



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

MISC. APPL. NO. 24 OF 2014

**IN THE MATTER OF APPLICATION BY NORAH BOCHABERI ORUOCHI FOR JUDICIAL
REVIEW**

REPUBLIC.....APPLICANT

VERSUS

KISII COUNTY REGISTRAR..... 1ST RESPONDENT

KISII COUNTY SURVEYOR.....2ND RESPONDENT

KISII COUNTY PHYSICAL PLANNER.....3RD RESPONDENT

AND

BEN MOSE & 9 OTHERS.....INTERESTED PARTIES

R U L I N G

1. The applicant was on 16th December 2014 granted leave to apply for orders of judicial review against the respondents to compel the respondents by an order of mandamus to visit land parcel **LR No. Central Kitutu/Daraja Mbili/769** to determine and fix the boundary locations in regard to the property and further to determine the ground position of the road of access in accordance with the relevant Registry Index Map (RIM). The applicant filed the judicial review application on 17th December 2014 to which the 2nd and 3rd respondents responded to vide a replying affidavit sworn by one Patrick Achoki, Director of Physical Planning Kisii County filed in court on 10th March 2015.

2. The 2nd and 3rd respondents vide the replying affidavit averred that there were other interested parties who had not been enjoined to the suit who had resisted efforts by the 1st and 2nd respondents to establish and mark the boundaries of the applicant's parcel of land and to establish the access road on the ground and thus contended they have not abdicated any responsibility or duty so as to make them liable to an order of Mandamus being granted against them but rather the acts of the interested parties who are neighbours of the applicant have made it difficult for them to carry out their mandate.

3. The court on 14th July 2015 ordered the interested parties to be enjoined in the suit. On 25th November 2015 when the matter came before me for mention for directions and having reviewed the pleadings it was apparent that the matter involved delineation of and fixing of parcel boundaries which it is the

mandate of the land registrar to do under the provisions of Section 18 and 19 of the Land Registration Act, 2012 to undertake. Accordingly the court inter alia issued orders/direction as follows:-

i. The land registrar Kisii and County Surveyor, Kisii do inspect and establish and fix the boundaries of land parcel LR No. Central Kitutu/Daraja Mbili/769 and also make note of any access road serving the plots and/or any other neighbouring plots. The affected parties will have liberty to have their independent surveyors on site during the exercise.

ii. The land registrar to complete and file his report within the next 120 days from today.

4. The land registrar visited the site and prepared his report dated 31st March 2016 filed in court on 11th April 2016. Among the observations made by the land registrar in his report were that:-

1. Land parcel Central Kitutu/Daraja Mbili/769 exists on the ground and is sandwiched in between three neighbouring plots.

2. There was no physical fence along the area of the road of access.

3. That from the records the road of access only leads to the suit plot and does not extend past it.

4. That although the access road terminates at the applicant's plot neighbours have extend the same and have thus encroached onto the applicant's plot.

The land registrar stated that he and the surveyors, physical planner inspected the boundaries and the roads of access and took measurements using the maps and the mutation forms to determine the boundaries of the suit property and the road of access. The report annexed a sketch plan showing the parcel boundaries and the disputed access road which the sketch shows to be part of the suit property.

5. After the land registrar's report was filed both the ex parte applicant and the interested parties filed comments and/or observations relating to the report by the land registrar. The ex parte applicant contends that the land registrar's report has more or less disposed of the dispute arguing that the judicial review for an order of mandamus was necessitated by the failure and/or refusal by the 1st and 2nd defendants to carry out their statutory mandate. The ex parte applicant prays that he be awarded the costs of the application.

6. The interested parties in their comments state that the land registrar's report has acknowledged there was creation of other roads of access which effectively interfered with the boundaries of the suit property. The interested parties urge the court to order a rectification of the Registry Index Map (RIM) to conform with what now appears on the ground.

7. I have considered the pleadings and the report by the land registrar and the observations and comments by the parties. The report by the land registrar affirms that the disputed portion of the road of access which runs through the applicant's plot does not exist on the current Registry Index Map (RIM) and that if it is permitted to exist it would markedly reduce the size of the applicant's plot. Indeed the land registrar's report acknowledges the access road has encroached onto the applicant's plot. There is no suggestion that any of the interested parties plots is landlocked and/or is not served by an access road. While having the access road at the disputed site may be convenient to the interested parties that cannot confer a right to the prejudice of the applicant.

8. In the premises, I find the applicant was entitled to initiate the judicial review proceedings to compel the respondents to have the boundaries of parcel 769 established and fixed and now that the respondents have in response to the court's order inspected and delineated the parcel boundaries of the suit land and verified the physical location of the roads of access, I direct that the land registrar's report be implemented. I find no basis to order for the amendment of the Registry Index Map (RIM) as there is no doubt that the interested parties want an access road to be created where there is none. The fact that there may have been encroachment over the applicant's land for a period of time cannot create a right. The

applicant's right over land parcel **CentralKitutu/Daraja Mbili/769** are absolute and indefeasible in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012 and the applicant is as it were entitled to exclusive use and possession of the same in its entirety. The portion being used as an access is an encroachment onto the applicant's land parcel and the applicant is entitled to reclaim the same.

9. In the premises, it is my holding and finding that the applicant's application for judicial review was merited. The report by the land registrar is hereby adopted and ordered to be implemented. Each party will bear their own costs of the application.

10. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of April, 2017.

J. MUTUNGI

JUDGE

In the presence of:

Ms. Mireri for the ex parte applicant

N/A for the 1st respondent

N/A for the 2nd and 3rd respondents

Miyenda for Ogari for the interested parties

Milcent court assistant

J. MUTUNGI

JUDGE