



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

JR MISC. APPLICATION NO. 3 OF 2021

**IN THE MATTER OF: ARTICLES 20(3), 22, 23, 40, 47,
48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: SECTION 2, 7, 8, 9, 10(1) AND 11 OF
THE FAIR ADMINISTRATION ACT NO. 4 OF 2015**

AND

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE LAND REGISTRAR KILIFI.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

KATSRAN LOGISTICS LIMITED.....INTERESTED PARTY

AND

RODGERS SAMMY KATANA (Acting for and on behalf of the estate of

Sammy Katana alias Katana Baya Thoya alias Toya Baya).....EXPARTE APPLICANT

JUDGMENT

By a Notice of Motion dated 3rd August 2021 the Ex – parte Applicant sought for the following orders.

a) A declaration that the proceedings leading to the determination of the Land Registrar Kilifi was and is invalid, procedurally flawed, ultra vires and void and of no legal effect.

b) An order of certiorari to remove into the High Court for the purposes of quashing a decision made by Land Registrar Kilifi whereby it was adjudged on the 22nd day of March 2021 that the boundaries of a parcel of land known as Chembe/Kibabamshe/390 and Parcel No. Chembe/Kibabamshe/210 as shown by the parties differ significantly with those on the map and that map boundaries ought to be maintained and adopted.

c) An order of certiorari to remove into the High Court for the purposes of quashing the proceedings before the Land Registrar

Kilifi that led to the above mentioned decision as the proprietor of Parcel No. Chembe/Kibabamshe/210 was deceased at the time the proceedings were conducted and no one had the necessary capacity to represent the deceased.

d) An order of mandamus directed to Land Registrar Kilifi to compel the said Registrar to hear and determine according to law, the dispute on the boundaries between the two parcels of land namely Chembe/Kibabamshe/390 and Chembe/Kibabamshe/210 after giving the estate reasonable opportunity to state its case as required by statute.

e) A declaration that the Land Registrar Kilifi is in breach of his duty under section 18(3) of the Land Registration Act as read together with Regulation 10 in that he has failed to follow the due procedure, the decision in issue was taken with an ulterior motive calculated to prejudice the legal rights of the applicant and the proceedings and decision violates the legitimate expectations of the Applicant.

f) Further or in the alternative damages arising from the matters herein and interest thereon.

g) An order for costs.

Counsel agreed to canvas the application by way of written submissions which were duly filed

BACKGROUND

It is important to give a background to the case which led to the present application for Judicial Review. The application was supported by the grounds set out in the statement of facts dated 13th July 2021. According to that statement, the two portions of land Chembe/Kibabamshe/390 and Chembe/Kibabamshe/210 belong to the Interested Party and the estate of Sammy Katana respectively. There was a boundary dispute between the two plots which prompted the Interested Party to file a boundary claim against the deceased.

On 10th February 2021, the Kilifi Land Registrar visited the two plots and gave a determination on 22nd March 2021. According to the Applicant, he was neither informed of the site visit nor anyone from the estate of the deceased and that there was no legally appointed representative of the deceased as at that time.

In response to the application the Respondent filed a Replying Affidavit sworn by J B Oketch on 24th September 2021 whereby he deponed that a request was made by Act Kenya Operations Limited for the determination of a dispute between two parcels of land known as **Chembe/Kibabamshe/210 and 390**. Upon issuing summonses, the concerned parties and their neighbours congregated on the site on 10/02/2021.

The Respondent further deponed that the proprietor of portion No. Chembe/Kibabamshe/210 was deceased and that during the site visit, the deceased's estate was represented by his brothers Clay Katana, Rodgers Katana and John Safari Stephen and their private surveyor. The 1st Interested Party's land was represented by one Thomas Mwambire and Benson Barongo and the other neighboring Plot Nos. 213, 290 and 385 were equally represented by the respective owners.

The Respondent also stated that upon hearing all the parties and giving them an opportunity to show their respective boundaries as known to them, the surveyor prepared a report which they relied on to arrive at the impugned determination of 22nd March 2021. He further deponed that during the entire process, none of the members of the deceased's family raised any objection and that failure by the family of the deceased to take out letters of administration of the Estate of the deceased cannot prevent the 1st Respondent from performing his duties.

The Respondent also argued that the main issue in contention is whether the process was conducted when there was no appointed administrator and not on the fidelity of the process and the outcome.

The Interested Party was served with the application on 27th September 2021 but they did not file any response.

APPLICANT'S SUBMISSIONS

Counsel submitted that the issue for determination by the court is whether in the absence of a legal representative duly appointed in the manner prescribed under the Law of Succession Act, proceedings taken against an estate of a deceased person would be lawful.

