judicata*.

10. On whether there was a previous survey and boundary demarcation in respect of plot No. Bukhayo/Bugengi/4364 and Bukhayo/Bugengi/2715 the applicant has submitted as follows: -

“...it is not in dispute that there was a boundary demarcation respecting land ... there was previous survey and boundary demarcation respecting plot No. BUKHAYO/BUGENGI/4364 and BUKHAYO/BUGENGI/2715 ... there was previous survey and boundary demarcation respecting plot No. BUKHAYO/BUGENGI/4364 and BUKHAYO/BUGENGI/2715 as disclosed by the interested party’s annexed survey report dated 15th October 2018 and marked JOK-1. ...a subsequent survey report produced by the applicant dated 18th July 2025 and marked JMO-4 established the position 5 above but also and most fundamentally that the boundary features (sisal) that had been previously placed had been destroyed and/or tampered with that they no

longer existed. That the parties herein the applicant and the interested party were not agreeable as to the exact position of the boundary as had been determined and placed; that the 1st respondent could not in the circumstances reinstate the boundary as earlier determined...it is in the light of the foregoing that the applicant is desirous to have the boundary dispute amicably and legally settled. Accordingly, we urge the honourable court to be persuaded to grant the prayers sought on the face of the instant application.”

11. As to whether the application is *res judicata*, the applicant admits and acknowledges that there were previous suits between him and the interested party to wit Busia CMCC No. 391 of 2026 and Busia ELC Civil Appeal No. E002 of 2021 but submits that the instant application is not *res judicata* those suits because the issue raised in those suits was trespass to land and not re-survey of the boundaries to the suit

properties with a view of determining the exact location of the boundaries.

12. Maintaining that the boundaries to the suit properties had been tampered with making it impossible to determine the exact location of the boundaries, the applicant urges the court to grant him the orders sought.
13. On costs, the applicant urges the court to find the application merited and grant him the orders sought.
14. The interested party filed submissions dated 15th January 2025 in which he has basically reiterated the contentions in his replying affidavit.
15. I have read and considered the grounds taken up in support of the application, the reasons given by the interested party in opposition to the application and the submissions by the

applicant and the interested party. I find the issues for determination arising therefrom to be as follows: -

- i) Whether the instant application is *res judicata* Busia CMCC No. 391 of 2026 and Busia ELC Civil Appeal No. E002 of 2021;
- ii) Subject to the outcome of (i) above, whether the applicant has made up a case for being granted the orders sought; and
- iii) What is the order as to costs?

16. On whether the instant application is *res judicata* Busia CMCC No. 391 of 2026 and Busia ELC Civil Appeal No. E002 of 2021, I have considered the issue raised in the instant application, being survey and re-establishment of the boundaries between the parcels of land known as Bukhayo/Bugengi/4364 and Bukhayo/Bugengi/2715 and the issue raised in the former suits which was alleged trespass to land. Whereas there are similarities in determining a case of trespass, the issue of boundary is impleaded or will have to be taken into account. In the circumstances of this case, I

do find the issue of resurvey and boundary re-fixation to be different as it entails determining the exact location of the boundaries in dispute and not merely the question as to whether the other owners of the parcels of land in question have encroached or trespassed to the other's land. For that reason, I return a negative verdict to the issue as to whether the instant application is *res judicata* Busia CMCC No. 391 of 2026 and Busia ELC Civil Appeal No. E002 of 2021.

17. As to whether the applicant has made up a case for being granted the orders sought, whilst the applicant has relied on the report of the Land Registrar dated 18th July 2025 which suggests that there is need to re-survey the suit properties with a view of re-establishing the boundaries, there being evidence that the boundaries were fixed and there being no evidence of tampering of the boundaries, I do find the application by the applicant to be a disguised appeal from the previous boundary exercise. That fact is discernable from the applicant's admission in the case he filed before the lower court, whose proceedings are captured in the

judgment in Busia ELC Civil Appeal E002 of 2021 where he is indicated to have informed the court that he was not satisfied with the previous boundary fixing exercise. In that regard, see his testimony as captured in the judgment, which at the relevant part is as follows: -

“I don’t remember when the land registrar came to survey with the county surveyor. I saw the report. I do not agree with the report. The report states the land is on the defendant’s land 2715. That is not true...I was not satisfied with the land surveyor’s report. I have appealed for them to return the land...” see judgment in annexed to the interested party’s replying affidavit.”

18. If the applicant was dissatisfied with the boundary fixing exercise, as indicated in the previous proceedings, his recourse was not to apply for re-establishment of the boundary but to appeal. In that regard, see **Section 86** of the Land Registration Act as read with **Regulation 40(6)** of

the Land Registration (General) Regulations 2017 which provide as follows: -

“If any question arises with regard to the exercise of any power or performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and there upon the Court shall give its opinion, which shall be binding upon parties-Section 86(1);

Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court-Regulation 40(6)”

19. No reason whatsoever has been given by the applicant why he did not appeal the previous decision. This court is not convinced that the boundary previously fixed was tampered with as no evidence capable of proving that fact has been tendered by the applicant. The report by the Land Registrar does not bring out that claim but brings out a case of the

parties being unable to agree on the boundary marks on the ground. The inability of the parties to agree on the boundary marks on the ground is not evidence that the boundaries have indeed been tampered with. Based on the admission or acknowledgement by the applicant in the previous proceedings, that he was not satisfied with the previous boundary fixing exercise, this court reasonably believes that the instant application is a veiled attempt by the applicant to appeal the previous boundary fixing exercise through the back door, which the court ought not to countenance.

20. The upshot of the foregoing is that the applicant has not made a case for being granted the orders sought. Consequently, I dismiss his notice of motion dated 12th August 2025 with costs to the interested party.
21. Orders accordingly.

**Ruling dated, signed and delivered virtually at Busia this
21st day of April, 2026.**

L. N. WAITHAKA

JUDGE

In the presence of;

Mr Nyabuto for the Applicant

N/A for the Respondents

Mr Nyagenye for the Interested Party

Court Assistant: Tracy