



**Republic v District Land Surveyor Kiambu & 2 others; Muchai (Exparte) (Judicial Review Cause E004 of 2022) [2023] KEELC 16277 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16277 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
JUDICIAL REVIEW CAUSE E004 OF 2022**

**JG KEMEI, J**

**MARCH 16, 2023**

**IN THE MATTER OF AN APPLICATION FOR JUDIUCAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS UNDER ORDER 53 OF THE CIVIL PROCEDURE RULES AND IN THE MATTER OF THE LAND REGISTRATION ACT (ACT NO. 3 OF 2012) AND THE LAND REGISTRATION (GENERAL) REGULATIONS, 2017 (S.I. NO. 278 OF 2017)**

**AND**

**IN THE MATTE ROF THE SURVEY ACT (CHAPTER 299 OF LAWS OF KENYA)  
AND IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 AND THE FAIR ADMINISTRATIVE ACTION ACT (2015) AND IN THE MATTER OF AND RESTORATION OF THE CORRECT AND LEGAL BOUNDARIES BETWEEN LAND PARCEL NUMBER LR LARI/KIRENGA/650 AND LR LARI/KIRENGA/624**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE DISTRICT LAND SURVEYOR KIAMBU ..... 1<sup>ST</sup> RESPONDENT**

**THE DISTRICT LAND REGISTRAR KIAMBU LANDS  
REGISTRY ..... 2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ONESMUS RIGII MUCHAI ..... EXPARTE**

**JUDGMENT**

1. The *exparte* applicant moved this court vide Judicial Review cause filed on July 1, 2022.



2. He sought the following orders:-
  - a. That by way of Judicial Review, an order of *certiorari* do issue to bring into this court and quash the entire decision of the 1<sup>st</sup> respondent and his Subordinate Government Surveyor of installing Boundary Demarcation Beacons between Lari/kirenga/650 owned by the *ex parte* Applicant herein and the adjacent Lari/kirenga/624 without following the due process laid down by the Rules of Natural Justice, the Constitution and the relevant Statute Law and Regulations hence being illegal, invalid, unlawful, illegal, null and void.
  - b. That by way of Judicial Review, an order of mandamus do issue, directing and/or compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein to proceed to the *ex parte* Applicant's Land Parcel LR No Lari/kirenga/650 and restore the beacons and boundary of the suit properties to their original state and/or re-establish its boundaries by affixing beacons or other appropriate boundary marks as per the Official Government Survey Map.
  - c. That this honourable court be pleased to give further orders and/or directions as it may deem fit and just to grant.
  - d. That the costs of this Application be in the cause and be borne by the Respondent.
3. The application is grounded upon the statement of facts and the Supporting Affidavit of Onesmus Rigii Muchai and the grounds set out as thus:-
  - a. That the Ex parte Applicant herein is the Legal, Bonafide, Registered and Lawful Owner of All That piece of land known as Lari/kirenga/650 registered within Kiambu Land District Registry and situate at Kwaregi Village, Githirioni Location, Lari Sub-County of Kiambu County.
  - b. That on October 8, 2021, a Government surveyor who never properly introduced and/or indentified himself accompanied by some individuals; entered into the *ex parte* applicant's parcel of land and installed land demarcation beacons without involving him and without following the boundaries set in the official government survey map.
  - c. That as a result of the unlawful and unprofessional conduct of the said Surveyor, the Owner of the adjacent land that is Lari/kirenga/624 used the said beacons to trespass into the Applicant's land, encroaching part of it by installing an illegal fence.
  - d. That the aforesaid illegal fencing divided the Ex parte Applicant's land leaving some of his crops and trees in the adjoining parcel of land thereby causing him a great economic loss.
  - e. That the said Actions of the said Government were unlawful as they did not adhere to the stipulations laid down by the [Land Registration Act](#) (Act No. 3 of 2012) and the [Land Registration \(General\) Regulations, 2017](#) (SI No 278 of 2017).
  - f. That the aforesaid boundary delimitation by the 1<sup>st</sup> respondent are also in breach of the cardinal rules of natural justice since the ex-parte applicant herein was never involved in the process wherefore it is unfair and unjust.
  - g. That despite the applicants' numerous follow ups to the relevant respondents' offices requesting the said public officer to repeat the process and correct the anomalies on the ground, the said respondents have willfully and blatantly rejected and/or ignored his pleas.
  - h. That the applicant is a peasant farmer who relies on the said parcel of land as his sole source of livelihood, and that of his family wherefore, any continued trespass, encroachment and



interference is hampering his daily economic activities thereby reducing him to a pauper which may result to the disintegration of his family.

