REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW NO. 170 OF 2013

REPUBLIC……....…….…..…....APPLICANT

-VERSUS-

LAND REGISTRAR,KAJIADO NORTH DISTRICT……...……..……....1ST RESPONDENT

DISTRICT SURVEYOR,KAJIADO NORTH DISTRICT.....2ND RESPONDENT

JAMES MUTI MAGUA.....3RD RESPONDENT

JOAKIM ALANYAKWA KATITIA.....4TH RESPONDENT

PETER WANJOHI MUTHEE.....5TH RESPONDENT

JOHN NGANGA KARANJA.....6TH RESPONDENT

ELIZABETH KANGORE MAUA……..…….....…..7TH RESPONDENT

EX PARTE

IRENE NAIPANOI MONTET.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 22nd May, 2013, the *ex parte* applicant herein, **Irene Naipanoi Montet,** who wrongly described herself as an Interested Party seeks the following orders:

1. **An order of prohibition do issue to prohibit the Land Registrar Kajiado North District in the Kajiado County and/or any other Registrar of officer thereat not to act on the Boundary Dispute Summons dated 18th March 2013 issued by the said Land Registrar Kajiado North District Kajiado County or on any other such summons or proceedings.**
2. **An order of certiorari to call remove and bring to this Honourable Court and quash the said Boundary Summons.**

3. **An order of mandamus do issue directing both the Land Registrar Kajiado North and the District Surveyor to act and give effect to ruling of the Kajiado North Land Dispute Tribunal in its Land Dispute Tribunal Case No. 236/12/2010 dated 26th July 2011.**
4. **Costs of this application be costs in the cause.**

Applicants' Case

2. The application was supported by a verifying affidavit sworn by the applicant on 20th May, 2013.
3. According to the applicant, she was a daughter and administrator of one **Salim Legishon Mundet** also known as **Salim Lekishon Montet** who died at Ngong Kajiado on 3rd May 1995 (hereinafter referred to as the deceased). The deceased, she deposed was the registered owner of the piece of land known as Title No. Ngong/Ngong/13086 ex 3324 ("the suit land").
4. The applicant deposed that on 18th March 2013 the Land Registrar Kajiado North District ("the Registrar") issued a Boundary Disputes Summons purportedly requiring the deceased and other owners of lands bordering the premises to appear before him on 6th June 2013 for the purpose of determining alleged boundary dispute thereof. According to her, the said summons smacked of bad faith and were oppressive of the deceased's estate as the same is impugned on the footing that it was addressed to a deceased person; it did not disclose the nature of complaint or application; there had been previous proceedings relating to the said boundary before the then Kajiado North Land Dispute Tribunal; the said Registrar knew or ought to have known about the deceased's death through the said proceedings; it is intended to circumvent and/or appeal the said Ruling; and the law (***Registered Land Act***) purportedly under which the said summons is issued was repealed on 2nd May 2012 by the coming into force of the ***Land Registration Act*** (No. 3 of 2012).
5. It was deposed that though served with decree ensuring from the said Ruling respectively on 9th and 10th October 2012 the Registrar and the District Surveyor Kajiado North District refused and/or defaulted to give effect and/or implement the said ruling and according to the deponent, if the matters canvassed by the summons take effect, the deceased's estate and/or the premises will be adversely affected and suffer irredeemable prejudice and damage as the boundaries thereof will be altered without due process.
6. It was submitted on behalf of the applicant that the orders sought to issue on the ground that the law under which the impugned Registrar's Summons was given had been repealed; that the Registrar was functus officio as the subject matter of the summons had been previously adjudicated upon by the Magistrate's Court, Kajiado and that both the Surveyor and the Registrar had refused to act thereon.
7. Without a replying affidavit, it was deposed that the substance of the application was not controverted and that the Respondents' written submissions only raised peripheral matters delving on minor defects in the Motion which even if existed were curable by sections 1A, 1B and 3A of the ***Civil Procedure Act*** and Article 159(2)(d) of the Constitution.

1st and 2nd Respondents' Case

8. In opposition to the application the 1st and 2nd Respondents filed the following grounds of opposition:

   1 THAT the application is frivolous and vexatious.

   2 THAT the application is an abuse of the court process.

   3 THAT the application as taken out is incompetent, bad in law, fatally and incurably defective and should be dismissed with costs.

9. It was submitted on behalf of the 1st and 2nd Respondents that though the 1st Respondent issued the summons to the applicant's deceased father on 18th March, 2013 under the forms provided under the ***Registered Land Act*** now repealed, the 1st Respondent was acting bona fides within the

provisions of section 14 of the **Land Registration Act** which saved the powers previously contained in section 21(2) of the said repealed Act hence the Land Registrar did not act ultra vires.

10. It was contended that the Land Registrar acted appropriately in issuing the Summons to the applicant's deceased father who was the registered owner of the land parcel over which there was a boundary dispute. It was submitted that since the applicant had no proprietary interest in the suit land, there was no violation of any rights under Article 40 of the Constitution as claimed.

