



**Republic v Kiambu County Surveyor & 2 others; Kimani & another (Exparte);
Njoroge (Interested Party) (Environment and Land Case Judicial Review Application
E006 of 2022) [2023] KEELC 21120 (KLR) (31 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE JUDICIAL REVIEW APPLICATION E006 OF 2022**

JG KEMEL, J

OCTOBER 31, 2023

**IN THE MATTER OF AN APPLICATION BY
BENJAMIN KIMANI AND GEORGE HIUHU FOR
JUDICIAL REVIEW ORDER OF MANDAMUS
AGAINST THE KIAMBU COUNTY LAND SURVEYOR
AND THE LAND REGISTRAR, KIAMBU**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE
LAW REFORM ACT, CAP 26 LAWS OF KENYA**

AND

IN THE MATTER OF SECTIONS 16, 17 AND 18 OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

ALL OTHER ENABLING PROCEDURES AND PROVISIONS OF THE LAW

BETWEEN

REPUBLIC APPLICANT

AND

THE KIAMBU COUNTY SURVEYOR 1ST RESPONDENT

THE LAND REGISTRAR, KIAMBU COUNTY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND



BENJAMI KIMANI EXPARTE
GEORGE HIUHU EXPARTE

AND

MICHAEL KIRIKA NJOROGE INTERESTED PARTY

JUDGMENT

1. With leave of the Court having been obtained on 14/11/2022, the Applicants filed the application dated 24/11/2022 under Order 53 rule 1 of the Civil Procedure Rules, Section 7,8 and 9 of the Fair Administrative Actions Act (FAA), 2015 seeking the following orders:-
 - a. Thatan Order Of Mandamusbe issued compelling the 1st and 2nd Respondents by themselves, their servants, agents and or persons directly working under them to amend the survey record of the Registry Index Map (RIM) Sheet No. 22 for land Registration No. Githunguri/Gathangari/1033 to rectify the disparity in the ground area of 1.48Ha and registered acreage of 1.00Ha.
 - b. Thatan Order Of Mandamusbe issued compelling the 1st and 2nd Respondents by themselves, their servants, agents and or persons directly working under them to amend the survey record of the RIM Sheet No. 22 for land Registration No. Githunguri/Gathangari/1034 to rectify the disparity in the ground area of 3.34Ha. and registered acreage of 2.64Ha.
 - c. Thatthe costs of this application be awarded to the ex-parte Applicants.
2. The application is based on the grounds set out as follows:-
 - a. The 1st Applicant is the Administrator of the Estate of the late Peninah Kabure Njane who was the registered proprietor of Land Registration Number Githunguri/Githangari/1033 and the 2nd Applicant is the registered proprietor of Land Registration Number Githunguri/Githangari/1034.
 - b. By the Order of Court dated 1st November, 2018 the High Court of Kenya sitting as a Succession Court issued an order directing the 1st Respondent herein to amend the perimeter boundary of the Interested Party's Land Registration Number Githunguri/Gathangari/624 to enclose the entire parcel to correspond with the Kiambu Land Registry records.
 - c. The 1st Respondent noted vide the letter dated 4th April, 2019 that the boundaries could not be amended as ordered without enjoining the 1st and 2nd Applicants in the suit to enable the 1st and 2nd Respondents to effectively carry out their statutory duties.
 - d. The 1st Respondent proceeded and visited the suit premises on 1st October, 2019 following which the boundaries of the Interested Party's Land Registration Number Githunguri/Gathangari/624 were altered.
 - e. The 1st and 2nd Applicants' respective parcels of land, Land Registration Number Githunguri/Gathangari/1033 and Land Registration Number Githunguri/Gathangari/1034 were adversely altered in the process.
 - f. Following the activities of the 1st Respondent as instructed by the Interested Party, the boundary alterations unlawfully encroached on the 1st and 2nd Applicants' parcels of land.



