



**Kimiriny v Land Registrar, Narok County; Leperes (Interested Party) (Environment and Land
Judicial Review Case E001 of 2023) [2023] KEELC 18752 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18752 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023

CG MBOGO, J

JULY 18, 2023

**IN THE MATTER OF AN APPLICATION BY KENNEDY LETOYA
KIMIRINY FOR JUDICIAL REVIEW ORDERS OF ORDER OF MANDAMUS**

AND

IN THE MATTER OF THE DISTRICT LAND REGISTRAR AT NAROK

AND

IN THE MATTER OF SECTIONS 18 & 19 OF THE LAND REGISTRATION ACT 2012

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

BETWEEN

KENNEDY LETUYA KIMIRINY APPLICANT

AND

LAND REGISTRAR, NAROK COUNTY RESPONDENT

AND

JOHN LEPERES INTERESTED PARTY

JUDGMENT

1. The application before this court is the Notice of Motion dated 10th February, 2023 and filed on 15th February, 2023 expressed to be brought under Order 53 Rule 3 (1) of the *Civil Procedure Rules* seeking the following orders: -
 - i. That a judicial review order of mandamus be and is hereby issued compelling the respondent to hear and determine the land boundary dispute between L.R. No. 18086 Cis-Mara-Ololulunga



and LR. No. 10916 Cis-Mara Ololulunga belonging to the ex parte applicant and the interested party respectively.

- ii. That the costs of this application be provided for.
2. The application is supported by the affidavit verifying the facts sworn on 17th January, 2023 and the statutory statement dated 17th January, 2023. In these documents, the Ex-parte applicant deposed that there has been a dispute between parcel number LR. No. 18086 Cis-Mara-Ololulunga and LR. No. 10916 Cis-Mara-Ololulunga which belongs to the applicant and the interested party respectively.
3. The Ex-parte applicant further deposed that vide a letter dated 27th July, 2020, he lodged a formal request to the respondent seeking intervention in order to resolve the boundary dispute over the parcels of land. That the respondent summoned both parties through a letter dated 22nd October, 2020 with a view to determine and resolve the boundary dispute on 13th November, 2020. Further, that respondent involved land surveyors to visit the dispute boundary and despite taking these steps, the respondent has never issued the parties with any report touching on the boundary dispute.
4. The Ex-parte applicant further deposed that he made further request to verify the boundary vide a letter dated 2nd November, 2022 but there has been no communication from the same. The applicant is apprehensive that the interested party is encroaching on his piece of land and it may be hived off, subdivided, sold, charged or interfered with.
5. In conclusion, the Ex-parte applicant deposed that in the event the respondent has refused to make a determination on a boundary dispute, this court has authority to issue orders of mandamus compelling the respondent to make a decision and file a report with the parties.
6. The interested party filed a replying affidavit on 21st March, 2023 in response thereto which was sworn on 17th March, 2023. The interested party deposed that indeed there has been an ongoing boundary dispute between their parcels of land and that he was also summoned to the Narok District Land Registrar's office on 13th November, 2022. Further, that sometime in February, 2023, he visited the office of the respondent and was issued with a copy of the report which the applicant is well aware of. In addition, the respondent deposed that the applicant is buying time to prolong the dispute as in any case, he is the one who has encroached on his (interested party's) parcel of land.
7. The interested party deposed that he has no objection to another ground visit with the aim of resolving the boundary dispute save that the applicant ought to cover all the costs.
8. The Ex-parte applicant filed a replying (sic) affidavit in response thereto which was sworn on 15th May, 2023. The Ex-parte applicant deposed that the alleged report was never availed to him despite numerous visits to the office of the respondent even then, the report does not emanate from the officer of the respondent but rather the district surveyor and therefore fails to meet the requirements of Section 18 (2) of the [Land Registration Act](#).
9. The Ex-parte applicant further deposed that the respondent has failed to interrogate the dispute personally in order to establish the truth and also failed to employ the dictates of the Fair Administrative Action Act which compels the respondent to accord affected persons an opportunity to attend proceedings in person and cross examine or in the company of an expert of their choice.
10. Further, that the respondent is required to interrogate the evidence submitted by both parties and allow persons who give adverse evidence and that it is only upon the conclusion of this that the respondent can purport to issue a conclusive finding as per Section 18 of the [Land Registration Act](#).



11. The Ex-parte applicant deposed that it cannot be gainsaid that the dispute requires evidence to be provided by both parties and interrogated by the respondent. As such, the respondent should be compelled to perform its statutory duties as contemplated under Section 14, 18 and 87 of the [Land Registration Act](#) together with Section 4 of the Fair Administrative Actions Act.

12. On 21st March, 2023, this court directed that the application be canvassed by way of written submissions. The applicant filed written submissions dated 15th May, 2023.

