



**Republic v Obare & 2 others; Walji (Interested Party); Ounga & another
(Exparte) (Environment and Land Case Judicial Review Application
E008 of 2022) [2023] KEELC 18227 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E008 OF 2022**

SO OKONG'O, J

JUNE 22, 2023

**IN THE MATTER OF: AN APPLICATION FOR
JUDICIAL REVIEW ORDER OF CERTIORARI**

AND

**IN THE MATTER OF: THE LAND REGISTRATION ACT,
NO. 3 OF 2012 AND THE LAND ACT NO. 6 OF 2012**

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, NO. 4 OF 2015

BETWEEN

REPUBLIC APPLICANT

AND

DAVID OBARE 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

THE KISUMU COUNTY DIRECTOR OF SURVEYS 3RD RESPONDENT

AND

LIAQUATALI SADRUDDIN WALJI INTERESTED PARTY

AND

JOHNSON OMONDI OUNGA EXPARTE

**TOBIAS ODHIAMBO OUNGA (SUING AS LEGAL REPRESENTATIVES OF
THE ESTATE OF THE LATE ABERDNEGO OUNGA AJUANG) EXPARTE**



JUDGMENT

The ex-parte Applicants

- 1 The ex-parte Applicants, Johnson Omondi Ounga and Tobias Odhiambo Ounga (hereinafter referred to only as “the applicants”) brought this judicial review application by way of Notice of Motion dated 14th December 2022 seeking the following orders;
 1. That this Honourable Court be pleased to issue an order of Certiorari to remove into this court the 1st Respondent’s land boundary dispute proceedings conducted on 19th May 2022 and findings contained in his report dated 26th May 2022 for the purposes of being quashed.
 2. That the costs of the application be provided for.
- 2 The application was brought on the grounds set out in the statutory statement and verifying affidavit of Johnson Omondi Ounga both dated 25th November 2022 and a supporting affidavit of the said Johnson Omondi Ounga dated 14th December 2022. The applicants averred that their late father, Aberdnego Ounga Ajuang (hereinafter referred to as “the deceased”) is and was at all material times the registered owner of all that parcel of land known as Kisumu/Dago/3635(hereinafter referred to as “the suit property”). The applicants averred that the deceased died on 10th September 2016 and they were issued with a Grant of Letters of Administration ad litem in respect of his estate on 10th November 2022. The applicants averred that the interested party was the owner of all that parcel of land known as Kisumu/Dago/3493(hereinafter referred to as “Plot No. 3493”). The applicants averred that the deceased was the first registered owner of the suit property on which stood their ancestral home which they had occupied peacefully for several years.
- 3 The applicants averred that on 19th May 2022, they were informed by the person taking care of the suit property on their behalf that the interested party came to the suit property with strangers who took measurements and thereafter erected beacons on the property. The applicants averred that they went to the suit property the following day and proceeded to the office of the area Assistant Chief to lodge a complaint against the interested party. The applicants averred that the Assistant Chief informed them that he had received a boundary dispute summons from the Land Registrar, Kisumu dated 14th May 2022 that the Land Registrar would visit the suit property on 19th May 2022, and that since they were not staying at their home on the suit property, he was unable to serve the said notice upon them.
- 4 The applicants averred that the interested party who had been their neighbour for about 20 years had never complained to them over their common boundary and that they were not given any notice of the visit to the suit property by the Land Registrar to determine the alleged boundary dispute with the interested party. The applicants averred that they wrote to the Kisumu County Land Registrar complaining about the illegal action that had been taken by his office and demanding that the process be reversed. The applicants averred that following the said letter of complaint, the County Land Registrar wrote to them a letter dated 8th September 2022 addressed “to whom it may concern” in which he enclosed a copy of a letter dated 26th May 2022 that was addressed to him by the County Director of Surveys in which letter was attached “a field report” on the boundary dispute between Land Parcels Kisumu/Dago/3493, 3635 and 3492 prepared by the 1st Respondent for the County Director of Surveys. The applicants averred that according to the said field report by the 1st and 2nd respondents, the applicants had encroached into the interested party’s parcel of land to the extent of 0.04 of a hectare



which was not correct. The applicants averred that their request to the County Land Registrar and County Surveyor to re-do the survey exercise did not elicit any response.

