



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMA BAY

ELC JUDICIAL REVIEW NO. 6 OF 2021

(FORMERLY MIGORI JUDICIAL REVIEW APPLICATION NO. 2 OF 2019)

JACOB OHURU OMOLO1ST APPLICANT

EVACE OTIENO OMOLLO2ND APPLICANT

VERSUS

ISMAEL OTIENO OTOGO 1ST RESPONDENT

HOMA BAY COUNTY LAND SURVEYOR2ND RESPONDENT

HOMA BAY COUNTY LAND SURVEYOR3RD RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 28th June 2019 and duly filed in court on even date under Order 53 (1) (1), (2), (4) of the Civil Procedure Rules, 2010 and section 3, 4 (1), (2) (3) and (7) (1) (a) of the Fair Administrative Actions Act, 2015 and Article 47 of the Constitution of Kenya, 2010 (the JR Application herein), the applicants through M/S Nyauke and Company Advocates, are seeking the following orders;

a) That this Honourable court be pleased to issue orders of judicial review against the 2nd and 3rd Respondent in the nature of certiorari and prohibition to move onto this court and quash the decision of the 2nd and 3rd Respondents to review the boundaries of Land parcel number Homa Bay/kawere/Konyango/Karading/1381 (the suit land herein) and to Prohibit the Respondents from interfering with the said parcel of land **pending the hearing and determination of this application.**

b) That the costs of this application be provided for.

2. The application is founded upon the statement of facts and the 2nd applicant's 11-paragraphed verifying affidavit of even date. Annexed thereto are documents being letters of the 2nd respondent's letter, the 3rd respondent's letters and proceedings marked as "JOO-01", "JOO-02" and "JOO-03" respectively.

3. In a nutshell, the applicants' complaint is that the 1st applicant is the 2nd applicant's father who is the registered as the proprietor of the suit land, LR No. Homa Bay/Kawere Konyango/ Karanding/1381 which is their ancestral land. That the 1st applicant received "JOO-01" and "JOO-02" from the 2nd and 3rd respondents respectively to give evidence in respect of boundaries of the suit land and LR Nos. Homa Bay/Kawere/Konyango/Karanding/ 1673, 2836, 1382 and 2835. That the 1st respondent's family has on several occasions challenged the 1st applicant's title to the suit land which has been proven to be good title. That the 2nd and 3rd respondents' decision to review the boundaries was a violation of their right to own property hence, it proved the Judicial Review application.

4. In his Replying affidavit sworn on 16th July 2019 and filed herein on 17th July 2019, the 1st respondent opposed the application. He deposed, inter alia, that this court is devoid of jurisdiction to hear and determine the present matter.

5. In support of the replying affidavit, the 1st respondent annexed thereto, a copy of certificate of official search in respect of the suit land (IOO-1) and the Land Registrar's letter (IOO-2). He termed the application misconceived, scandalous, vexatious, frivolous and brought in bad faith and ought to be dismissed with costs.

6. The applicant's submissions dated 24th September 2021 and the 1st respondent's submissions dated 3rd December 2021 together with the sections of the law and the case of **Hassan Mohammed Haji-vs-Mohammed Kenyan and another (2019) KLR** cited therein, are noted herein.

7. I have thoroughly considered the entire application, the replying affidavit and the submissions. In that regard, were the letters ("JOO-01" and "JOO-02") lawful, reasonable and procedurally fair in the obtaining circumstances?

8. The application is generated under various provisions of the Constitution and the law cited on it's face. This court takes into account all the said provisions.

9. **Notably, Sections 18 and 19 Land Registration Act 2016(2012)** (the LRA herein) govern boundaries and fixed boundaries of registered land. Section 20 of the same Act is on maintenance of boundaries.

10. By documents marked as "JOO- 1" "IOO-2" and "JOO-2" an opportunity was given to 1st applicant and 3 others to be heard as per sections **14 and 19 of the LRA**. It is also noted that the Proceedings (JOO-03) were in favour of the 1st applicant.

11. No court shall entertain any action or proceeding unless boundaries of registered land have been determined; see Section 18 (2) of the LRA,

12. Plainly, the issuance of JOO-01 and JOO-2 is technical in nature. The court will be at liberty to reject or allow any report generated pursuant to JOO -01 and JOO-02 depending on the facts and circumstances; see **CD Desouza-vs-BR Sharma 1953 26 KLR 41 at 42**

13. I endorse the decision in **Re Hebtullah Proprties Ltd (1976-80) 1 KLR 1195 at 1209** on violation of the audi alteram partem rule (right to be heard). The court held;

".....The Tribunal (BPRT) had a duty to hear the land lord on the objection....."

14. In the premises, the Ex parte applicants were accorded fair hearing by the administrative action of the 2nd respondent. It is the finding of this court that proposed action by way of "JOO1 and JOO 2", are reasonable, procedurally fair and lawful in the circumstances.

15. To that end, the instant application is devoid of merits.

16. A fortiori, the application dated 28th June 2019 and filed in court on even date, be and is hereby disallowed with costs to the 1st respondent.

Delivered, Dated and signed at Homa Bay this 28th February 2022.

G M A ONG'ONDO

JUDGE

Present;

Odera, learned counsel for the 1st respondent.

Okello, court assistant.