REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 441 OF 2012

IN THE MATTER FOR AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI & PROHIBITION

BY NAISIANOI OLONGE JEK AND LEGATIE MPESHE MODE

AND

IN THE MATTER OF THE DECISION BY THE KAJIADO DISTRICT LAND REGISTRAR MADE ON 26TH JULY 2012

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, THE LAW REFORM ACT CAP 26, THE JUDICATURE ACT CAP 8, LAND REGISTRATION ACT CAP 3 OF 2012, ENVIRONMENTAL AND LAND COURT ACT NO. 19 OF 2011,

LAWS OF KENYA

AND THE REGISTERED LAND ACT, CAP 300 (REPEALED)

BETWEEN

THE REPUBLIC ..... APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL

(Sued for and on behalf of

KAJIADO DISTRICT LAND REGISTRAR)..... RESPONDENT

SALAU OLE SOKONLIMURINKE.....INTERESTED PARTY

NAISIANOI OLONGE JEK

LEGATIE MPESHE MODO

(As administrators to the Estate of the late

MBESHE MOYAE MODE)..... EX-PARTE APPLICANTS

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 24th January, 2013, the *ex parte* applicants herein, **Naisianoi Olonge Jek** and **Legatie Mpeshe Modo** seek the following orders:

1. **THAT an order for Certiorari do issue to bring before Court and quash the decision of the Kajiado District Land Registrar made on 26th July 2012 together with all prior and or subsequent proceedings premised and or emanating therefrom.**
2. **THAT an order of prohibition do issue directed against the Kajiado District Land Registrar to prohibit him from delineating or altering boundaries of all those parcels of land known as Kajiado/Olooloitikoshi/Kitengela/3204, Kajiado/Olooloitikoshi/Kitengela/3205 and Kajiado/Olooloitikoshi/Kitengela/3206 (Originally known as Kajiado/Olooloitikoshi/Kitengela/1862).**

APPLICANTS' CASE

2. The application was grounded on the statutory statement filed on 17th December 2012 and a verifying affidavit sworn by **Naisianoi Olonge Jek** the same day.
3. The facts according to the applicants as contained in the statement were that the applicants are the administrators of the estate of the late **Mbeshe Moyae Modo** who in or about June 1989 together with the applicants entered on to all that land then described as Kajiado/Olooloitikoshi/Kitengela/1862 (hereinafter referred to as the suit land) and constructed homestead and or residential premises or homes thereon and clearly had the boundaries marked enclosing the suit land as part and parcel of their possessed and occupied land, clearly visible by bypassers, actual, open, notorious and exclusive. Accordingly, the suit land has, since that time, and at all material times herein, been accessible only by and or on the applicants' permission.
4. The suit land as registered in the name of their predecessor-in-title, the late Mpeshe Moyae Modo, originally registered as Kajiado/Olooloitikoshi/Kitengela/1862 but which was later sub-divided into Kajiado/Olooloitikoshi/Kitengela/3204, 3205 and 3206, the latter of which was disposed off.
5. At the time of land demarcation and or allocation, in or about the year 1989, the boundaries marked and beacons installed disclosing land owned, possessed and allotted to the late **Mpeshe Moyae Modo** under the aforesaid LR Number Kajiado/Olooloitikoshi/Kitengela/1862 has remained intact. On 24th May 2012, the 1st Respondent issued boundary dispute summons to the applicants requiring them to be present on 7th June, 2012 to determine a purported boundary dispute in respect of title No. KJD/Kitengela/ 1862 and 1860 together with 1863, and thereafter delivered a decision thereof on 26th July 2012 by which the 1st Respondent invoked provisions of the law under the ***Registered Land Act***, Cap 300 which statute had since been repealed as at the time the subject summons were issued and decision thereof made.
6. It is therefore the applicants' position that the 1st Respondent's summons dated 24th May, 2012, the purported boundary dispute proceedings conducted on 7th June, 2012 and the decision made on 26th July, 2012 is tainted with illegality, null and void *ab initio*.
7. In the said affidavit the facts in the statement were reproduced by the deponent.

