



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC MISC. E004 OF 2021**

**IN THE MATTER OF ARTICLES 23 (3) (F), 50 (1) & 162 (2) (B) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 18 & 19 OF THE LAND REGISTRATION ACT NO 3. OF 2012**

**AND**

**IN THE MATTER OF LAND ACT NO. 6 OF 2012**

**AND**

**IN THE MATTER OF ENFORCEMENT OF THE DECISION OF THE LAND REGISTRAR, RUMURUTI DATED 11<sup>TH</sup> MAY, 2021**

**AND**

**IN THE MATTER OF LAND PARCEL NOS. LAIKIPIA/EASO NAROK B1326 AND LAIKIPIA/UASO NAROK/B1327**

**AND**

**IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW REMEDIES OF MANDAMUS, CERTIORARI & PROHIBITION**

**BETWEEN**

REPUBLIC.....APPELLANT

**AND**

ELC CHIEF MAGISTRARE'S COURT NYAHURURU.....1<sup>ST</sup> RESPONDENT

THE CHIEF LAND REGISTRAR,

RUMURUTI LAND REGISTRY.....2<sup>ND</sup> RESPONDENT

JAMES MIGWI MUGUMO.....3<sup>RD</sup> RESPONDENT

**AND**

JECINTA WANGECHI KABIA.....EX PARTE APPLICANT

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. The material on record shows that the *ex-parte* Applicant (*the Applicant*) is the registered proprietor of **Title No. Laikipia/Uaso Narok B1327 (parcel B1327)** whereas the 3<sup>rd</sup> Respondent is the registered proprietor of an adjacent **Title No. Laikipia/Uaso Narok B1326 (parcel B1326)**.

2. The record further shows that whereas the Applicant acquired **parcel B1327** in 2016 or thereabouts, the 3<sup>rd</sup> Respondent acquired **Parcel B1326** much earlier. It is further evident that upon the Applicant being dissatisfied with the boundaries of the two suit properties, she called upon the 2<sup>nd</sup> Respondent to fix or mark out the correct boundaries of the said properties.

3. The material on record shows that when the 2<sup>nd</sup> Respondent embarked upon the task of resolving the boundary dispute on 21<sup>st</sup> April, 2021, the 3<sup>rd</sup> Respondent did not attend the relevant hearing hence the process was undertaken in his absence. The 3<sup>rd</sup> Respondent then decided to file a plaint dated 28<sup>th</sup> April, 2021 in **Nyahururu CMCC No. 35 of 2021** seeking, *inter alia*, a permanent injunction to restrain the Land Registrar and District Surveyor from amending the registration records and the Registry Index Map (*RIM*) for the suit properties.

4. Simultaneously with the filing of the suit, the 3<sup>rd</sup> Respondent filed an application seeking, *inter alia*, an interim injunction to restrain the Land Registrar and Surveyor from changing the relevant land registration records in their respective departments pending the hearing and determination of the suit. The 3<sup>rd</sup> Respondent was granted interim orders on 29<sup>th</sup> April, 2021 pending *inter partes* hearing.

## **B. THE APPLICATION FOR JUDICIAL REVIEW**

5. Being aggrieved by the filing of the said suit and the granting of interim orders, the Applicant filed a notice of motion dated 4<sup>th</sup> June, 2021 under **Section 3A of the Civil Procedure Act (Cap. 21), Section 18 (2) of the Land Registration Act 2012, and Order 53 Rule 3 of the Civil Procedure Rules, 2010** seeking the following reliefs:

(a) ...spent.

(b) That this honourable court be pleased to grant an order of *certiorari* to remove into this honourable court and quash the proceedings in **Nyahururu CM ELC Case No 35 of 2021** between **James Migwi Mugumo v Jecinta Wangechi Kabia & 2 Others**.

(c) That consequent to granting prayer (2) above, this honourable court be pleased to issue an order of *mandamus* directing and compelling the 2<sup>nd</sup> Respondent to rely on and/or effect its decision contained in the letter of 11<sup>th</sup> May, 2021.

(d) That this honorable court be pleased to issue an order of *prohibition* prohibiting the 3<sup>rd</sup> Respondent from exercising proprietary rights over the disputed boundary between himself and the *ex parte* Applicant.

(e) ...spent

(f) ...spent

(g) ...spent

6. The application was grounded upon the statutory statement dated 4<sup>th</sup> June, 2021 and the verifying affidavit sworn by the Applicant on 4<sup>th</sup> June, 2021 and the exhibits thereto. The Applicant contended that the nature of the dispute over the suit properties was a boundary dispute which could only be resolved by the Land Registrar in the 1<sup>st</sup> instance as provided for under **Sections 18 and 18 of the Land Registration Act** and that the Chief Magistrate's Court had no jurisdiction to entertain the dispute. The Applicant, therefore, contended that the trial court had acted *ultra vires* by entertaining the 3<sup>rd</sup> Respondent's suit and granting the interim orders and that the proceedings were consequently a nullity.

