



Okumu v District Land Registrar, Rachuonyo & 4 others (Miscellaneous Application E005 of 2023) [2023] KEELC 22128 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
MISCELLANEOUS APPLICATION E005 OF 2023
GMA ONGONDO, J
DECEMBER 6, 2023**

BETWEEN

DAMARIS AYOMO OKUMU APPLICANT

AND

THE DISTRICT LAND REGISTRAR, RACHUONYO 1ST RESPONDENT

THE SUB-COUNTY SURVEYOR, RACHUONYO 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

MOSES OTIENO OLOO 4TH RESPONDENT

EDITH AKUMU OTIENO 5TH RESPONDENT

RULING

1. The applicant, Damaris Ayomo Okumu through the firm of G & A Advocates commenced a Notice of Motion dated 13th June 2023 under, *inter alia*, Section 86 of the [Land Registration Act](#), 2016 (2012) and Order 40 Rule 1 of the [Civil Procedure Rules](#), 2010 (The application herein) seeking the following principal orders;
 - a. This Honourable Court be pleased to issue a declaration that the process the 1st and 2nd Respondents used to have the Applicant's land being Central Kasipul/Kapchieng/1012 (The suit land herein) resurveyed and boundaries varied, was unlawful as it contravened Section 18 and 19 of the [Land Registration Act](#), Section 23 of the [Survey Act](#) and Regulation 31 of the [Survey Regulations](#).
 - b. This Honourable Court be pleased to issue a binding opinion on the legality of the 1st and 2nd Respondent's actions of surveying, ascertaining boundaries and planting of beacons on the suit land without issuing the Applicant the statutorily mandated notices and or opportunity to be heard thus depriving the Applicant the benefit of a fair administrative action.



- c. Costs of the Application be borne by the Respondents.
2. The application is premised upon the applicant's supporting affidavit of thirteen paragraphs sworn on even date and copies of documents (DO-1 to DO-3) namely title deed of the suit land, court order and letters annexed to the affidavit. Also, the application is based on grounds 1 to 8 set out on the face of it.
 3. Briefly, the applicant contends that on 25th May 2023, the 1st and 2nd respondents forcibly entered the suit land and without reference to the applicant, proceeded to alter the existing boundaries and placing new beacons ostensibly pursuant to a request by the 4th and 5th respondents who alleged that the applicant had encroached their parcel of land parcel no. Central Kasipul/Kachieng/1169. That the respondents have threatened that if the applicant does not remove any fixtures to align with the unilateral boundaries, they will at any time, forcefully remove the fixtures and evict the applicant from the affected portion of her land.
 4. In a replying affidavit of twelve paragraphs sworn on 12th July 2023, the 4th respondent through the firm of H.O Mimba and Company Advocates, opposed the application. He averred, *inter alia*, that he obtained an order issued in Oyugis Law Courts Misc Application number 3 of 2023 against the applicant and 3 others to ascertain boundary as regards land parcel numbers Central Kasipul/Kachieng/1169, 1170, 73, 79 and the suit land. That a report dated 12th June 2023 (The report herein) pursuant to the exercise was prepared accordingly.
 5. Further, the 4th respondent averred that thereafter, the exercise was carried out and the applicant was found to have trespassed into the suit land jointly registered in the name of the 4th respondent's daughter and himself. That the dispute is boundary determination where ordinarily, the Land Registrar and Surveyor are involved. That the application had been brought to court in bad faith and lacks merit hence, should be dismissed with costs.
 6. The 1st, 2nd, 3rd and 5th respondents were made aware of the application as disclosed in an affidavit of service sworn on 16th October 2023 by a licenced process server, Henry Wanyonyi Kisabuli and another affidavit of service sworn on 23rd November 2023 by Charles Mayiga, learned counsel for the applicant. However, they opted not to participate in this application.
 7. The application was heard by way of written submissions further to directions of this court given on 25th July 2023.
 8. Learned counsel for the applicant filed submissions dated 8th September 2023 and implored this court to find merit in the application and rectify the boundaries in question. Counsel submitted, *inter alia*, that further to orders issued on 6th February 2023 at Oyugis Law Courts, touching on the boundaries of LR no. Central Kasipul/ Kachieng/1169 registered in the name of 4th and 5th respondents and the suit land belonging to the applicant, the respondents altered the boundaries without following due process. That the said actions of the respondents were illegal and *ultra-vires*. That this application was generated to avoid imminent eviction of the applicant by the 4th and 5th respondents. To buttress the submissions, counsel relied on Sections 16, 19, 86 and 87 of the [Land Registration Act](#), 2016 (2012) as well as [Re Estate of Said Abdalla \(Deceased\)](#) (2018) KLR and [David Murai Kori v District Land Registrar Nyandarua](#) (2019) KLR, among other pronouncements.
 9. In the supplementary submissions dated 30th October 2023, learned counsel for the applicant termed the report challenged and that the court has power to interfere with it. Counsel cited, *inter alia*, Section 86, [David Kori](#) case (both *supra*) alongside Sections 1A and 1B of the [Civil Procedure Act](#) Chapter 21 Laws of Kenya and case of [Terry Maina v District Land Registrar, Kajiado](#) (2015) eKLR, to fortify the supplementary submissions.