The Ex-parte applicant raised three issues for determination. These were: -

- a. whether the Respondent is legally mandated to perform and/or execute the duties pertaining to the ascertainment of boundaries.
- b. whether the dispute between the applicant and the interested party is a boundary dispute within section 18 and 19 of the [Land Registration Act, 2012](#)?
- c. whether the applicant is entitled to the reliefs sought

On whether the respondent is legally mandated to perform and/or execute the duties pertaining to the ascertainment of boundaries, the applicant submitted that under Section 18 (2) and 19 of the [Land Registration Act](#), it is ostensibly clear that the respondent is conferred with the statutory duty of conducting and/ or carrying out boundary delineation and or ascertainment.

13. On whether the dispute between the applicant and the interested party is a boundary dispute within Section 18 and 19 of the [Land Registration Act](#), the applicant submitted that there is an error in the RIM and what is on the ground and that the respondent is the best person to rectify or determine by way of measurement. Further, that it is instructive to note that the role of the Registry Index Map (RIM) is used to ascertain general boundaries as well as fixed or appropriate boundaries. The applicant relied on the cases of [Azzuri Limited versus Pink Properties Limited](#) [2017] eKLR and [Ali Mohamed Salim versus Faisal Hassan Ali](#) [2014] eKLR.

14. On whether the Ex-parte applicant is entitled to the reliefs sought, the Ex-parte applicant submitted that by failing to give both parties an opportunity to be heard, to interrogate the evidence tendered and allowing both parties to probe the documents being relied on, then the registrar failed to perform his duties and for this reason, the applicant has satisfactorily demonstrated that he is entitled to the reliefs sought. Reliance was placed in the cases of [Simon Salaon Pertet & Another versus County Land Registrar, Kajiado & Another](#); [Peterson Ndungu Marira & 2 Others \(Interested Parties\)](#) [2019] eKLR and [Republic versus Kenya National Examinations Council exparte Gathenji & 8 Others](#), Civil Appeal No. 234 of 1996.

15. The respondent and the interested party did not file their written submissions. Be that as it may, I have carefully analysed and considered the application, replies thereof and the written submissions filed by the applicant and the issue for determination is whether the Ex-parte applicant is entitled to the orders of mandamus.

16. It is notable that the Ex-parte applicant herein has sought an order of mandamus against the respondent to compel him to determine the boundary dispute between him and the interested party in accordance with the provisions of Sections 18 and 19 of the [Land Registration Act](#). The application was precipitated by the actions of the respondent who despite summoning the parties herein and taking the steps necessary to ensure that there is a determination of the dispute, (the respondent) has failed to do so. The purpose of an order of mandamus is to compel the performance of a public duty or any act contrary to or evasive of the law. It therefore lies against a public officer when some specific act or thing, which the law requires to be done, has been omitted. The conditions for its grant are that it must be



shown that the public officer has failed to perform his duty; the court will not grant mandamus where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will pose implementation challenges that require the Court's supervision. See the decision in *Evanson Jidiraph Kamau & Another versus The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000*.

17. In *Republic versus The Commissioner of Lands & Another Ex-Parte Kithinji Murugu M'agere*, Nairobi High Court Misc. Application No. 395 of 2012, it was held that mandamus is employed to enforce the performance of a public duty which is imperative, not optional or discretionary, with the authority concerned. In addition, that mandamus may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has "a public element" which may take any forms.
18. The Court of Appeal in the case of *Republic versus Kenya National Examinations Council ex parte Gathenji & Others*, (1997) eKLR explained the applicable principles for an order of mandamus to issue as follows:

"The next issue we must deal with is this: What is the scope and efficacy of an Order Of Mandamus? Once again we turn to Halsbury's Law Of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says: -

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...."

19. Section 18 of the *Land Registration Act* No. 3 of 2012 provides as follows: -

"

"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.



- (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.*”

20. Further Section 19 of the same Act provides as follows: -

- “ 19. . (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.

21. The interested party argued that the Ex-parte applicant is aware of the outcome of the filed report and also expressed no objection to another ground visit being conducted by the respondent. The interested party annexed a copy of a filed report dated 24th November, 2022 by the District Surveyor which is addressed to the District Land Registrar.
22. The letter dated 24th November, 2022 does not comprise what may be referred to as a determination by the Land Registrar. In other words, the respondent has not determined the boundary dispute between the parties. Pursuant to Section 18 of the *Land Registration Act*, the respondent is mandated by law to determine boundary disputes which he has failed to do.
23. The order commending itself for issuance at this stage is that of Mandamus which is hereby issued compelling the respondent to hear and determine the land boundary dispute between L.R. No. 18086 Cis-Mara-Ololulunga and LR. No. Cis-Mara Ololulunga belonging to the Ex-parte applicant and interested party. Each party to bear their own costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 18TH DAY OF JULY, 2023.

HON. MBOGO C.G.



JUDGE

18/7/2023.

In the presence of:

CA:Chuma