Counsel submitted that the proprietor of the portion of land known as Chembe/Kibabamshe/210, Sammy Katana alias Katana Baya Thoya alias Toya Baya died on 28/12/2007 at the Malindi District Hospital and that on 24th of June 2021, the Hon. W.K. Chepseba issued a limited grant of letters of administration ad litem to the Ex-parte Applicant, Rogers Sammy Katana. That there is no dispute that the deceased owned the portion of land known as Chembe/Kibabamshe/210 as appears from Exhibit RSK2 and as confirmed by J.B. Oketch on behalf of the 1st Respondent in paragraph 8 of his replying affidavit.

Mr. Ole Kina counsel for the Applicant submitted that Section 4 (3) of the Fair Administrative Act, 2015 dictates that where administrative action is likely to adversely affect the rights and fundamental freedoms of any person, the administrator shall give the person adequate notice and an opportunity to be heard and to make representation including the right to cross examine witnesses where applicable.

It was counsel's submission that Part III of the Act provides for Judicial Review of administrative action and that Section 7 of the said Act empowers any person aggrieved by an administrative action or decision to apply for review of the said action to the court in accordance with

Section 8 of the Act.

Counsel also relied on Section 87 of the Land Registration Act, 2012 which requires that the Land Registrar gives every person appearing in the register an opportunity to be heard, and further that in this case the deceased could only be heard in accordance with the provisions of the Law of Succession Act, Cap 160 which provides that only the personal representatives of a deceased person could bring or defend any action in relation to the deceased's estate.

Mr. Ole Kina cited the case of **Touristik Union International & another v Jane Mbeyu & Another [1993] eKLR** where the court observed as follows:

“But by far, the highest authority which, by necessary implication repudiated the holding in the Hintz case is the often cited Otieno vs. Ougo case decided in 1987. The question in issue in that Appeal was the right of a widow to bury her intestate husband when she obtained no letters of administration to his estate. The court gave vent to an important principle of law of universal application with respect to the right of a party to fulfil the role of an administrator of an estate without obtaining letters of administration the court, inter alia, observed: “the administrator is not entitled to bring an action as administrator before he has taken letters of administration if he does the action is incompetent at the date of inception”.

Counsel therefore submitted that since the estate of the deceased was not represented, the requirements of notice and the right to a fair hearing guaranteed by the Constitution of Kenya, 2010 were not complied with yet the decision had an adverse effect on the rights of the estate under Article 40, 47 and 50 of the Constitution of Kenya, 2010. Counsel also submitted that pursuant to Article 23 (3) of the Constitution of Kenya, 2010 and section 11 of the Fair Administrative Act, 2015, this court has the power to issue declarations, make Judicial Review orders and make costs and other pecuniary compensation and urged the court to be guided by the case of **Re Estate of Said Abdalla (deceased) [2018] eKLR** where the court held that:

“Having arrived at this conclusion the Land Registrar Order on the impugned decision of 26/1/2016 is hereby quashed. The effect of the order is that the Land Registrar ought to revisit the dispute taking into account and acting in compliance with section 19 as read together with section 87 of the Land Registration Act No. 3 of 2012.”

1ST AND 2ND RESPONDENTS' SUBMISSIONS

Counsel for the Respondents submitted on two issue for determination by the court, whether the Land Registrar followed due process in determining the boundary dispute; and whether the Applicant is entitled to the prayers sought.

On the first issue whether the Land Registrar followed due process in determining the boundary dispute counsel submitted that the boundary dispute resolution procedure is outlined under section 19 and 87 of the Land Registration Act and Regulation 40 of the Land Registration (General) Regulations, 2017, which the Registrar followed in determining the dispute in this case. Regulation 40 of The Land Registration (General) Regulations, 2017 provides that:

40.(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 (1).

(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)

(8)

It was counsel's submission that at the time the Land Registrar issued summons to the parties, they were not aware that Sammy Katana was deceased and had no means of ascertaining the same until when they were informed by the family members of the deceased.

Mr. Mkalla relied on the provisions of Section 87 of the Land Registration Act which defines the meaning of opportunity of being heard and submitted that the Applicant was represented during the boundary dispute hearing by their representatives including a surveyor hence was given an opportunity to be heard.