- g. The 1st and 2nd Applicants thus filed an Application dated 28th October, 2019 as Interested Parties in the Nakuru High Court Succession Case No. 52 of 1988 In the Matter of the Estate of Njoroge Gioko seeking to have the boundaries restored to status quo prior to the alterations on 1st October, 2019.
- h. In its Ruling dated 7th May, 2020 the Honourable Court allowed the application directing the 1st Respondent to restore the boundaries to the status quo ante.
- i. On 6th October, 2021 the 1st Respondent visited the suit premises and effectively and successfully implemented the Court Order dated 7th May, 2022 thereby restoring the boundaries to the situation prior to 1st October, 2019.
- j. Upon rectification, there was an issue to the Register Index Map Sheet No. 22 bearing the suit premises in which the grounds areas and the acreage recorded in the Land Register were not the same.
- k. The survey record of the 1st Applicant's Register Index Map Sheet No. 22 for Land Registration No. Githunguri/Gathangari/1033 denoted ground area of 1.48Ha. and Registered acreage of 1.00Ha.
- l. The survey record of the 2nd Applicant's RIM (Register Index Map) Sheet No. 22 for Land Registration No. Githunguri/Gathangari/1034 denoted ground area of 3.34Ha. and Registered acreage of 2.64Ha.
- m. The 1st and 2nd Applicants have on various occasions, visited the Kiambu Land registry to the 1st and 2nd Respondents' offices to seek the 1st and 2nd Respondents to rectify the RIM to reflect the correct position but the duo declined stating that there was no Court order to that effect without which they could not act.
- n. The 1st and 2nd Applicants instructed their Advocates who issued the letter dated 10th February, 2021 addressed to the 1st Respondent calling upon him to perform his statutory duties but which has elicited no action.
- o. The 1st and 2nd Respondents have subsequently visited the Kiambu Land Registry to the 1st and 2nd Respondents' offices to seek the 1st and 2nd Respondents to rectify the Register Index Map to reflect the correct position but the duo declined stating that there was no Court order to that effect without which they could not act.
- p. The 1st and 2nd Respondents have a statutory duty under Section 16, 17 and 18 of the *Land Registration Act* to update and maintain the Land Registry boundaries and Maps and to ensure the registration records of the Applicants' parcels of land are accurate.
- q. The refusal of the 1st and 2nd Respondents to perform their statutory duties has threatened and infringed the Applicant's full enjoyment of their right to the respective properties.
- r. The Respondents' refusal to perform their duties have infringed on the Applicants' right to fair administrative action under Article 47 of the *Constitution* of Kenya 2010, necessitating this Judicial Review action to compel their action.
- s. The failure to act by the 1st and 2nd Respondents was procedurally unfair and influenced by error of law.



- t. The 1st and 2nd Respondents failed to take into account relevant considerations and jeopardized the rights of the Applicants by irrelevantly requesting for a Court order before performing duties well granted to them by statute.
 - u. The 1st and 2nd Respondents inaction was not appropriate in light of the previous contentious disputes on the issue of boundaries to the suit premises.
 - v. The Respondents are highly unlikely to act without the intervention of this Honourable Court in which case the Applicants' full enjoyment of the right to the property and right to fair administrative action will remain prejudiced and denied.
 - w. The Interested Party will not be prejudiced in any way by the Order herein sought as his parcel can be rectified alongside the Applicants' parcels.
 - x. This Honourable Court has the requisite jurisdiction to determine this application.
 - y. The Applicants have timeously filed the application after allowing the Respondents time to act without success.
3. The application is supported by the Supporting Affidavit of Benjamin Kimani, the 1st Applicant, who deponed on his own behalf and on behalf of the 2nd Applicant.
 4. He stated that he is the administrator of the Estate of Peninah Kabure Njane, who was the registered proprietor of parcel No. Githunguri/Gathangari/1033. That the 2nd Applicant is the registered owner of Parcel Githunguri/Gathangari/1034.
 5. That the orders of the Court dated 1/11/2018 issued in High Court Succession Cause No. 52 of 1998 directed the 1st Respondent to amend the perimeter boundary of the Interested Party's land parcel No. Githunguri/Gathangari/624 to enclose the entire parcel to correspond with Kiambu land registry records. In response the 1st Respondent vide letter dated 4/4/2019 stated that the boundaries could not be amended as ordered by the Court without enjoining the 1st and 2nd Applicants in the suit. That said, the 1st Respondent proceeded and visited the suit premises on 1/10/2019 following which boundaries of the Interested Parties parcel Githunguri/Gathangari/624 were altered, effectively adversely affecting parcels Githunguri/Gathangari/1033 and Githunguri/Gathangari/1034 in the process. That the Applicants then moved to Court and obtained orders restoring the status quo prior to the alteration on 1/10/2019 whereupon the Court in its Ruling on 7/5/2020 directed the 1st Respondent to restore the boundaries to the status quo ante.
 6. Following the rectification of the boundaries, there arose another issue in which the measurements of the two parcels of land Githunguri/Gathangari/1033 and Githunguri/Gathangari/1034 were found to be at variance on the ground viz a viz the Registry Index Map (RIM) sheet No. 22.
 7. That to address the issue, the Applicants have on various occasions visited the 1st and 2nd Respondents offices seeking the rectification of the RIM to reflect the correct position but the said Respondents have continued to decline to act on their statutory duty of rectifying the said RIM unless a Court order has been issued directing them to do so.
 8. That the Applicants' letter dated 10/2/2021 addressed to the 1st Respondent calling upon it to perform its statutory duties has elicited no action. That the 1st and 2nd Respondents have a statutory duty in line with Section 16, 17 and 18 of the [Land Registration Act](#) to maintain and update the land registry boundary and the maps to ensure that the registration records of the Applicants' parcels of land remain accurate and updated.