10. In the submissions dated 12th October 2023, learned counsel for the 4th respondent referred to the orders sought in the application, pointed out the genesis of the instant dispute revolving on boundary of the suit land and that the orders to survey the same were duly served on all the parties inclusive of the area chief and the neighbouring land owners. That the exercise was carried out and land dispute resolution dated 12th June 2023 namely the Report was prepared but the applicant has not challenged the same.
11. Counsel submitted that the applicant has failed to raise the issues in the application through a substantive suit. That the application is an after-thought meant to delay the implementation of the Land Surveyor's report, lacks merit, an abuse of the court process and has not been brought to court in good faith. Thus, counsel implored the court to dismiss the application with costs to the respondents.
12. In the foregone, is there merit in the application?
13. It is noteworthy that the application is brought under Order 40 (*supra*) as regards temporary injunction and temporary orders. The 1st, 2nd and 3rd respondents are public officers and I bear in mind that they are bound by the national values and principles of governance and the values and principles of public service as provided for under Articles 10 and 232 of the *Constitution* of Kenya, 2010. In a proper case, injunctive relief may be made against Government of Kenya officials as held in *B v Attorney General* (2008) 1 KLR (G & F) 535.
14. Be that as it may, an interim preservation order in form of status quo is in place in this matter; see *Ogada v Mollin* (2009) KLR 620.
15. The boundary dispute was heard and the Report was generated thereof. So, there was a determination of the boundaries in question.
16. Boundaries and fixed boundaries of registered land are regulated by Sections 18 and 19 of the *Land Registration Act*, 2016 (2012). Section 86 (*supra*) provides for the review of decision of the Land Registrar through the opinion of the court which shall be binding on the parties.
17. Clearly, the court is devoid of jurisdiction in respect of disputes relating to boundaries of registered land unless the boundaries have been established and fixed by the Land registrar; see also *Andrew Marigwa v Josephat Ondieki Kebati* (2017) eKLR.
18. The applicant contends that the respondents failed to follow due process in their actions which produced the report. That the said actions were ultra-vires.
19. Article 47 of the *Constitution* of Kenya, 2010 provides for the right to fair administrative action. The same is given effect by Section 4 of the *Fair Administrative Action Act*, 2015.
20. It is established law that where there is a clear procedure of redress of any particular grievance, the same to be adhered to since there are good reasons for such special procedures; see *Speaker of National Assembly v Karume* (1992) KLR 21.
21. Moreover, in *Geoffrey Muthinja Kabiru & 2 others v Samuel Muguna Henry & 1756 others* (2015) eKLR, the Court of Appeal held;

“The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent.....”



22. The applicant's assertion as revealed in order 5 sought in the application, grounds 1, 2 and 4 set out on the face of the application and paragraphs 2, 5 and c, and 9 of the applicant's supporting affidavit, the applicant's submissions, among others, is that the respondents did not follow due in their actions which gave forth to the report. In particular, that the purported ascertainment of boundaries by way of survey violated the applicant's right to fair hearing and fair administrative action.
23. It is thus, the finding of this court that the applicant's lamentations tend to relate to violation of fair administrative action. There are no rules formulated as envisioned under Section 86 (*supra*) and the application has not been brought as a Judicial Review matter. The same is incompetent.
24. The upshot is that the application dated 13th June 2023 is hereby struck out with no orders as to costs.
25. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 6TH DECEMBER 2023

G.M.A ONGONDO

JUDGE

Present;

1. Mr. Mayiga learned counsel for the applicant
2. H. Mimba learned counsel for the 4th respondent
3. Luanga, court assistant