5th and 6th Respondents'' Case

11. On the part of the 5th and 6th Respondents, the following grounds of opposition were filed:

    1. **That the orders sought cannot issue at law.**

    2. **That the application as drawn filed and taken out is fatally defective at law.**

    3. **That the 5th and 6th Respondents are wrongly brought into this suit *ab inito.***

    4. **That the application is conveniently, but unprocedurally filed as an omnibus application raising constitutional, civil and judicial review jurisdictions.**

12. It was submitted on behalf of the 5th and 6th Respondents that the prayers as sought herein cannot be granted since as opposed to seeking to prohibit the doing of an act what is sought is the prohibition of not doing an act.
13. It was further submitted that in this application not only is the title of the Motion defective but the applicant and/or the interested party does not have a distinct position.
14. According to the 5th and 6th Respondents they are not authors or at all of the administrative action sought to be quashed and therefore cannot be called upon to defend their positions as respondents as they have been made and at best would have been interested parties.
15. According to the 5th and 6th Respondents, the application was fatally defective for seeking constitutional, civil and judicial review orders all in one application.

Determinations

16. It is contended in this application that the Summons in question were issued pursuant to the provisions of 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.

17. It has not been alleged that by using the forms under the repealed Act, the Respondents meant to mislead the applicant. 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. Nothing therefore turns on the said issue.
18. It has also been alleged that the improper intituling of the application rendered the application fatally and incurably defective. In judicial review applications, the applicant is always the Republic rather than the person aggrieved by the decision sought to be impugned. See **Farmers Bus Service & Others vs. Transport Licensing Appeal Tribunal [1959] EA 779.** The rationale for this was given in **Mohamed Ahmed vs. R [1957] EA 523** where it was held:

    "This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners' offices and in some registries of the High Court. The

appellant's advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter".

19. However 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".

20. I however must state that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs.
21. It has also been contended that the 5th and 6th Respondents ought not to have been named as Respondents but rather as interested parties. In **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005**, **Nyamu, J** (as he then was) held:

"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."

22. I agree that judicial review orders are not available against the 5th and 6th respondents herein. Such persons could only be joined as interested parties under Order 53 rule 6 of the ***Civil Procedure Rules***.
23. It was contended that the application is incompetent for seeking constitutional, civil and judicial review orders all in one application. Whereas that reasoning may have found favour in the old Constitutional dispensation, that is nolonger the case under the new Constitution where there is no clear demarcation between a Constitutional petition and judicial review application in terms of the grounds therefor. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century.
24. It was contended that the manner in which the prayer for prohibition was drafted renders the application incompetent. Although the said prayer is not a paragon of elegant drafting, it is my view that the applicant's intention is very clear that the applicant was seeking to prohibit the Land

Registrar from proceeding as he intended to do. I do not see any substance in the objection.

25. It was contended that the applicant's father, the registered proprietor of the suit land was dead at the time he was summoned to appear before the Registrar. This contention is not denied save that the 1st and 2nd Respondents contend that they were under obligation to summon the deceased since he was still the registered owner of the land whose boundary was in dispute.

26. With due respect the said argument cannot hold. To hold that a dead person can be summoned to appear in a boundary dispute and that such summons would be validated by a Court of law is not only grossly unreasonable but is irrational and no Court of law ought to countenance such argument. Anybody who believes that a Court of law worth its salt would buy into that kind of argument ought to be reminded of the wise words of **Madan, J** (as he then was) in **N vs. N [1991] KLR 685** where the learned Judge said:

"I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted."

27. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** takes the form of Wednesbury unreasonableness explicated by **Lord Green** and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

28. Similarly in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was 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."

29. To summon a dead man to appear in a boundary dispute in my view is so outrageous in its defiance to logic or of accepted moral standards that no sensible person applying his mind to the

real requirement for the summons ought to arrive at the decision to summon such a "person".

30. There also seems to have been a dispute between **Joseph Montet**, **George Montet** and **Irene Montet** on one hand and **John Nganga Karanja** on the other which was determined by the Kajiado North Land Dispute Tribunal whose award was adopted by the Senior Resident Magistrate's Court, Kajiado on 20th March 2012. Whereas the land titles mentioned thereunder are not exactly the same as the one in the summons the subject of this application there is no reason why the District Land Surveyor to whom the order was directed cannot be compelled to implement the said order for whatever it is worth.
31. In the result I find merit in the Notice of Motion dated 22nd May, 2013.

Order

32. Consequently the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of prohibition is hereby issued prohibiting the Land Registrar Kajiado North District in the Kajiado County and/or any other Registrar or officer thereat from proceeding based on the Boundary Dispute Summons dated 18th March 2013 issued by the said Land Registrar Kajiado North District Kajiado County.**

5. **An order of certiorari is hereby issued removing into this Court the said Boundary Summons for the purposes of being quashed which summons are hereby quashed.**
6. **An order of mandamus do issue directing both the Land Registrar Kajiado North and the District Surveyor to act and give effect to ruling of the Kajiado North Land Dispute Tribunal in its Land Dispute Tribunal Case No. 236/12/2010 dated 26th July 2011.**
7. **In light of the improper intitulement of the parties to these proceedings each party will bear own costs.**

Dated at Nairobi this 17th day of October, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Omari for Mr Kigano for the ex parte applicant

Mr Terer for the 1st and 2nd Respondents

Cc Patricia