- 5 The applicants averred that the 1st and 2nd respondents had overstepped their mandate under section 18 of the [Land Registration Act](#), 2012. The applicants averred that the decision by the 1st and 2nd respondents to hive off a portion of the applicants' land and to award the same to the interested party was without jurisdiction and as such null and void. The applicants averred that failure on the part of the 1st and 2nd respondents to give the applicants notice prior to visiting the suit property violated their right to fair administrative action. The applicants averred that the 1st and 2nd respondents' action was unlawful, unreasonable, and procedurally unfair. The applicants averred that the 1st and 2nd respondents' acted in excess of their powers and against the rules of natural justice. The applicants averred that the 1st and 2nd respondents' decisions complained of were unreasonable and oppressive. The applicants averred that the 1st and 2nd respondents' actions aforesaid interfered with the estate of the deceased to the detriment of the family of the deceased. The applicants averred that this was a fit and proper case to grant the orders sought.

The responses by the respondents and the interested party

- 6 The application was opposed by the 1st and 3rd respondents. The 1st respondent filed grounds of opposition on 16th December 2022. The 1st respondent contended that the decision on the boundary between the applicants' and the interested party's parcels of land complained of by the applicants was made by the Land Registrar under section 18 of the [Land Registration Act](#), 2012 and not by the 1st respondent. The 1st respondent contended that the said Land Registrar was present when the 1st respondent visited the suit property and carried out the boundary determination survey exercise. The 1st respondent contended that he did not deal with the issues concerning the boundary dispute. The 1st respondent denied that the applicants were not served with a notice of the boundary determination exercise. The 1st respondent averred that all the parties concerned were served with notices by the Land Registrar through the area Chief. The 1st respondent averred that he performed his role as a surveyor and submitted his report to the Land Registrar who made a decision on the boundary dispute. The 3rd respondent opposed the application through grounds of opposition dated 15th December 2022. The 3rd respondent contended that the application was premature as against the 3rd Respondent. The 3rd respondent averred that it had been wrongly joined in the application. The 3rd respondent averred that the orders sought could not issue against the 1st respondent. The 3rd respondent averred that the application was brought against the doctrine of exhaustion. The interested party appointed a firm of advocates to act for him. He however chose not to file any response to the application.

The submissions

- 7 The application was argued by way of written submissions. The applicants filed their submissions on 14th February 2023. The 3rd respondent and the interested party filed their submissions on 10th February 2023 and 7th March 2023 respectively. The applicants submitted that the 1st respondent did not demonstrate that he acted within the law when he issued his report dated 26th May 2022 on the boundary dispute between the applicants and the interested party. The applicants submitted that the Land Registrar was not present during the survey exercise that was carried out by the 1st respondent. The applicants submitted that the boundaries between the applicants' and the interested party's parcels of land were general boundaries that could only be fixed by the Land Registrar with notice to the parties concerned. The applicants submitted that neither the applicants nor the owners of the neighbouring parcels of land were notified of the boundary dispute or summoned to appear on the day when the Land Registrar was supposed to go to the suit property to determine the dispute. The applicants