Interested Party's Case

8. In response to the application a replying affidavit was sworn by **Salau Ole Sokon Limurinke**, the interested party herein who erroneously referred to himself as the 2nd Respondent on 19th February, 2013.
9. According to the deponent, he has been wrongly joined to these proceedings with the intention of

disinheriting him of a substantial portion of his land since the orders sought against him cannot be granted in these proceedings. In his view the applicants have attempted to alter the boundary line dividing his plot No. Kajiado/Olooloitikoshi/Kitengela/1863 which is adjacent to plot No. Kajiado/Olooloitikoshi/Kitengela/1862 which the applicants possess.

10. According to him the boundary dispute was instigated by the 1st applicant who owns Kajiado/Olooloitikoshi/Kitengela/1860 unde rthe guise of seeking counsel and advise from the Respondent's office to ascertain the correct boundary lines and that the deponent was equally summoned just like the applicants and that the District Surveyor did confirm that the applicant had interfered with the boundaries of the said plots hence the Respondent merely gave recommendations pursuant to the said confirmation and that the same was not an award to be enforced by the Court.
11. However some sons of the late **Mpeshe Moyae Mondo**, the owner of plot no. 1862, **Amos Mpeshe**, **Tumpeine Mpeshe** and **Kupere Mpeshe** attempted to dispose of some of their plot inclusive of the illegally and unlawfully extended portion to third parties in mid January, 2013 forcing the deponent to seek and obtain injunctive orders in Machakos Court.
12. It was only after that the deponent was on 31st January, 2013 served with the pleadings in this case.

Rejoinder by the Applicants

13. In a rejoinder the 1st Applicant swore what was referred to as a further replying affidavit on 13th August, 2013.
14. According to the deponent, these proceedings are not meant to disinherit the interested party of his land but simply to remove an illegality committed by the Respondent. The deponent denied that they were trying to alter the boundary of the suit lands and deposed that it was in fact the interested party who was seeking to use the 1st Respondent to alter the boundaries in his favour and hive off part of the applicants' land to the interested party who initiated the boundary dispute.
15. According to the deponent, upon being served with the pleadings herein on 29th January, 2013 the interested party rushed to Machakos Law Courts and instituted different proceedings relating the suit parcels. The allegation of intention to sell the land was denied by the deponent who stated that the Machakos proceedings were instituted to pre-empt these proceedings which were instituted in good faith.

Applicants' Submissions

16. In their submissions, the applicants contended that the Respondent in so far as he purported to apply the provisions of the repealed ***Registered Land Act*** after the ***Land Registration Act***, 2012 had come into force was tainted with illegality, null and void. In their view the dispute ought to have been determined in accordance with section 16 of the ***Land Registration Act***.

Interested Party's Submissions

17. On behalf of the interested party it was submitted that to the extent that the interested party was joined as the 2nd Respondent in the Chamber Summons dated 17th December, 2012 and the supporting documents thereto, the application ought to fail as judicial review orders cannot be sought against an individual as opposed to a public body.
18. The interested party submitted that he had no role to play in the impugned decision since it is one **Naisianoi Oloisia** who sought the determination of the boundary herein. It was reiterated that since the decision of the Respondent was never an award, these proceedings are brought to avoid the due process of the law where the boundary dispute can be determined on merits.
19. It was further submitted that there is a pending suit No. 53 of 2013 in which the parties herein will have a chance to be heard and the matter determined on the merits hence these proceedings are meant to render the said suit res judicata hence the application filed herein should be dismissed.

Determinations

20. I have considered the foregoing.
21. The first issue is whether this application is incompetent and ought to be dismissed on that score on the ground that judicial review orders are sought against an individual as opposed to a public body.
22. That judicial review orders can only be sought against a public body and not an individual is not in doubt. This position was made clear in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, in which **Nyamu, J** (as he then was) held:

> **"What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not herein lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. That is why it is said prohibition looks to the future so that if a tribunal were to arrange in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However where a decision has been made ... an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made it can only prevent the making of a contemplated decision. There is nothing the respondents have failed to do, as matter of statute law or legal duty. The other reason why the claim must fail is that the 5th and 6th respondents are not public bodies but only some juristic land owners. Thus the remedies of *mandamus*, prohibition or *certiorari* are only available against public bodies. The 5th and 6th respondents could be sued in respect of the ownership of the land should the applicants have evidence that the alienation was not done in accordance with the outlined provisions of the relevant Land registration Acts under which the parcels fall, they might also have relief for full compensation under the Trust Land provisions of the Constitution if as stated above, land adjudication and registration or the setting apart were not done as envisaged under the Constitution and the Land Adjudication Act. There is no proof that the alternative remedies as set out above would be less convenient beneficial, or effectual."**

