REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

IN THE ENVIRONMENT AND LAND COURT

MISCELLANEOUS CIVIL APPLICATION NUMBER 387 OF 2014

NADEJDA KISSELEVA MURAGE……..…….....APPLICANT

VERSUS

KAJIADO NORTH DISTRICT LAND REGISTER.....1ST RESPONDENT

MARY MOTHER OF GOD CATHOLIC CHURCH EMBULBUL

PARISH NGONG DIOCESE…...…….....…….2ND RESPONDENT

ATTORNEY GENERAL OF KENYA…….....…3RD RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF LANDS HOUSING

AND URBAN DEVELOPMENT…….....……..4TH RESPONDENT

CHIEF LANDS REGISTRAR, MINISTRY OF LANDS HOUSING

AND URBAN DEVELOPMENT…….....…….……5TH RESPONDENT

DIRECTOR OF SURVEY, MINISTRY OF LANDS HOUSING

AND URBAN DEVELOPMENT…….....……..6TH RESPONDENT

JUDGEMENT

Introduction

1. This judgement arises from a Notice of Motion dated 23rd October, 2014 by which the ex parte applicant herein seeks the following orders:

a. **An Order of Certiorari to bring before this Honourable Court and quash the decision of the 1st Respondent dated the 6th of August 2014.**
b. **An Order of Prohibition preventing the 6th Respondent from preparing new maps and to amend the Registry Index Map on the basis of the 1st Respondent's ruling**
c. **The costs of this Application be provided for.**

The Applicant's Case

2. According to the Applicant, in the year 1992 she purchased a piece of land from one **Mr. Dickson Lewett Marritei**, (the vendor) being title number Ngong/Ngong/14568 (hereinafter referred to as the "suit property") and on the 12th of August 1992, a title deed for the suit property was duly registered and issued in her name.
3. Subsequently, she deposed, on the 6th of February, 1996 she applied to the Oloolaiser Land Control Board for consent to subdivide the suit property into four portions and on the 29th of February, 1996 after completion of the physical exercise, the surveyor prepared the mutation forms with the measurements of the portions of the land and informed her that, according to his measurements, the vendor had moved the right beacon which was facing the road by three (3) metres thereby affecting the new plots.
4. According to the applicant, she met the vendor to discuss this issue after which they agreed that the beacons be left as they were and as good neighbours the vendor offered to fence the land on the side where the right beacon was.
5. The Applicant averred that on the 12th of March, 1996 four new titles for the divided portions were issued in her name and thereafter in 1997 she left the country for work and study. However when she returned in 2003 she found that the 2nd Respondent had purchased the land next to hers and put up the church known as Embul Bul Catholic Church and upon careful observation, she alleges that the beacon to the right facing the road had been moved again by at least eight (8) metres. She then instructed her lawyers to take up the matter with the 2nd Respondent which failed to respond to her concerns necessitating her to lodge a complaint to the 1st Respondent in writing vide a letter dated the 26th of August 2014 which letter was received by the District Surveyor. The Applicant is aggrieved that the 1st Respondent did not take any action. Her several correspondences also went unanswered.
6. She deposed that on the 29th November 2011 an official of the 2nd Respondent a Father Reginald Nwachukwi telephoned her and set up a meeting to discuss this matter though a date was not set, and she averred that she followed this up with a letter on the 2nd of December 2011. On the 19th of November 2011 she instructed a surveyor from Ardhi Surveys Consultants to carry out a ground inspection and report on the encroached part and it was her case that this survey demonstrated that about 0.0564 Ha of the land had been lost.
7. The Applicant further deposed that on the 10th of January 2012 she received a Boundary Disputes Summon from the 1st Respondents setting a meeting for the 17th of January 2012 from 10.00 am at the suit property in the presence of representatives of the 2nd Respondents but the 1st Respondent arrived at 4.00 pm. The Applicant alleged that during the meeting a representative of the 2nd Respondent admitted that they had moved the beacons when they were preparing their fence. However the measuring process could not commence because the land had been clogged by heavy rains and as such the meeting was adjourned. On the 7th of May 2012 the applicant received another summons which set the meeting for the 18th of May 2012 10.00 a.m. again at the suit property when the measurement of the land was performed. However, on the 31st of May 2012 she received another summons from the 1st Respondent to meet on the 27th of June 2012 at the suit property for repeat measurements of the property after which the 1st Respondent would prepare a report. However despite the applicant's several attempts to have the 1st Respondent prepare the said report, none was forthcoming forcing her to seek the assistance of the 5th Respondent who wrote to the 1st Respondent enquiring over the delay in receipt of the report but the 1st Respondent never responded to the 5th Respondent's letter.
8. It was the applicant's case that on the 15th of September 2014 and out of sheer frustration she visited the offices of the 1st Respondent where she was informed that the report was ready for collection. The Applicant disclosed is that the report which was dated 7th August 2014 was not in her favour.
9. Aggrieved by the said report, the Applicant on 17th September 2014 wrote a letter protesting the delay in the preparation of the report and served it on the 1st Respondent in which letter she also

requested for the land survey report which the 1st Respondent used to make his decision. It is on this accord that the Applicant seeks orders to prevent the 1st Respondent from ordering the alteration of the registry index maps for the area until this application is heard and determined.