- submitted that through the illegal exercise, the respondents had hived off a portion of the applicants' parcel of and awarded the same to the interested party.
- 8 The applicants submitted that no evidence in the form of minutes for the day or proceedings were placed before the court in proof of the 1st respondent's allegation that the Land Registrar was present during the boundary determination exercise.
 - 9 The applicants submitted that if the 1st respondent's decision was implemented, the applicants risked being dispossessed of a portion of their land measuring 0.04 of a hectare. The applicants reiterated that the respondents' decision was tainted with illegality, irrationality, and procedural impropriety. The applicants urged the court to grant the prayers sought in the application.
 - 10 The applicants cited *Pastoli v. Kabale District Local Government and Others* [2008] 2 E.A 300, *Zachariah Wagunza & Another v. Office of the Registrar, Academic Kenyatta University & 2 Others* [2013] eKLR and *Commissioner of Lands v. Kunste Hotel Ltd.*[1997]eKLR in support of their submissions.
 - 11 In its submissions in reply, the 3rd respondent reiterated that it was wrongly joined as a party to the suit. In support of this submission, the 3rd respondent cited Order 1 Rule 3 of the Civil Procedure Rules, Article 156 of *the Constitution*, and the case of *Republic v. A.G & 4 Others Ex parte Ravji Lalji* [2021] e KLR.
 - 12 The 3rd respondent submitted that the impugned survey report dated 26th May 2022 was prepared by the County Director of Surveys in the Department of Lands, Housing, Physical Planning and Urban Development within Kisumu County Government. The 3rd respondent submitted that the office of said County Director of Surveys did not fall under the National Government. The 3rd respondent submitted that it did not act for the County Governments. The 3rd respondent submitted that section 7 of the County Attorney Act, 2020 established the office of the County Attorney. The 3rd respondent submitted that the County Attorney was the Principal Legal Advisor to the County Government and shall on instruction of the County Government represent the County Executive in court or any other legal proceedings to which the County Executive was a party other than criminal proceedings. The 3rd respondent submitted that since it was not a legal advisor to the County Government of Kisumu, its joinder to this suit was wrongful.
 - 13 On his part, the interested party framed three issues that he submitted on namely; whether the report dated 26th May 2022 by the 1st respondent amounted to a decision that was amenable to judicial review in the nature of certiorari, whether the 1st respondent exceeded his powers in surveying the suit property, and whether the applicants were entitled to the orders sought.
 - 14 On the first issue, the interested party submitted that a boundary determination was only legally capable of being carried out by a surveyor under the *Survey Act* Chapter 299 Laws of Kenya and the *Land Registration Act*, 2012. The interested party relied on Halsbury's Laws of England, 3rd Edition Vol. 11 page 55 paragraph 114 and the case of *Republic v. Kenya National Examinations Council Ex parte Gathenji & Others* (Court of Appeal Civil Appeal No. 266 of 1996) quoted in *Chuka ELC JR No. E001 OF 2021*, *Republic v. The District Land Adjudication Officer, Maara Sub-County & Others* in support of his submissions.
 - 15 The interested party submitted that section 23 (1) of the *Survey Act*, Chapter 299 Laws of Kenya sets out what a surveyor can do and that the duties imposed thereby are all executive in nature and are not anywhere near decision making let alone judicial decision making. The interested party submitted that the surveyor in carrying out any of the six functions set out in the said Act only applies his technical



- skills to interpret the map of the area under survey in relation to any physical features on the land being surveyed to arrive at the technical conclusion for which the exercise is being undertaken.
- 16 The interested party submitted that surveys under sections 18,19 and 20 of the *Land Registration Act* No. 6 of 2012 are done by a surveyor at the instance of the Land Registrar and these are done in cases where there is a boundary dispute which the land owners report to the Land Registrar. The interested party submitted that in resolving boundary disputes, the Land Registrar receives an allegation of interference by one land owner and a denial by another land owner, and evidence for and against interference with the boundary is given by the parties.
 - 17 The interested party submitted that the Land Registrar in the process calls for technical expert evidence from a surveyor to help the Land Registrar make a decision on whether there is interference with a boundary or encroachment by any party. The interested party submitted that where a surveyor is called by the Land Registrar to establish a boundary under section 19 or 20 of the *Land Registration Act*, the surveyor is an expert witness giving expert and technical evidence which assists the Land Registrar to make a determination. The interested party submitted that the surveyor's report is not a decision (judicial or non-judicial) and cannot, therefore, be the subject of judicial review in the nature of certiorari or prohibition.
 - 18 The interested party submitted that the report dated 26th May 2022 sets out the methodology that was applied in arriving at the final conclusion. The interested party submitted that in preparing his report, the 1st respondent neither conducted a hearing nor took oral evidence. The interested party submitted that the report was therefore not a judicial or quasi-judicial decision.
 - 19 The interested party submitted that the report was not a final product as it was for use by the Land Registrar to consider and pronounce itself on the issues in dispute regarding the boundary of the subject parcels of land. On the issue of whether the 1st respondent in surveying the subject properties overstepped his mandate, the interested party submitted that the exhibits furnished by the applicants showed that the 1st respondent was invited to survey the subject boundary by the Land Registrar and he made a report which he forwarded to the Land Registrar for action.
 - 20 The interested party submitted that it was not upon the 1st respondent to invite owners of the properties whose boundaries were in dispute to witness the survey exercise. The interested party submitted that that obligation fell on the Land Registrar. On the issue of whether the applicants were entitled to the orders sought, the interested party submitted that he had demonstrated that there were neither proceedings nor a decision that was judicial in nature capable of being quashed by an order of Certiorari. The interested party submitted that the 1st respondent whose report was challenged was not an administrative body and that the 1st respondent neither took evidence nor made a decision based on the evidence from the owners of the properties that were surveyed.
 - 21 The interested party submitted that the applicants' application was based on a false premise that the survey exercise by the 1st respondent was a judicial or quasi-judicial or administrative proceeding and that the 1st respondent's report was a decision. The interested party submitted that the application was misconceived and that the same did not lie to this court and must be dismissed.

