



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 59 OF 2015

FLORENCE AUMA WEKESA APPLICANT

VERSUS

PATRICK OMONDI KEYA 1ST RESPONDENT

JOSEPH ONYANGO KEYA 2ND RESPONDENT

PANCRAS OUMA 3RD RESPONDENT

PATRICK RAPENDA 4TH RESPONDENT

FRANCIS ODUORI 5TH RESPONDENT

KIZITO NDAKALU 6TH RESPONDENT

THE COUNTY GOVERNMENT OF BUSIA 7TH RESPONDENT

R U L I N G

1. The application for determination before me is a Motion on Notice dated 15/10/2018 filed in court on the same date. It is stated to be brought under Sections 3, 3A and 63(c) of the Civil Procedure Rules and/or any other provision of the law and the Constitution of Kenya. The Applicant – **FLORENCE AUMA WEKESA** – is the Plaintiff in the suit while the Respondents – **PATRICK OMONDI KEYA, PANCRAS MUGA, PATRICK RAPENDA, FRANCIS ODUORI, KIZITO NDAKALA** and **THE COUNTY GOVERNMENT OF BUSIA** – are the Defendants.

2. The prayers for consideration at this stage are as follows:

(1) That the County Surveyor and the Land Registrar, Busia County do visit LR. No. MARACHI/ELUKONGO/1293 and identify the boundary and file their report within 30 days from the date of such visit.

(2) That the O.C.S, Bumala Police Station and/or any other nearest police station do assist in effecting the order.

(3) That costs of the application be in the cause.

3. The application is anchored on the grounds, *inter alia*, that the Applicant is the administrator of the estate of the late Situndo Otsieno who was the registered owner of LR. No. MARACHI/ELUKONGO/1293, that the Respondents have unlawfully invaded the land and destroyed or interfered with the boundaries, and that it is in the interests of justice that such a visit be made.

4. Not all the Respondents responded to the application. I only see the response of 5th and 7th Respondents. The 5th Respondent filed grounds of opposition on 5/12/2018. The position taken by the 5th Respondent is that the suit was filed prematurely as the issue of boundary should have been resolved first by the relevant office. The 5th Respondent sees this application as an attempt to create evidence where none exists.

5. The 7th Respondent filed grounds of opposition on 30/10/2018. According to the 7th Respondent, the Applicant is fishing for evidence.

The application was said to lack merit and the court was asked to dismiss it.

6. The application was canvassed by way of written submission. The submissions were not filed by all parties. Only the Applicant and 5th Respondent filed submissions. The Applicant's submissions were filed on 16/1/2019. The submissions reiterated what the application contains.

7. The 5th Respondent's submissions were filed on 22/1/2019. He submitted that the Applicant needed to resolve the issue of boundary before filing her suit. The court was asked to dismiss the application.

8. I have considered the application, the response made, and the rival submissions. I have also had a look into the suit as filed. One of the prayers made in the Plaintiff's suit is that a survey be conducted by the County Land Surveyor and County Land Registrar on Land Parcel No. MARACHI/ELUKONGO/1293 to re-establish the boundary and relocate the road passing through the land.

9. The prayer for survey in the plaint is in the nature of a final order. That prayer requires that evidence be taken first in order for the court to determine whether to grant it or not. And while the prayer is still in the suit, the Applicant made this application again asking that a survey be done. A question arises whether the Applicant wants two surveys to be done. It seems to me like the Applicant is abit confused. Which survey does she want? The one asked for in this application or the one asked for in the suit?

10. Various Respondents have filed defences to the suit. The Applicant has accused them of trespass and/or illegal occupation. They have denied all this and some are also claiming ownership of some parts of the land. In a scenario like that, it becomes completely unhelpful to delve into the issue of survey without at least taking some evidence or hearing the whole matter altogether. It is clear that while the Applicant believes that the whole land belonged to her late father, others-like the 1st, 2nd, and 4th Respondents – do not see it that way. They believe that the land should be divided into two, with them getting half share. Others, like the 7th Respondent, are saying that they have not constructed any road through the land.

11. One would wonder therefore why a boundary should be put at this stage. Of what use would it be when various parties are claiming ownership?

12. At this stage, the application made is clearly one without merits. I hereby dismiss it with no order as to costs.

Dated, signed and delivered at Busia this 10th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Applicant: Present

1st Respondent: Present

2nd Respondent: Absent

3rd Respondent: Absent

4th Respondent: Absent

5th Respondent: Present

6th Respondent: Absent

7th Respondent: Absent

Counsel for the Applicant: N/A

Counsel for the Defendants: Present

CA: Nelson Odame