## **C. THE RESPONDENTS' RESPONSE**

7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not file any response to the application but the 3<sup>rd</sup> Respondent filed a replying affidavit sworn on 4<sup>th</sup> October, 2021 in opposition to the application. He denied the existence of a boundary dispute and contended that he had already settled on **parcel B1326** by the time the Applicant bought her **parcel B 1327** and that he had no dispute with the previous owner over the common boundary. He further contended that he had confined all his activities within the boundaries initially shown to him by the Settlement Fund Trustees at the time of allocation.

8. The 3<sup>rd</sup> Respondent contended that on 21<sup>st</sup> April, 2021, the Land Registrar and District Surveyor - Laikipia West visited the suit properties and illegally undertook a survey which resulted in excision of half an acre out of his **parcel No. B1326** without any form of compensation which was added to the Applicant's **parcel No. B1327**. He further contended that the said exercise was undertaken in utter violation of his right to property and right to be heard.

9. The 3<sup>rd</sup> Respondent asserted that the trial court had jurisdiction to entertain his suit and grant the interim orders sought. He further contended that if the Applicant was aggrieved by the interim orders his only recourse was to apply to the trial court for variation or discharge or to appeal against them but not to institute judicial review proceedings.

## **D. DIRECTIONS ON SUBMISSIONS**

10. When the application was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange written submissions. The record shows that the Applicant filed her submissions on 2<sup>nd</sup> November, 2021 whereas the 3<sup>rd</sup> Respondent filed his on 17<sup>th</sup> January, 2022. There is no indication on record of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents having filed any submissions.

#### **E. THE ISSUES FOR DETERMINATION**

11. The court has considered the application for judicial review, the replying affidavit in opposition thereto as well as the supplementary affidavit and the court is of the opinion that the following issues arise for determination herein:

- (a) **Whether the dispute between the Applicant and the 3<sup>rd</sup> Respondent is a boundary dispute.**
- (b) **Whether the trial court has jurisdiction to entertain the 3<sup>rd</sup> Respondent's suit.**
- (c) **Whether the Applicant has made out a case for the grant of the orders sought.**
- (d) **Who shall bear costs of the application.**

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the dispute between the Applicant and the 3<sup>rd</sup> Respondent is a boundary dispute**

12. The court has considered the material and submissions on record on this issue. Whereas the Applicant contended that the dispute between the parties was a boundary dispute within the meaning of **Section 19 of the Land Registration Act**, the 3<sup>rd</sup> Respondent was of a contrary opinion. The 3<sup>rd</sup> Respondent contended that in his suit before the trial court he had simply sought a declaration and permanent injunction and that the Applicant's claim was for a portion of land out of **parcel B1326**. The 3<sup>rd</sup> Respondent further contended that he had settled in the area much earlier than the Applicant and that he had no boundary dispute with the previous owner of **parcel B 1327**.

13. The court has fully considered the material and documents on record. The court has noted that the Applicant is the one who initiated resolution of what she believed was a boundary dispute involving the suit properties. The Land Registrar initiated the resolution mechanism under **Section 19 of the Land Registration Act** but the 3<sup>rd</sup> Respondent does not appear to have participated in the proceedings.

14. The court has perused the report of the Land Surveyor and the Registrar and there is no doubt that the nature of the dispute between the warring parties was a boundary dispute. In his report, the Land Registrar - Rumuruti concluded as follows:

**“From the report the proprietor of Laikipia/Uaso Narok B1326 has planted trees where he had marked his boundary. From the survey, these trees are far inside the parcel B1327. The margin of error is more than the acceptable survey margin of plus or minus 10%.**

**In conclusion and considering all the facts and observations, the boundary was placed and marked as fixed. The parties have a 30 day window of appeal to the court.”**

15. The mere fact that the 3<sup>rd</sup> Respondent had settled in the area earlier than the Applicant does not necessarily mean that there can never be a boundary dispute involving the suit properties. The mere fact that the 3<sup>rd</sup> Respondent did not have a dispute with the previous owner of **parcel B1327** does not necessarily prevent one from arising at any moment.

##### **(b) Whether the trial court has jurisdiction to entertain the 3<sup>rd</sup> Respondent's suit**

16. The court has considered the material and submissions on record. Whereas the Applicant contended that the trial court had no jurisdiction to entertain the suit, the 3<sup>rd</sup> Respondent contended otherwise. The Applicant cited the cases of **Azzuri Properties v Pink Properties Limited [2018] eKLR** and **Whitehorse Investments Ltd v Nairobi City Council [2019] eKLR** for the proposition that the disputing parties were legally bound to follow the laid down statutory mechanism for resolution of the boundary dispute and that the courts have no jurisdiction to entertain such disputes in the first instance.