Analysis and determination

- 22 I have considered the applicants' application together with the supporting affidavits and the grounds of opposition filed in response thereto by the 1st and 3rd respondents. I have also considered the submissions by the advocates for the applicants, the 3rd respondent, and the interested party. In their application, the applicants are seeking an order of certiorari to bring before this court and quash the



land boundary determination proceedings of 19th May 2022 and the findings in the report dated 26th May 2022. I am of the view that there is only one issue arising for determination in the application namely, whether the applicants have made out a case for the grant of an order of judicial review in the nature of certiorari against the respondents. Judicial review is now a constitutional, statutory, and common law remedy. Section 4 of the *Fair Administrative Action Act*, 2015 (hereinafter referred to as “the Act”) provides as follows:

“4.

- (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.”



23 Section 7 of the Act provides as follows:

- “(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-
- a. a court in accordance with section 8; or
 - b. a tribunal in exercise of its jurisdiction conferred in that regard under any written law.
- (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
- a. the person who made the decision-
 - (i) was not authorized to do so by the empowering provision;
 - (ii) acted in excess of jurisdiction or power conferred under any written law;
 - (iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - (iv) was biased or may reasonably be suspected of bias; or
 - (v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person’s case;
 - b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
 - c. the action or decision was procedurally unfair;
 - d. the action or decision was materially influenced by an error of law;
 - e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
 - f. the administrator failed to take into account relevant considerations;
 - g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
 - h. the administrative action or decision was made in bad faith;
 - i. the administrative action or decision is not rationally connected to-
 - i. the purpose for which it was taken;



- ii. the purpose of the empowering provision;
- iii. the information before the administrator; or
- iv. the reasons given for it by the administrator;
- j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- k. the administrative action or decision is unreasonable;
- l. the administrative action or decision is not proportionate to the interests or rights affected;
- m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- n. the administrative action or decision is unfair; or
- o. the administrative action or decision is taken or made in abuse of power.”

24 Section 12 of the Act provides that:

“This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.”

25 In *OJSC Power Machines Limited, Trans Century Limited, and Civicon Limited (Consortium) v. Public Procurement Administrative Review Board Kenya & 2 others* [2017] eKLR, the Court of Appeal stated as follows:

“The law on the jurisdiction of the High Court to entertain judicial review proceedings are encapsulated in several decisions, some of which were cited before us while the learned Judge applied others in his judgment. The law, from these decisions is to the following effect; That the purpose of judicial review is to ensure that a party receives fair treatment in the hands of public bodies; that it is the purpose of judicial review to ensure that the public body, after according fair treatment to a party, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court in a judicial review proceeding. Put another way, judicial review is concerned with the decision making process, not with the merits of the decision itself. In that regard, the court will concern itself with such issues as to whether the public body in making the decision being challenged had the jurisdiction, whether the persons affected by the decision were heard before the decision was made and whether in making the decision, the public body took into account irrelevant matters or did not take into account relevant matters”.

26 In *Municipal Council of Mombasa v. Republic & another* [2002] eKLR the Court of Appeal stated as follows concerning judicial review:

“... And as the Court has repeatedly said, judicial review is concerned with the decision - making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was



the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision - maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decision; acting as an appeal court over the decision would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review...”

27 In the book, H. W. Wade and C. F. Forsyth, *Administrative Law*, 10th Edition, the authors have stated as follows at page 509 on the remedies of Certiorari and Prohibition:

“The quashing order and prohibiting order are complementing remedies, based upon common law principles...A quashing order issues to quash a decision which is ultravires. A prohibiting order issues to forbid some act or decision which will be ultravires. A quashing order looks to the past, a prohibiting order to the future.”

