



REPUBLIC OF KENYA



**KENYA LAW**  
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**Republic v Gathara & another; Kinya (Exparte Applicant) (Judicial Review Miscellaneous Application E001 of 2022) [2023] KEELC 16408 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16408 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2022**

**AK BOR, J**

**MARCH 16, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**SAMUEL GATHARA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RUMURUTI LAND REGISTRY ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**CATHERINE KINYA ..... EXPARTE APPLICANT**

*(After being granted leave to commence judicial review proceeding on 30/6/2022, the Applicant filed the notice of motion dated 18/7/2022.)*

**JUDGMENT**

1. The Applicants seek an order of *certiorari* to quash the decision of the 2<sup>nd</sup> Respondent contained in his report on the boundary dispute between her and the 1<sup>st</sup> Respondent relating to the parcels of land known as Laikipia Mbuyu/513 and Laikipia Mbuyu/576 with 577. The Applicant also sought an order of *mandamus* to compel the 2<sup>nd</sup> Respondent to repeat the process he undertook and resolve the boundary dispute in compliance with the law.
2. The application was supported by statutory statement setting out the parties, the reliefs sought and the grounds upon which the reliefs are sought. It was also supported by the Applicant's verifying affidavit.
3. The 2<sup>nd</sup> Respondent is the Land Registrar of the Rumuruti land registry in Laikipia County and is charged under Section 19 (1) of the [Land Registration Act](#) to determine disputes relating to boundaries of land.



4. The Applicant contends that the 2<sup>nd</sup> Respondent failed to take all relevant considerations into account in arriving at his decision and that the decision is flawed in law for lack of participation by the Applicant. The Applicant contended that the 2<sup>nd</sup> Respondent acted in bad faith when he arrived at his decision without hearing both parties. Further, that the decision made by the 2<sup>nd</sup> Respondent offends the rules of natural justice because the Applicant was condemned without being heard. The Applicant contended that the 2<sup>nd</sup> Respondent's administrative actions were disproportional, unfair and in violation of her legitimate expectation.
5. In her supporting affidavit sworn on 18/7/2022, the Applicant averred that the 2<sup>nd</sup> Respondent issued a report pursuant to Section 19 of the [Land Registration Act](#) regarding the boundary dispute between herself and the 1<sup>st</sup> Respondent relating to parcel numbers Laikipia/Mbuyu 513 and Laikipia /Mbuyu 576. Prior to issuing that report, the 2<sup>nd</sup> Respondent served the notice dated October 18, 2021 on the Applicant requiring her to attend the site visit on 1/12/2021.
6. The Applicant deponed that she availed herself and was at the site on 1/12/2021 but the Respondents never turned up. She later learnt through one of her neighbours that the 2<sup>nd</sup> Respondent subsequently visited the site in the company of the district surveyor and the 1<sup>st</sup> Respondent and made the decision without hearing her.
7. She contended that the impugned decision affected her right to user and possession of her property because the first Respondent had encroached on her land on the strength of the decision. She attached the mutation form for her land which she stated that she had subdivided and had started selling the resultant plots.
8. The 1<sup>st</sup> Respondent swore the affidavit in opposition to the application on 23/9/2022. He deponed that parcel numbers 576 and 577 resulted from the subdivision of parcel no. 514 which is adjacent to his land being parcel no. 513. He averred that at the time of purchasing the land there were no existing bacons but they were shown the extent of their land. Further, that after acquiring parcel no. 577, the Applicant fenced her portion and her fence protruded into his land which prompted him to lodge a complaint at the Rumuruti Land registry.
9. The 2<sup>nd</sup> Respondent deponed that during the site visit on 26/1/2022 the Applicant was represented by Stephen Muchemi who was given an opportunity to ventilate the Applicant's case on her behalf. He maintained that all the requisite procedures were followed in arriving at the decision and urged the court to dismiss the claim.
10. The court directed parties to file written submissions, which it considered. The 2<sup>nd</sup> Respondent neither participated in the proceedings nor did it file any documents in the suit.
11. The Applicant relied on Articles 47 and 50 of the [Constitution](#) on the right to fair administrative action and the right to a fair hearing respectively. She relied on various decisions made by the courts regarding the grant of orders of *mandamus* and judicial review generally. She maintained that the 2<sup>nd</sup> Respondent's decision was made without giving her an opportunity to be heard. She urged the court to grant the orders sought.
12. The 1<sup>st</sup> Respondent filed submissions and relied on Section 19 of the [Land Registration Act](#). He submitted that according to the report prepared by the land registrar, the Applicant was represented at the hearing by Stephen Muchemi. He relied on Section 87 (1) (a) of the [Land Registration Act](#) on the meaning ascribed to the opportunity to be heard and submitted that a person is deemed to have been given an opportunity to be heard if the person attends before the registrar personally, or by an advocate or other agents and is given such an opportunity.



13. He argued that both parties were heard and that there was no bad faith on the part of the 2<sup>nd</sup> Respondent. He added that the 2<sup>nd</sup> Respondent took all relevant considerations before arriving at his decision by listening to the 1<sup>st</sup> Respondent and the Applicant's representative and that he also took into account the findings of the surveyor who is an expert in that field. He maintained that the decision could not be said to be irrational.
14. He added that during approval and registration of a mutation, there was no requirement to visit the site to countercheck and approve the beacons on the ground because what was approved and registered was the approximate size of the new parcels indicated in the mutation. He added that the position of the parcel of the land on ground was determined by beacons and which were not visible hence new ones had to be placed. He urged the court to dismiss the claim and award him costs.
15. The issue for determination is whether the court should grant the orders of *certiorari* and *mandamus* sought by the Applicant. Under section 19 of the [Land Registration Act](#), if an interested person applies to the registrar to indicate the precise position of the boundaries of a parcel of land or its parts, the registrar is required to give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries. After giving all persons appearing in the register an opportunity of being heard, the registrar is required to cause to be defined by survey the precise position of the boundaries in question and file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed. After that, the plan is deemed to accurately define the boundaries of the parcel.
16. The Applicant's contention is that she was condemned without being heard. She exhibited the notice dated October 15, 2021 issued to Nahason Mwaura Njenga and her by the Land Registrar, Rumuruti land registry indicating that the land registrar would visit the disputed boundaries on 1/12/2021 at 11:00 a.m. The notice required the addressees to be at the site on the date specified and indicated that a decision would be taken if they failed to attend.
17. The report on the boundary dispute filed in court as well as the surveyor's report dated 3/3/2022 confirmed that there was a site visit and that Samuel Gathara and Stephen Muchemi attended with their latter representing the proprietor of parcel 577.
18. The 1<sup>st</sup> Respondent confirmed that the exercise undertaken to determine the boundaries for parcel numbers 513, 577 and 576 was undertaken on 26/1/2022. There is no indication that a notice was served on the Applicant notifying her of the new date as stipulated in section 19. Not having attended the site visit, the Applicant was not afforded an opportunity to be heard as required by the law.
19. An order of *certiorari* is issued to quash the decision of the 2<sup>nd</sup> Respondent in his report on the boundary dispute between the Applicant, the Respondent relating to parcel numbers Laikipia Mbuyu 513, 577 and 576. An order of *mandamus* is issued directing the 2<sup>nd</sup> Respondent to repeat the process to solve the boundary dispute in strict compliance with the law. The Applicant is awarded the costs of the suit to be borne by the 2<sup>nd</sup> Respondent.

**DELIVERED VIRTUALLY AT NANYUKI THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**K. BOR**

**JUDGE**

