



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. JR 47 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BY:

REPUBLIC

FOR ORDERS FOR PROHIBITION AND MANDAMUS

DIRECTED TO DISTRICT LAND REGISTRAR KIAMBU.....1ST RESPONDENT

DISTRICT LAND SURVEYOR KIAMBU.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE: KARIUKI KINOTHE

RULING

Introduction

1. By a Notice of Motion dated 18th June, 2010 the *ex parte* applicant herein, **Kariuki Kiothe**, seeks the following orders:

- 1. An order of Mandamus be and is hereby granted compelling the 1st respondent to issue a notice to the District Land Surveyor Kiambu to mark the beacons and resurvey and further ascertain acreage of the land reference number Githunguri/Kimathi/591 and mark the beacons of the plotted public road between the applicant's land and Nyaga location.**
- 2. An order of prohibition be issued prohibiting District Land Registrar Kiambu from registering any easement or accepting the construction of a public road which would reduce or infringe upon the land proprietary interest of the applicant.**
- 3. That the cost of this be provided for.**

Ex Parte Applicant's Case

2. According to the Applicant, he is the registered owner of land reference number Githunguri/Kimathi/591 on which the District Land Register and District Land Surveyor are meant to survey, ascertain, fix and mark the boundary and beacons. He averred that on 15th September 2004 he and others were directed by the District Land Registrar to pay a total of Kshs 10,000 which he acknowledged

vide receipt numbers 1295502 and 129957 dated 4th June, 2004 and 15th September, 2004 for disbursement and surveying fee.

3. Despite that however the Applicant contended that the District Land Registrar and the District Land Surveyor refused and or deliberately neglected to visit the land at the site and further failed to ascertain, fix and or mark boundary and beacons of the above mentioned parcels of land. Instead, it was averred, the District Land Registrar Kiambu and District Land Surveyor Kiambu intended to plot out a public road passing between the Applicant's parcel of land and Nyaga Location an action which the Applicant claimed would affect and or consume his parcel.

4. According to the Applicant despite notice of intention to sue having been served and acknowledged and Chief Land Commissioner having directed the 1st respondent to visit the site, there was inordinate delay and negligence of the District Land Surveyor to fix the beacons and thereafter ascertain the boundary hence the orders sought herein.

Respondents' Case

5. In response to the application, the Respondents averred that the issue in dispute is a road access demarcating two sub locations namely Nyaga sub location and Kimathi sub location within Githunguri location which road was plotted in the 1956-57 when land adjudication was done for Nyaga sub location. Around the year 2004, it was contended the applicant herein approached the 1st Respondent's office with a request that they wanted their parcels of land re-surveyed to ascertain and/or mark boundary and beacons between their said lands and a road of access demarcating Nyaga and Kimathi sub locations. Accordingly, the applicants were advised to pay the requisite charges and a date was fixed for that exercise.

6. According to the Respondents, since the issue involved a public road it was deemed necessary that summons be issued to all those persons who were to be affected by the action of re-surveying the land and the 1st Respondent visited the disputed parcels of land on 5th April, 2007 in the presence of all the parties and after hearing all the parties to the dispute were duly heard and a ruling delivered by which the 1st Respondent noted that the road of access the applicant wanted to close does not serve them alone but with other people comprising an entire sub-location. It was further observed that if the road was closed then some people would not be able to access their parcels of land.

7. The Respondents clarified that since the area falls under general boundaries with no fixed beacons, the issue of refusal to ascertain boundary and beacons does not arise.

8. The Respondent however contended that since the applicant did not appeal against the 1st Respondent's ruling to the Chief Land Registrar as provided by law, the application before the court is incompetent as the applicant seeks orders to compel him to re-hear a matter which he had heard and delivered a ruling as a result of which he was *functus officio*.

9. The Respondents' view was that what the applicant is seeking is to re-survey parcels of land belonging to persons who are not parties to this suit.

10. It was further contended that *mandamus* is a common law remedy based on the royal authority hence used in public nature and not for private purpose such as enforcement of private rights which is the case here. In addition grant of orders in judicial review being discretionary there was inordinate delay in bringing up this application hence there is every likelihood that there will be practical problems in enforcing the orders if granted as parties to be affected by orders are not parties to this suit.

Directions

11. On 2nd February, 2012, **Githua, J** delivered a ruling in which she ordered that the 2nd Respondent do re-survey the subject piece of land and file a report. The 2nd Respondent was also ordered to ascertain the

boundaries of the parcel of land number 591/Githunguri. On 19th March, 2012 the 2nd Respondent duly filed his report in Court on which the Court was to give directions.

12. It is those directions that the parties seek from this Court.

13. According to the Applicant, since the report shows where the road is on the ground, if the Respondents intend to create another road which is not on the map, they ought to follow the legal process in establishing the same. The applicant therefore sought orders that the illegal road be closed while the road on the map be allowed to remain.

14. On the part of the Respondents they relied on the submissions filed herein on 26th July, 2011 before the said report was filed and before the ruling of 2nd February, 2012 was delivered.

15. It is therefore my view that the submissions filed by and relied upon by the Respondents are not of much use to the Court. What is however clear to this Court is that the directions which the Applicant seeks were not part of the application which this Court was asked to determine. Section 8(1), (2) and (3) of the **Law Reform Act**, Cap 22 Laws of Kenya provides as follows:

(1) The High Court shall not, whether in the exercise of its civil or criminal jurisdiction, issue any of the prerogative writs of mandamus, prohibition or certiorari.

(2) In any case in which the High Court in England is by virtue of the provisions of section 7 of the Administration of Justice (Miscellaneous Provisions) Act, 1938, of the United Kingdom empowered to make an order of mandamus, prohibition or certiorari, the High Court shall have power to make a like order.

(3) No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

16. What comes out from the foregoing is that once the orders sought under section 8(1) of the **Law Reform Act** are granted, no return shall be made to such orders. In my understanding once the said orders are granted the Court cannot return to the proceedings and make other orders which were neither not sought nor contemplated by the parties. In this case the order for the closure of the road was not expressly sought by the applicant and being an order in the nature of mandamus cannot be granted unless leave to apply therefor was sought and granted.

17. From the survey report it is clear that the disputed road serves other people apart from the parties before this Court. Apart from that the report indicates that even if the area covered by the road is discounted the Applicant's parcel is still larger in size than what is indicated in the registration.

18. Therefore even if the Court had the power to grant the orders sought in the applicant's submissions the Court would have to keep in mind that the decision whether or not to grant judicial review remedies is an exercise of discretion and as stated in **Halsbury's Laws of England 4thEdn. Vol. 1(1) para 12 page 270:**

“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether

the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’ [Emphasis provided].

19. As other parties are involved and considering that the mere existence of the road, according to the Surveyor has not prejudiced the Applicant’s proprietary interest, it is unlikely that this Court even if it could do so, would have ordered the closure of the disputed road.

20. In the premises this Court declines to give directions closing the disputed road. The parties if still minded to do so are at liberty to institute civil proceedings where all the parties will be afforded an opportunity of being heard and seek appropriate orders.

21. There will be no order as to costs.

Dated at Nairobi this 16th day of August, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Juma for Mrs Owino for the Applicant

Cc Mwangi