



**Republic v Homa Bay County Land Surveyor & 2 others; Nyang’or & another (Exparte Applicants) (Environment and Land Judicial Review Case E001 of 2023) [2023] KEELC 21811 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21811 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023  
GMA ONGONDO, J  
NOVEMBER 29, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**HOMA BAY COUNTY LAND SURVEYOR ..... 1<sup>ST</sup> RESPONDENT**

**HOMA BAY COUNTY LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

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

**AND**

**JACOB ARWA NYANG’OR ..... EXPARTE APPLICANT**

**KENNEDY OCHIENG’ ORANGA ..... EXPARTE APPLICANT**

**JUDGMENT**

1. At the outset, it is noted that on 28<sup>th</sup> February 2023, the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte applicants (The 1<sup>st</sup> and 2<sup>nd</sup> applicants or the applicants herein) obtained leave to commence Judicial Review proceedings against the respondents in the nature of certiorari, mandamus, prohibition and that cost of the application be provided for. This followed the applicants’ chamber summons application dated 12<sup>th</sup> January 2023.
2. Subsequently, the two applicants through the firm of Aluoch Odera & Nyauke Advocates, lodged a Notice of Motion application dated 30<sup>th</sup> March 2023 and lodged in court on 31<sup>st</sup> March 2023 seeking the orders that;
  - a. The Honourable court be pleased to grant orders of Certiorari to quash the decision of the County Land Surveyor and County Land Registrar to create an access road on land parcel number Kanyamwa/Kyambo/Kwamo/2951 (The suit land herein).



- b. The Honourable court be pleased to grant orders of Mandamus to compel the County Land Registrar to remove the access road created on the suit land.
  - c. The Honourable Court be pleased to grant orders of prohibition to prohibit any feature creation of the access road on the suit land.
  - d. Cost of the application be provided for.
3. The application is founded upon grounds 1 to 5 stated on the face of the same and the 2<sup>nd</sup> applicant's affidavit of thirteen paragraphs sworn on even date in support of it together with a copy of a certificate of official search (KOO-01) and a copy of a sketch map record (KOO-02) annexed thereto. Also, there is a statutory statement and the 2<sup>nd</sup> applicant's affidavit verifying statement of facts that accompanied the chamber summons application. In summary, the applicants' lamentation is that the 1<sup>st</sup> applicant was the initial proprietor of the suit land which he sold to the 2<sup>nd</sup> applicant who remains the registered owner thereof as per a certificate of official (KOO-01) herein. That the respondents unreasonably created an access road through the suit land as shown in the sketch map record (KOO-2) without any justification and contrary to the rules of natural justice thus, precipitating this application.
  4. The respondents were duly served with the application as disclosed in an affidavit of service sworn on 29<sup>th</sup> May 2023 by Odera Aluoch, learned counsel for the applicants. Indeed, they failed to respond to the application.
  5. On 16<sup>th</sup> November 2023, this court directed that the application be heard by way of written submissions.
  6. Accordingly, learned counsel for the applicants filed submissions dated 19<sup>th</sup> October 2023 where reference was made to the application inclusive of the orders sought therein and stated that the application is not opposed. Counsel delineated an issue for determination namely whether the application has merit. It was submitted that the 1<sup>st</sup> applicant was the initial proprietor of the suit land and sold the same to the 2<sup>nd</sup> applicant who remains the registered owner of it as per a certificate of official search marked as "KOO-01" annexed to the affidavit in support of the application. That the respondents unreasonably created an access road through the suit land without any justification and contrary to the rules of natural justice.
  7. Moreover, counsel submitted that the actions of the respondents violated the applicant's Constitutional right pursuant to Article 43 (I, think counsel meant Article 40 of the Constitution of Kenya, 2010 the Constitution herein and Article 47 (1) of the same Constitution as stressed in the case of Kenya Re-Insurance Corporation v National Land Commission (2018) eKLR. That applicants have proved that they are deserving of the orders sought in the application and the same be granted accordingly.
  8. The respondents did not file and serve submissions in this application.
  9. In the foregone, is the present application merited?
  10. It must be noted that the applicants instituted this application that their rights have been violated pursuant to Article 22 (1) of the Constitution.
  11. In any proceedings brought under Article 22 (*supra*), this court is mandated to grant an order of judicial review as an appropriate relief pursuant to Article 23 (3) (f) of the Constitution.
  12. The applicants' complaint relates to the alleged violation of protection of their right to property under Article 40 of Constitution by the respondents.



13. Article 47 (1) (*supra*) provides;

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

14. The right under the said Article is reproduced and elaborated in Section 4 of the *Fair Administrative Action Act* No. 4 of 2015. The application reveals that the respondents failed to give the 1<sup>st</sup> and 2<sup>nd</sup> applicants an opportunity of advancing reasons for contesting the access road across the suit land as observed by Lord Diplock in the case of *CCSU v Ministers for the Civil Service* (1984) 3 All ER, 935; see also *Kenya Re-Insurance Corporation case* (*supra*).

15. In the case of *Republic v Kenya Revenue Authority Ex Parte Yaya Towers Ltd* (2008) KLR, it was held that judicial review remedy is concerned with reviewing not the merits of the finding but the decision making process itself.

16. Having been made aware of the existence of application, the respondents failed to respond to it; see *Ogadav Mollin* (2009) KLR 620.

17. Therefore, I find the application well presented, cogent and unchallenged. The applicants have proved their case against the respondents to the requisite standards.

18. Accordingly, the application dated 30<sup>th</sup> March 2023 is allowed in terms of orders (a), (b) and (c) sought therein as stated in paragraph 2 (a) (b) and (c) hereinabove.

19. Given the nature of the instant matter, parties to bear their respective costs of the application.

20. It is so ordered.

**DATED AND DELIVERED AT HOMA BAY THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023**

**G.M.A ONGONDO**

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**JUDGE**

PRESENT;

a. Mr. S. Nyauke learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> applicants

b. Luanga and Mutiva, Court Assistants