- i. That if the application herein is not heard and orders herein granted, the ex-parte applicant stand to suffer grievous prejudice and financial embarrassment, irreparable loss, harm and damage.
  - j. That this honourable court has jurisdiction to grant the orders sought herein.
  - k. That it would be just and expedient if the application is heard as a matter of priority to protect the constitutional rights of the applicant from draconian, arbitrary and unjustifiable actions of the 1<sup>st</sup> respondent.
4. In the statement of facts filed pursuant to order 53 rule 1(2) of the Civil Procedure Rules the Applicant described himself as a retired teacher and a peasant farmer and owner of parcel 650. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are the Surveyor and the Land Registrar Kiambu while the 3<sup>rd</sup> Respondent is the Hon Attorney General, the Principal Legal Adviser to the Government of Kenya.
  5. The background of this review is traced to the October 8, 2021 when the Applicant avers that an unidentified Government Surveyor in the company of others entered his land parcel Lari/Kirengo/650 and installed the beacons without involving him or adhering to the boundaries set in the survey map. That the act was unlawful and unprofessional. As a result the owner of parcel 624 used the said beacons to trespass and encroach into his land and erect an illegal fence. Despite several demands to rectify the beacons, his request and demands have been met with inaction on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
  6. The grounds of appeal are cited as unreasonable and irrationality, illegality, procedural, unfairness, unmet legitimate expectations.
  7. The applicant sought the following reliefs:-
    - a. An order of *certiorari* to remove into this Court and quash the entire decision of the 1<sup>st</sup> Respondent and his subordinate Government Surveyor of installing Boundary Demarcation Beacons between Lari/kirenga/650 owned by the *exparte* Applicant herein and the adjacent Lari/kirenga/624 without following the due process laid down by the relevant rules of Natural Justice, the Constitution, Statue Law and Regulations hence illegal, invalid, unlawful, illegal, null and void.
    - b. An order of mandamus do issue directing and/or compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to proceed to the Exparte Applicant's land parcel LR No Lari/kirenga/650 and restore the beacons and boundary of the suit properties to their original state and/or re-establish its boundaries by affixing beacons or other appropriate boundary marks as per the official government survey map.
    - c. Costs of the application be borne by the respondent and the interested party.
    - d. Such further and other reliefs as this honourable court may deem just and expedient to grant.
  8. In the verifying affidavit of the applicant dated May 25, 2022 he reiterated the contents of the facts aforestated.
  9. In addition he stated that the illegal fencing has divided his land leaving some of his crops and trees in the adjoining parcel of land causing loss and injury. That the actions of the Surveyor were contrary to the laid down stipulations in the Land Registration Act and the Land Regulations General Regulations



2017. The boundary delimitation is in breach of the cardinal rules of natural justice since he was neither consulted nor participated in the exercise.
10. Further he stated that his several attempts to follow up with Respondents to rectify the anomalies on the ground bore no fruit hence the review. The parcel of land is his only source of income for his family. The encroachment of his land has caused him distress and mental anguish.
  11. In support of his case the Applicant has enclosed a copy of title and various photographs, RIM, demand letter dated January 6, 2022, March 2, 2022 and May 5, 2022 marked as ORM 1-3.
  12. Despite service of the Judicial Review the Respondents failed to enter appearance nor to file response thereto. The Judicial Review is therefore unopposed.
  13. On the November 9, 2022 the Applicant elected to file written submissions in support of the Judicial Review. By the time of writing this Judgment no written submissions are on record.
  14. That be the case I shall proceed to determine the Judicial Review based on material before me.
  15. The key issue for determination is whether the Judicial Review Motion is merited.
  16. The onus of proof rests on the one that alleges. It is the responsibility of the Applicant to proof his case.
  17. It is the case of the Applicant that the 1<sup>st</sup> Respondent entered into his land and installed beacons without involving him and without adhering to the law. As a result the owner of parcel 624 relying on the said erected beacons has trespassed onto the land and erected an illegal fence. The photographs of a new fence was exhibited. It is also not in dispute that parcel 624 and 650 are adjacent to each other. The extent of the encroachment is however not disclosed.
  18. Section 18 and 19 of the Land Registration Act provides guidelines on boundary disputes. It states as follows:-
    - (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
    - (2) the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
    - (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;  
  
Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act.
      - (1) if the Registrar considers it desirable to indicate on a field plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
      - (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in



question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

19. Pursuant to Section 19(1) it is clear that the Land Registrar is obligated to give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix boundaries. The Applicant has led unchallenged evidence that he was not notified before the boundaries were altered. He states that on October 8, 2021 a Government Surveyor who never identified himself accompanied by some individuals entered his land and proceeded to erect beacons. In the absence of any evidence of notice addressed to the Applicant, the evidence of the Applicant remains unchallenged and is taken to be credible.
20. Under Article 47 of the Constitution every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4 of the [Fair Administrative Action Act](#) states as follows:-
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
  2. Every person has the right to be given written reasons for any administrative action that is taken against him.
  3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
    - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
    - b. an opportunity to be heard and to make representations in that regard;
    - c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
    - d. a statement of reasons pursuant to section 6;
    - e. notice of the right to legal representation, where applicable;
    - f. notice of the right to cross-examine or where applicable; or
    - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
  4. The administrator shall accord the person against whom administrative action is taken an opportunity to-
    - a. attend proceedings, in person or in the company of an expert of his choice;
    - b. be heard;
    - c. cross-examine persons who give adverse evidence against him; and



- d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
  5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
  6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 41 of the Constitution, the administrator may act in accordance with that different.”
21. Article 50 of the Constitution espouses the right to be heard as sacrosanct when it states that-
- “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”
22. It is clear from the above provisions of the law that to the extent that the Applicant was not notified contacted and or afforded the opportunity to be heard with respect to the rectification of the boundary the actions of the 1<sup>st</sup> Defendant in so erecting new beacons cannot be said to be lawful.
23. Final orders for disposal:-
- a. An order of *certiorari* to remove into this Court and quash the entire decision of the 1<sup>st</sup> Respondent and his subordinate Government Surveyor of installing Boundary Demarcation Beacons between Lari/kirenga/650 owned by the *exparte* Applicant and the adjacent Lari/kirenga/624,
  - b. An order of mandamus do issue directing and/or compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to proceed to the Exparte Applicant’s land parcel LR No Lari/kirenga/650 and restore the beacons and boundary of the suit properties to their original state and/or re-establish its boundaries by affixing beacons or other appropriate Boundary Marks as per the Official Government Survey Map.
  - c. I make no orders as to costs.
24. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 16<sup>TH</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Karanja for the Applicant

1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents – Absent

Court Assistants – Esther / Kevin