23. In this case the application seeking leave indicated the Respondent herein as the 1st Respondent while the interested party was indicated as the 2nd Respondent. Obviously the application was not properly intituled. In **Republic vs. Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563,** it was held that an application for leave ought to be intituled as hereunder:

> **In the Matter of An Application by (the applicants for leave to apply for orders of certiorari and prohibition**
>
> **And**
>
> **In the Matter of Kenya Ports Authority Act**
>
> **And**
>
> **In the Matter of the National Environmental Management and Co-ordination Act 1999.**

24. When a party makes an application for leave it is usually presumed that the application will be heard ex parte. It therefore follows that at that stage it is not necessary to have applicants and respondents in the title to the application.
25. Nevertheless, in **Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani**

& Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

"Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".

26. In this case it is clear that the application identifies what the matter in dispute is and who the persons moving the Court are. Accordingly the joinder of the interested party as the 2nd respondent was unnecessary and inconsequential. It was a mere surplusage which neither added to nor subtracted from the substance of the application. Accordingly, I do not agree that the application is incompetent on that score.
27. I however find the joinder of the Attorney General to these proceedings to be inappropriate. Judicial review proceedings are not civil proceedings hence the Attorney General is not in my view a proper party unless the complaint is against that office. Judicial review proceedings are proceedings against a public body hence in this case the Respondent ought to have been the Registrar of Land and not the Attorney general on behalf of the Registrar of Land. Misjoinder, however, is not fatal to these proceedings.
28. It follows that the objection is unmerited.
29. The substantive Motion on the other hand was properly intituled and no issue has been raised in respect thereto. It is the Motion which is the subject of this decision.
30. It was also contended that to grant the orders sought herein would render the pending civil proceedings res judicata. I am however unable to agree with this line of submission. Judicial review proceedings do not deal with the merits of the case but only deals with the process. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

31. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
32. It follows that a decision in these proceedings either way will not operate as ***res judicata*** in so far as the pending civil proceedings are concerned.
33. The issue for determination in these proceedings is whether the Respondent's decision ought to be quashed. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

34. That the Respondent had jurisdiction under the repealed ***Registered Land Act*** is not in doubt. That at the time of the impugned decision the said piece of legislation had been repealed by the ***Land Registration Act***, 2012, is not in doubt. It is clear that the form which was relied upon the Respondent in summoning the parties to appear for the purposes of the determination of the boundary dispute referred to the repealed Act. However section 72 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

35. It is therefore my view and I do hold that the mere fact that a wrong form was used would not *ipso facto* be fatal to the Respondent's action if it was not meant to mislead and transmitted the correct information if the Respondent had jurisdiction to act in the manner he did.
36. It is however contended based on section 16 of the ***Land Registration Act***, 2012 that the Respondent had no jurisdiction to act in the manner he did. Section 16 in my view deals with "power to alter boundary lines and to prepare new editions". It provides as follows:

(1) The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instructions of the Registrar, in writing, in the prescribed form, and in accordance with any law relating to subdivision of land that is for the time being in force.

(2) Notwithstanding subsection (1), any alteration made shall be made public and whenever the boundary of a parcel is altered on the cadastral map, the parcel number shall be cancelled and the parcel shall be given a new number.

(3) The office or authority responsible for the survey of land may prepare new editions of the cadastral map or any part thereof, and may omit from the new map any matter that it considers obsolete.

37. In my view neither that section nor section 18 deals with fixing of boundaries contrary to the impression created under section 18 of the said Act. Accordingly, this anomaly ought to be brought to the attention of Hon. Attorney General to make the necessary adjustments to the Act. The power to fix boundaries is provided for under section 19 of the ***Land Registration Act*** which provides as follows:

(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.

38. It is therefore clear that the 1st Respondent has powers even under the ***Land Registration Act*** to fix boundaries of adjoining lands.
39. It follows that the Notice of Motion dated 24th January, 2013 lacks merit and the same is dismissed with costs to the interested party.

Dated at Nairobi this 7th day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wekesa for Mr Welimo for the Applicant

Mr Kihanga for Mrs Mukweyi for the 2nd Respondent