28 In *Kenya National Examination Council v. Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR, the court stated as follows on the scope and efficacy of remedies of Prohibition and Certiorari:

“... prohibition is an order from the High Court directed to an inferior tribunal or body which prohibits that tribunal or body to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land...Only an order of Certiorari can quash a decision already made and an order of Certiorari will issue if the decision is made without or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons.”

29 In the book; *Public Law in East Africa* published by Law Africa, the author Ssekaana Musa has stated as follows at page 250:

“Judicial review is a discretionary jurisdiction. The prerogative remedies, the declaration and the injunction are all discretionary remedies with exception of habeas corpus which issues ex debito justitiae on proper grounds being shown. A court may in its discretion refuse to grant a remedy, even if the applicant can demonstrate that a public authority has acted unlawfully.”

30 It is on the foregoing principles that the applicants’ application falls for consideration. I am satisfied that the applicant has made out a case for the grant of the order sought in their application. The 1st respondent is a surveyor in the office of the 2nd respondent. I am in agreement with the 3rd respondent that the 1st respondent should have been sued in his official capacity rather than in his personal name as he undertook the exercise complained of as an official of the 2nd respondent. This error is however not fatal to the application since the 2nd respondent on whose behalf the 1st respondent acted has been joined as a party to the application. The joinder of the 1st respondent to the suit is in my view superfluous since everything he did was done for and on behalf of the 2nd respondent. The exercise that the 1st and 2nd respondents were engaged in was the determination of the boundary between the applicants’ and the interested party’s parcels of land. The manner in which the exercise should have been conducted is provided for in law. The 1st and 2nd respondents had a duty to ensure that their participation in the exercise was lawful and that the procedure set out in law for the determination of



boundaries was complied with. In HC. Misc Application No. 524 of 2017, R v. The Chief Licensing Officer and Another, Ex Parte Tom Mboya Onyango that was quoted in Re: Kisumu Muslims Association HC. Misc Application No. 280 of 2003 the court stated that:

“Where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters...”

31 The statutory basis and the procedure for determining land boundary disputes is provided for in sections 18 and 19 of the [Land Registration Act](#), 2012 which provide as follows:

“Boundaries.

18.

- (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. (emphasis added).
- (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](#), Cap. 299. (emphasis added)

Fixed boundaries.

19.

- (1) If the Registrar considers it desirable to indicate on a filed 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.(emphasis added)
- (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. (emphasis added)



- (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”.

- 32 It is clear from the foregoing provisions of the law that the power to determine boundaries of land is conferred by law upon the Land Registrar. Sections 19(1) and (2) of the *Land Registration Act* make it mandatory for the Land Registrar to notify the owners of the parcels of land adjoining the parcel whose boundary is to be determined of his intention to carry out the exercise and he must hear them before he calls in the surveyor to determine the precise location of the boundaries of the particular parcel of land. This means that the survey exercise comes at the tail end of the entire exercise of fixing of a boundary.
- 33 It is undisputed that the deceased whose estate is represented by the applicants was the registered proprietor of the suit property which is adjacent to Plot No. 3493 owned by the interested party and whose boundary was to be determined by the Land Registrar. It is not disputed that the deceased died on 10th September 2016 and that the applicants were not issued with a limited Grant of Letters of Administration in respect of his estate until 10th November 2022. According to the report dated 26th May 2022 that was prepared by the 1st respondent for the 2nd respondent, the 1st respondent visited the suit property, Plot No. 3493 and Plot No. 3492 on 19th May 2022 for the survey exercise.
- 34 The Land Registrar was aware of his duty to serve notices upon the owners of the parcels of land adjoining Plot No. 3493 before he could embark on the determination of the boundary dispute involving the suit property, Plot No. 3493 and Plot No. 3492. The Land Registrar is said to have issued Summons on 14th May 2022 for service upon among others, the deceased through the Assistant Chief and the Chief, Dago Sub-location and Dago Location respectively to appear at the site of the disputed boundary during the Land Registrar’s visit on 19th May 2022. The applicants have denied that they were served with the said Summons which was addressed to their deceased father. The applicants have contended that they received a copy of the said Summons at the office of the Assistant Chief on 20th May 2022 after the survey exercise when they went there to lodge a complaint against the interested party. The applicants’ contention that they were not served with the said Summons was not controverted by the respondents and the interested party who never swore a replying affidavit in response to the application. In any event, the Summons were not addressed to the applicants. They were addressed to the deceased who died in 2016. Furthermore, the Summons gave a notice of 5 days 2 of which fell on a weekend. The notice even if it had been addressed to the applicants and served upon them was inadequate. There is also no evidence that the Land Registrar accompanied the 1st respondent to the site of the boundaries that were in dispute on 19th May 2022 pursuant to the said Summons. The 1st respondent did not indicate in his report that the Land Registrar or any other person was present when he conducted a survey on the suit property and Plot No. 3493 on 19th May 2022.
- 35 As I have mentioned earlier, the survey that was to be conducted by the 1st and 2nd respondents was part of a boundary determination exercise that was being carried out by the Land Registrar. It was not an independent process as suggested by the interested party in his submissions. Both the Land Registrar and the 1st respondent were public officers. The exercise that they were involved in was quasi-judicial. They both had a duty to ensure that they complied with the law while carrying out the exercise. They had a duty to observe the rules of natural justice and to ensure that those who were likely to be affected by their decision were accorded a fair hearing. As I have mentioned earlier in the judgment, the 1st and 2nd respondents could only proceed with the survey after the Land Registrar had heard the persons whose parcels of land were adjoining Plot No. 3493. In the absence of any evidence that they were given