9. It was averred that the Respondents' refusal to perform their statutory duties have infringed on the Applicants right to fair administrative action as provided for under Article 47 of the Constitution of Kenya 2010, necessitating the filing of this Judicial Review to compel them to so act.
10. That the failure to act by the 1st and 2nd Respondents was procedurally unfair and influenced by error of law. In their opinion the 1st and 2nd Respondents do not require a Court order to perform duties required of them by Statute.
11. The Interested Party opposed the application vide the Grounds of Opposition filed on 10/2/2023 on the following grounds:-
 - a. This Honourable Court lacks jurisdiction to entertain and determine this matter in the first instance for the reason that the case entails a boundary dispute and which dispute ought to be placed before the Land Registrar for consideration in the first instance.
 - b. The order issued by the Family High Court at Nakuru in the Succession Cause No. 52 of 1988 on the 1st November directing the amendment of the perimeter boundary was for the purpose of the dispute therein being brought to the attention of the appropriate forum being the Land Registrar in Kiambu instead of this Honourable Court.
12. In addition the Interested Party also filed further Grounds of Opposition dated 27/2/2023 on the following grounds:-
 - a. Paragraph 3 and 4 of the Order of Hon Mumbua T. Matheka LJ in High Court of Nakuru, Succession Cause No 52 of 1988 *In the Matter of the Estate of the Late Njoroge Gioko (Deceased)*, dated 7th May, 2020 "BK6" was a conservatory order. The Court as it were, Court of Probate and Administration of estate lacked jurisdiction to determine the issues of boundaries with finality.
 - b. The District Land Surveyor and the District Land Registrar have the jurisdiction to determine the issue of boundaries and not the Court of Probate and Administration of estates or the Environment and Land Court.
 - c. The application herein is premature, the process for determination of the boundary dispute herein has not been carried out.
 - d. Intermeddling with a deceased person's estate under the Probate and Administration estate as governed by the Law of Succession Act Cap 160 Laws of Kenya is illegal. A criminal offence. The Court cannot abate an illegality.
 - e. The title deed is conclusive evidence of ownership and as exhibited by the Applicants' Exhibits "BK2", "BK3" annexed to the Applicants' Affidavit the acreage for each of the three parcels of land is spelt out in their respective title documents.
13. None of the other Respondents opposed the application despite service having been effected on them.
14. The Applicants filed their written submissions on 29/8/2023 through the firm of Munyendo Mapesa & Co. Advocates. There is no evidence of any submissions filed by the Respondents and the Interested Party despite service of substantive motion and directions of this Court dated 18/7/2023 with respect to filing of written submissions.
15. As to whether the orders of mandamus should be issued against the Respondents, the Applicants submitted in the positive on the grounds that the parcels have varied measurements on the RIM compared to the ground; the 1st and 2nd Respondents have a statutory duty under Sections 15 - 20



and 79 of the [Land Registration Act](#) to update and maintain the land registry boundaries and maps to ensure that the registration records of the parcels remain accurate as part of their administrative roles under statute; the Applicants have made requests for the correction of the anomalies and the 1st and 2nd Respondents have declined arguing that they could only act pursuant to a Court order; this Court has power to exercise supervisory jurisdiction and order the Respondents to exercise their statutory and administrative duties.