2nd Respondent's Case

10. In opposition to the application, the 2nd Respondent filed the following grounds of opposition:

a. **No sufficient reason or at all has (sic) been given to warrant granting the order sought.**
b. **That the decision sought to be quashed is fair and reasonable in that all land owners in the subject site have lost portions of their land.**
c. **The applicant is now challenging the same mutations which she herself submitted during the subdivision of the parcel of land. She is estopped in law and in equity to do so.**
d. **The applicant is guilty of laches and should not benefit from her indolence.**

Determinations

11. It is clear that the ex parte applicant is aggrieved by the decision of the District Land Registrar, Kajiado North District made on 6th August, 2014.
12. Section 86 of the ***Land Registration Act*** (hereinafter referred to as "the Act") provides:

(1) If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.

(2) The Rules Committee shall make rules on the procedures to be followed by the Registrar or an aggrieved person under subsection (1).

40. It is therefore clear that section 86 of the Act provides for a remedy for a person aggrieved by the decision of the Registrar. It trite, however where that there is an alternative remedy which is more convenient and appropriate for the resolution of the issues in contention in judicial review proceedings, the Court ought to exercise restraint. As was held by this Court in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nai. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

41. It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a

statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted.

42. It is however contended, which contention was not controverted that the Rules Committee is yet to make rules contemplated under section 86 aforesaid. Without the said rules it cannot be gainsaid that the applicant's right to seek the remedy contemplated thereunder would be rendered illusory. In **Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi And Another [2008] 2 EA 311, Rawal, J** (as she then was) expressed herself as follows:

"In Kenya, the functions and remedies of orders of *certiorari, mandamus* and prohibition by way of judicial review found roots in 1956 by the enactment of the Law Reform Act (Chapter 26 Laws of Kenya) and thereafter by the Constitution of Kenya itself. Simply stated, these remedies are in our judicial system to uphold and protect and defend the rule of law, that is, to supervise the acts of government powers and authorities which affect the right or duties or liberty of any person. The affected person may always resort to the Courts of law and if the legal pedigree is not found to be perfectly in order the court will invalidate the act which can be safely disregarded. The government is a government of laws and not of mess and will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

13. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to investigate the allegations. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

14. The law being a living thing, a court would be shirking its responsibility were it to say, assuming that there be no existing recognised remedy covering the facts of a particular case, "Why then, this must be an end to it". The law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238.**

15. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

16. The law must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. The court in the modern society in which we live cannot deny them a remedy. The courts have recognised that unlawful interference with a citizen's rights give rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it: and indeed, it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are

reciprocal. Whether or not they will be able to prove that their rights have been contravened or infringed is another matter altogether. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

17. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement and proceeded to uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals are practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".
18. What then ought a person who intends to challenge a decision of the Registrar of Lands do when there are no rules of procedure enacted to enable him/her invoke the Court's jurisdiction under section 86 of the Act?
19. Section 89 of the ***Civil Procedure Act***, however provides:

The procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.

20. This was the view adopted by the then East African Court of Appeal in **Ayoob vs. Ayoob Civil Appeal No. 34 of 1967 [1968] EA 72.** In my view, whereas Order 35 deals with "case stated" by agreement of the parties, I do not see why the procedure thereunder cannot be modified to accommodate the proceedings under section 86 of the Act pending the making of the rules by the Rules Committee.
21. In the premises, it is my view that the applicant ought to have resorted to the provisions of section 89 of the ***Civil Procedure Act*** which provides for an alternative remedy which in my view is more convenient and appropriate since section 86 of the Act contemplates a review of the decision of the Registrar, a course which in my view may encompass a consideration of the decision on its merits, a jurisdiction which this Court sitting as a judicial review court does not have.
22. In the premises I decline to grant the orders sought herein.
23. However taking into account the lack of the procedural legal regime contemplated under section 86 of the Act, there will be no order as to costs.
24. I however direct the Deputy Registrar of this Court to serve a copy of this judgement of the secretary to the Rules Committee for appropriate action.

Dated at Nairobi this 28th day of April, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Muroni for Mr Kipkemei for the Applicant

Miss Kamende for Mr Thangei for 2nd Respondent

Cc Patricia