Counsel relied on the case of **Republic v The Non-governmental Organizations Ex parte Linda Bonyo & 4 others; Philip Opiyo Sadjah & 5 others (interested parties) [2020] eKLR** where the court explained that Judicial Review orders are discretionary in nature and the court cannot be forced to grant them even where the public body acted wrongly and urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

This is a Judicial Review application challenging the process which the Land Registrar used in determining a boundary dispute involving land belonging to a deceased person. In the case of **Biren Amritlal Shah & Another –vs- Republic & 3 others (2013) eKLR** the Court of Appeal reiterated the position that Judicial Review is not concerned with the merits of the decision but rather the fairness of the process in reaching the decision. The court held that:

“Judicial Review is not concerned with reviewing the merit or otherwise of a decision by a public entity, in respect of which the application for review is made, but the decision, making process itself. It is important to note in every case, that the purpose of Judicial Review is to determine whether the application was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question”.

The court is therefore only concerned with the process and not the outcome of the decision. The issue for determination whether the failure to have a legal representative in a boundary dispute hearing involving land belonging to a deceased person was unprocedural, unfair and null and void.

It is not in dispute that the suit parcel Chembe/Kibambamshe/210 belonged to the deceased Sammy Katana alias Katana Baya Thoya who died on 28th December 2007. This is also admitted by the Respondent in the replying affidavit. It is further admitted in the submissions by counsel for the Respondent that at the time the Land Registrar issued summons for the hearing of the boundary dispute they were not aware that the deceased had passed on. The Registrar later knew that the owner of the suit land had passed on but did not bother to ascertain whether the parties purporting to represent the deceased were the legal representatives duly appointed as such.

It is trite law that the estate of deceased person can only be represented in any legal proceedings by a person who is duly authorized to do so on behalf of the estate. Such a person is one who has been issued grant of letters of administration. The powers of the personal representative are set out under Section 82 of the Law of Succession Act, Cap 160 of the Laws of Kenya. Section 82 (a) provides as follows:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

It is on record vide the 1st Respondent Replying Affidavit which states that they received a request from Act Kenya Operations Limited to resolve a boundary dispute between the suit plots and annexed a copy of the title deed for Parcel No. Chembe/Kibabamche/210 registered in the name of the deceased.

The Respondent also annexed a copy of the summons dated 3rd February 2021 regarding the impugned hearing and the said summons were addressed to one Sharif Milawa Habib, owner of Plot No. 213 and to the owners of Plot No. 209 and 390. It appears from the notice that the owner of the Parcel No. Chembe/Kibabamche/210 is the one who allegedly made the application for the boundary dispute to be resolved which cannot be near the truth.

It follows that neither the deceased nor legal representatives of the estate of the deceased were summoned, even though the application was made by a different party other than the registered proprietor of the said Parcel No. Chembe/Kibabamche/210. This was in contravention of section 19 of the Land Registration Act which provides that owners of the disputed parcels were to be given notice.

The general powers of a Land Registrar are set out under section 14 of the Land Registration Act, 2012 (the Act). The 1st Respondent visited the suit properties with the boundary dispute pursuant to section 19 of the Act which provides:

19. Fixed boundaries.

(1) If the Registrar considers it desirable to indicate on a filed 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.

Section 87 further provides:

Meaning of 'opportunity of being heard'.

(1) If this Act requires that a person be given an opportunity to be heard before a particular thing is to be, or may be done, that person shall be deemed to have been given such an opportunity—

(a) if the person attends before the Registrar personally or by an advocate or other agent, and is given such an opportunity; or

(b) if the person intimates, personally or by an advocate or other agent, that the person does not wish to be heard; or

(c) if the person has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which, if the person attends before the Registrar, the person may be heard.

(2) If a person or an advocate or other agent on the person's behalf attends before the Registrar concerning a matter on which the person is entitled to be heard, or fails to attend pursuant to such a notice, the Registrar may, adjourn the hearing from time to time, and, notwithstanding failure to attend, may, hear that person at any time.

Although the Land Registrar is empowered under section 19 to adjudicate on boundary disputes, the Registrar is bound by law and procedure to follow due process.

Section 4 (3) and (4) of the Fair Administrative Action Act, 2015 lays down the procedure to be adopted by decision makers as follows in this regard:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

The right to be heard is an essential element of fair administrative action and section 87 of the Act further states that the Land Registrar must give an individual an opportunity to state his or her case in respect of any matters expressly stated in the Act before making a decision.

I have considered the application and the submissions by counsel and find that the Land Registrar missed a major step in summoning the owner of the suit plot who was deceased and further failed to summon the legal representatives of the deceased estate of Sammy Katana alias Katana Baya Thoya.

The upshot is the Notice of Motion dated 3rd August 2021 is hereby allowed as prayed save for the claim for general damages which is declined. I order that the proceedings of the boundary dispute held on 22nd March 2021 is hereby quashed and a fresh process be carried out within 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF JANUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.