16. It was further submitted that the inaction on the part of the 1st and 2nd Respondents to perform their statutory duty have threatened to infringe the Applicant's rights to property under Article 40 of [the Constitution](#) of Kenya. That their right to fair administrative actions has also been infringed and their rights to property have been limited as well.
17. The Applicants submitted that the inaction of the 1st and 2nd Respondents is irrational, unreasonable and constitutes a breach of statute and public power for which the Court has jurisdiction to intervene by compelling the action of the adamant public officers. That they have derogated on their statutory and administrative power and authority bestowed upon them by statute through an office which they hold in public trust for the benefit of citizens, the Applicants included.
18. Relying on the case of *Council for Civil Service Unions v Minster for civil Service* (1985) AC the Respondents argued that the only way the Applicants can get justice is by way of an order of mandamus in the manner requested in this Judicial Review proceedings.
19. Reliance was also placed on the decision of the Court in [Republic v Chief Land Registrar & 3 others Exparte Njiru Kithua](#) (2017) eKLR where the Court stated as follows;

“In the premises, the Court is satisfied that the Applicant has made out a case for the grant of the order of judicial review sought. One of the purposes of judicial review is to review administrative action for the purpose of ensuring that public agencies and officers act fairly towards the citizen and that they abide by the law. This Court shall not shy away from facilitating the realization of the objective.

The upshot of the foregoing is that the Court finds merit in the ex-parte Applicant's notice of motion dated 2nd October 2012 and the same is consequently allowed as prayed with costs to be borne by the Respondents.”
20. In conclusion the Court was urged to grant the application.

Analysis and determination.

21. Having considered the application, the Affidavit evidence the written submissions of the Applicants and all the material placed before the Court, the issues that commend themselves for determination are; Whether the orders of mandamus should be granted and who meets the cost of the application.
22. Under Article 47 of the [Constitution](#) of Kenya every person has the right to administrative action that is expeditious efficient lawful reasonable and procedurally fair.
23. This Court is empowered under Article 23 of the [Constitution](#) of Kenya to grant reliefs including an order of judicial review.
24. The Court is further guided by the provisions of Section 7 - 11 of the [Fair Administrative Actions Act](#) which the Court shall refer in the full text of the Judgement.



25. Simply put the orders of mandamus are granted to compel the doing of a public duty. This Court is guided by the decision of the Court in the case of *Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 others* (1997)eKLR where the Court stated that;

“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.”

26. The background of the application has been aptly captured in the main body of the Judgment and will not serve any purpose to regurgitate it save to address the pertinent issues.
27. In brief, the case of the Applicants is that there are variances in the measurements of the two parcels, the subject of the Review before Court in terms of the measurements on the ground and what obtains in the RIM. That according to the RIM sheet No 22 parcel Githunguri/Gathangari/1033 the ground measurement is 1.48 Ha while the registered acreage is 1.00 Ha. Equally the 2nd Applicants land parcel Githunguri/Gathangari/1034 measures 3.34 Ha. on the ground while the registered acreage on the title is 2.64 Ha.
28. The above discrepancies have been captured by the letter dated the 4/4/2019 authored by a Mr J D Musungu, District Surveyor Kiambu addressed to the Deputy Registrar, High Court Nakuru which states in part as follows;

“Apart from what is contained in the previous report it should be noted that the ground and RIM measurements differs completely. Therefore, we decided to measure the following existing boundaries as per ground for the following parcels of land namely Gathunguri/Gathangari/624, Githunguri/Gathangari/1033 and Gathunguri/Gathangari/1034 and this was our findings: The area for parcel No. Githunguri/Gathangari/624 is 8.13Ha. on the ground while the registered acreage is 8.88Ha. The adjacent parcel No. Githunguri/Gathangari/1033 measures 1.48 Ha on the ground but the registered acreage is 1.00Ha. The next parcel No. Githunguri/Gathangari/1034 measures on the ground as 3.34Ha while the one registered in our records is 2.64Ha.

Attached, find the diagrams illustrating the ground situation versus the registered areas as per the RIM.

While the survey office was able to take the measurements of the three parcels, it was not possible to shift the boundaries of the parcels as per the RIM or as per the existence on the ground. The Land Registrar was required to be present during the exercise as per the *Registration Land Act 2012* Section 16(1) to suggest any necessary decision.