notice and heard before the said survey was carried out, the survey exercise was conducted in breach of the rules of natural justice. The interested party has contended that the 1st respondent had no duty to give any person a hearing before conducting the survey. The survey as I have stated was not being done in isolation. It was part of a process. Parties had to be heard on the boundaries of their parcels of land to guide the survey. The applicants had a right to be given adequate opportunity to defend the deceased against the interested party's allegation that the deceased had encroached on his land. That opportunity was not given.

- 36 From the material on record, the report of the survey that was conducted by the 1st and 2nd respondents appears also to have been taken as the decision of the Land Registrar on the boundary dispute between the applicants and the interested party. I am saying so because upon the report being submitted to the Land Registrar, the Land Registrar who appears not to have conducted any hearing of the boundary dispute did not make any determination of its own on the dispute. Instead, it sent out the report "to whom it may concern"... "for your further necessary action." On receipt of the report, the interested party fenced off a portion measuring 0.04 of a hectare of what was hitherto considered part of the suit property. The interested party's action was based on the said report by the 1st respondent dated 26th May 2022 and not on any determination by the Land Registrar of the boundary dispute between the applicants and the interested party.
- 37 Due to the foregoing, it is my finding that the 1st and 2nd respondents did not carry out a survey in accordance with the provisions of sections 18 and 19 of the [Land Registration Act, 2012](#). The 1st and 2nd respondents had no power to carry out a survey until the Land Registrar had issued adequate notices to the owners of the parcels of land adjoining Plot No. 3493 and heard those who wished to be heard. The survey that was conducted without the applicants having been heard was ultravires the powers of the 1st and 2nd respondents under section 19(2) of the [Land Registration Act](#). The survey was also conducted in breach of the rules of natural justice and arbitrarily. The 1st and 2nd respondents also usurped the powers of the Land Registrar by purporting to determine with finality the boundary dispute between the applicants and the interested party. The 3rd respondent had contended that it was wrongly joined in the suit. I am of the view that it was a necessary party to the application to represent the Land Registrar which not only failed to follow the law but abdicated its statutory duty of determining boundary disputes altogether to the 1st and 2nd respondents.

Conclusion

- 38 In the final analysis and for the foregoing reasons, I find merit in the applicants' Notice of Motion application dated 14th December 2022. I, therefore, remove to this court and quash the boundary dispute proceedings conducted on 19th May 2022 relating to land parcels, Kisumu/Dago/3493, Kisumu/Dago/3492 and Kisumu/Dago/3635, and the report dated 26th May 2022 compiled by the 1st respondent for the 2nd respondent. The applicants shall have the costs of the application to be paid by the 2nd respondent and the interested party.

DELIVERED AND SIGNED AT KISUMU THIS 22ND DAY OF JUNE 2023

S. OKONG'O

JUDGE

Judgment delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. C. Onyango for the Applicants

N/A for the 1st and 2nd Respondents



Ms. Masaka for the 3rd Respondent

Mr. Odero h/b for Mr. Wasuna for the Interested Party

Ms. J. Omondi-Court Assistant