17. In the case of **Azzuri Properties v Pink Properties Limited [2018] eKLR**, the Court of Appeal held, *inter alia*, that:

**“23 From this analysis of the law, it should be clear from the above that, we are in agreement with the learned Judge's conclusion that the dispute ought to have been heard by the Land Registrar as stated in the statute. Jurisdiction is everything. It has been said many times before, that, without it a court has no powers to make one more step, irrespective of the strength and nature of evidence in the parties' possession...**

**In this case, reference of the dispute to the Environment and Land Court at first instance was proscribed by statute and on that account alone, the Appellant's case was a non-starter. Although this matter would have rested on this point of jurisdiction, we will deal with the issue of evidence purely because counsel made submissions on the same and there was a determination by the Judge.”**

18. The court is satisfied that the trial court had no jurisdiction to entertain the boundary dispute between the parties. The mere fact that the plaint was framed in such manner as to disguise or camouflage the nature of the dispute could not legally confer jurisdiction upon the trial court contrary to express statutory provisions in the **Land Registration Act**. The case of **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017] eKLR** is no authority for the proposition that subordinate courts have jurisdiction to entertain boundary disputes in the first instance.

**(c) Whether the Applicant has made out a case for the grant of the orders sought**

19. Whereas the Applicant submitted that she had satisfied the requirements for the grant of the judicial review orders and other orders sought in the application, the 3<sup>rd</sup> Respondent submitted otherwise. There are various grounds for granting judicial review orders in law. For instance, in the Ugandan case of **Pastoli V Kabale District Local Government Council & Others [2008] E.A. 300 at 303-304** the grounds for judicial review were summarized as follows:

**“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 or procedural impropriety. See *Council of Civil Service Union v Minister for the Civil Service [1985] A.C.2* and also *Francis Bahikirwe Muntu and Others Vs Kyambogo University, High Court, Kampala, Miscellaneous application number 643 of 2005 (UR)*.**

**Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provisions of the law or its principles are instances of illegality.**

**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. *Re an application by Bukoba Gymkhana Club [1963] EA 478* at page 479 paragraph E.**

**Procedural impropriety is when there is 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 exercise jurisdiction to make a decision (*Al-Mehdawi V Secretary of State for the House Department [1990] AC 876*).”**

20. The court has already found and held that the dispute between the Applicant and the 3<sup>rd</sup> Respondent was a boundary dispute. The court has also found and held that the trial court has no jurisdiction to entertain the 3<sup>rd</sup> Respondent’s suit. It would follow that any proceedings undertaken without jurisdiction would be a nullity *ab initio*. The court is of the opinion that a judicial review order of *certiorari* can properly issue to call up and quash such proceedings being undertaken without jurisdiction. The court is thus inclined to grant the prayer for an order of *certiorari* to quash the proceedings in Nyahururu CM ELC. No 35 of 2021.

21. The court is, however, not inclined to grant the order of *mandamus* sought to compel the Land Registrar to “rely on” or “effect” his decision dated 11<sup>th</sup> May, 2021. There is no allegation in the application to the effect that the Registrar has failed in the performance of his statutory duty under the law. On the contrary, the material on record shows that he attended to the boundary dispute and made a determination thereon under Section 19 of the Land Registration Act. There is no material on record to demonstrate that the Registrar was required to take any steps or action to give “effect” to his determination.

22. In the case of **Republic v Kenya National Examinations Council ex parte Geoffrey Gathanji Njoroge & 9 Others [1997] eKLR**, the scope of the order of *mandamus* was considered by the Court of Appeal as follows:

**“The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAWS OF ENGLAND, 4<sup>th</sup> Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-**

**“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty...”**

**The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.**” (emphasis added).

23. The court has further noted that the Applicant has sought an order of prohibition to stop the 3<sup>rd</sup> Respondent from exercising proprietary rights over the disputed portion of land. The court takes the view that an order of prohibition is a public law remedy for control of administrative action of public agencies in the exercise of public authority. It ought not to be employed like the private law remedy of a prohibitory injunction in ordinary civil cases. The court is not satisfied that an order of prohibition would lie against a private citizen for vindication of perceived private property rights in a boundary dispute. Accordingly, the court is not inclined to grant the same.

**(d) Who shall bear costs of the application**

24. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court has noted that the Applicant has partly succeeded and partly failed in her application. The court is of the opinion that the appropriate order to make on costs is that each party shall bear his own costs.

**G. CONCLUSION AND DISPOSAL**

25. The upshot of the foregoing is that the court finds merit in the application for judicial review. However, the Applicant is not entitled to all the prayers sought in the application. Accordingly, the court makes the following orders for disposal thereof:

- (a) **An order of *certiorari* be and is hereby granted to remove into this court and *quash the* proceedings in Nyahururu CM ELC Case No. 35 of 2021 between James Migwi Mugumo v Jecinta Wangechi Kabia & 2 Others.**
- (b) **The prayers for orders of *mandamus* and *prohibition* are hereby declined.**
- (c) **Each party shall bear his own costs of the application.**

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 10TH DAY OF MARCH, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**IN THE PRESENCE OF:**

**MR. OWOUR FOR THE EX PARTE APPLICANT**

**NO APPEARANCE FOR THE 1ST AND 2ND RESPONDENTS**

**MR. GAKUHI CHEGE FOR THE 3RD RESPONDENT**

**CA- CAROL**

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**Y. M. ANGIMA**

**JUDGE**