It is also our request that the other parties of Parcels No. Githunguri/Gathangari/1033 and 1034 are enjoined in the suit to enable the Land Surveyor and the Land Registrar to effectively carry out the exercise regarding the boundaries.

I hope this report will assist the Honourable Court.

Thank you.



J. D. Muchungu
District Surveyor
Kiambu.”

29. Section 18, 19 and 20 of the *Land Registration Act* gives the mandate to the Land Registrar to establish and fix land parcel boundaries of land registered under the current Act or the previous Land Acts.
30. Equally Section 79 of the *Land Registration Act* empowers the Land Registrar to rectify the register in cases of errors. Mistakes, omissions not materially affecting the interests of the land owners and by consent of all affected parties. In cases where upon resurvey an area in the register is found to be incorrect the registrar may rectify the register upon notice in writing to all the persons with an interest in the rectification of the parcels.
31. Section 40 and 41 of the Subsidiary Legislation to the *Land Registration Act* (LRA) provides a detailed manner in which a request from a land owner ought to be handled by the Land Registrar who has 60 days to act on the request. The provisions are set out as follows;

“40. Application for re-establishing a missing boundary or ascertainment of a boundary in dispute

1. An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under Section 18(3) of the Act in Form LRA 23 set out in the Sixth Schedule.
2. The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph 91).
3. The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
4. In determining a boundary dispute lodged in accordance with paragraph (1) the Registrar shall be guided by the recommendation of the office responsible for survey of land.
5. The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
6. Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.
7. Upon expiry of thirty days, the Registrar shall-
 - a. Cause to be defined by survey the precise position of the boundaries in question;



- b. File a plan approved by the authority responsible for survey of land containing the necessary particulars; and
 - c. Make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel
- 8. A dispute for determination of a boundary and or parcel shall, unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.
- 41. Application for ascertaining and fixing boundaries
 - (1) An interested person may apply to the Registrar for the ascertaining and fixing of boundaries of land under Section 19(1) of the Act, in Form LRA 23 set in the Sixth Schedule.
 - (2) The notice issued by the Registrar under Section 19(1) of the Act shall be in Form LRA 24 set out in the Sixth Schedule.
 - (3) When making a decision under Section 19(1) of the Act, the Registrar shall follow the procedure outlined in Regulation 40.”
- 32. The Applicants have led Affidavit evidence that they have severally visited the offices of the 1st and 2nd Respondents requesting the 1st and 2nd Respondents to rectify the RIM to reflect the correct acreage. That they have failed to act. The Court finds that no evidence was placed before it by the Applicants in support of this averment.
- 33. The Court has seen the letter dated the 10/2/2021 written by the advocates of the Applicants to the District Surveyor Kiambu asking for the rectification of the acreage on the ground in line with Section 16, 17 and 18 of the *Land Registration Act*. From the preceding paras, it is the Land Registrar who is mandated to rectify boundaries the register and titles where applicable. The Applicants’ averment that the Land Registrar has failed, ignored and or neglected to act is unfounded given that the application was addressed to the District Surveyor and not the Land Registrar.
- 34. Further there is no evidence led by the Applicants that they approached the office of the Land Registrar in the manner contemplated under Section 40 and 41 of the subsidiary legislation under the *Land Registration Act* and that the said Land Registrar failed to act as contemplated by the law.
- 35. Further this Court is guided by the provisions of Section 9 (2) of the FAA which state as follows;

“The High Court or a Subordinate Court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”
- 36. Given that the law has provided other mechanisms to resolve the matter, the Court finds that the orders of mandamus are not available to the Applicant. The Court agrees with the 1st and 2nd Respondents that the Applicants ought to exhaust the internal remedies available in law before seeking orders of mandamus application has been prematurely placed before the Court. Further the Court is in



agreement with the 1st and 2nd Respondents that the application has been placed prematurely before this Court.

37. The Court finds that the orders of mandamus in the circumstances of this case are not available and cannot be granted.
38. Taking all factors into consideration the Court finds the application is unmerited. It is dismissed with costs payable by the Applicants.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 31ST DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mapesa for 1st & 2nd Applicants

1st, 2nd and 3rd Respondents – Absent

Interested Party - Absent

Court Assistants – Phyllis/Lilian

