



**Ragot v Sub County Land Registrar Nyando, Muhoroni, Nyakach Sub Counties & another  
(Miscellaneous Civil Application 3 of 2021) [2022] KEELC 3214 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION 3 OF 2021**

**A OMBWAYO, J**

**MAY 13, 2022**

**IN THE MATTER OF PURPOTED BOUNDARY DISPUTE RESOLUTION  
INVOLVING PARCELS OF LAND KNOWN AS KISUMU FORT TERNAN 251 & 252**

**AND**

**IN THE MATTER FOR APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL  
REVIEW BY WAY OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLES  
22,23,25(C),35(1),40 (1) (2)(3),48,50(1),60,64,162(2)(B),165 (3)(5)(6)(7)**

**AND**

**IN THE MATTER OF LAND REGISTRATION ACT 2012 SECTIONS 19(2) (3) & 101**

**AND**

**THE LAND REGISTRATION REGULATIONS 40(1)(2)(3)(4) (6) (7) (8)**

**AND**

**THE FAIR ADMINISTRATIVE ACTION ACT 2015, SECTIONS 2,3,4,6,7,8,9,10,11,12**

**AND**

**THE ACCESS TO INFORMATION ACT 2016 SECTIONS 2,3,4,5,8,9,10,11,14**

**AND**

**THE CIVIL PROCEDURE ACT CHAPTER 21, LAWS  
OF KENYA, ORDER 53, CIVIL PROCEDURE RULES**

**BETWEEN**

**JUDE RAGOT ..... APPLICANT**

**AND**



**SUB COUNTY LAND REGISTRAR NYANDO, MUHORONI, NYAKACH SUB  
COUNTIES ..... 1<sup>ST</sup> RESPONDENT  
JAMES OCHIENG ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The application for Judicial Review herein was commenced by way of Chamber Summons dated 25<sup>th</sup> November 2020 and filed on 30<sup>th</sup> November 2020 by Ex-parte Applicant seeking for the following orders:
  1. That this Application be certified as urgent and be heard Ex parte on a priority basis on the grounds set out in the Certificate of Urgency and the grounds of this Application.
  2. That leave be granted to enable the Applicant seek an order of Judicial Review by way of mandamus compelling the 1<sup>st</sup> Respondent to produce before this court, his report and that of the surveyors ,who accompanied him, if any, by which he purported to determine the alleged boundary dispute resolution undertaken on 19<sup>th</sup> August 2020,between the parcels of land known as Kisumu/Fort Ternan/ 251and Kisumu/Fort Ternan /252 and the minutes of persons in attendance, and the handwritten statements of the Applicant and the 2<sup>nd</sup> Respondent’s representative which he recorded at the site visit and a certified copy of the green card register of the parcel of land known as Kisumu/ Fort Ternan/252.
  3. That leave be granted to enable the Applicant seek an order of Judicial Review by way of certiorari, to bring before this court and quash, the proceedings and decision , if any, of the 1stRespondent’s purported boundary dispute resolution undertaken on 19<sup>th</sup> August 2020 in which the surveyors who accompanied him, planted beacons 10 meters into the Applicant’s parcel of land known as Kisumu/Fort Ternan/ 251, in a parallel line along the entire length of land , claiming that the said portion constituting part of the Applicant’s aid parcel of land , should form part of the 2<sup>nd</sup> Respondent’s adjacent parcel of land known as Kisumu/Fort Ternan/252.
  4. That in the event that the Respondents or any of their agents or any person acting pursuant to the decision complained of , have already acted on or otherwise implemented the said decision, in any manner , or taken any action thereon pursuant to that decision, then leave be granted to enable the Applicant seek an order of Judicial Review by way of mandamus compelling the Respondents, their agents or any such person acting pursuant to that decision to restore the status quo as it was before that decision was acted upon, by removing all the beacons and any other structures they may have planted on the Applicant’s parcel of land known as Kisumu/ Fort Ternan/251, in purported determination and or implementation of the alleged boundary dispute resolution undertaken on 19<sup>th</sup> August 2020.
  5. That leave be granted to enable the Applicant to seek an order of Judicial Review by way of prohibition restraining the 1<sup>st</sup> Respondent from purporting to hear , review and determine the ‘purported boundary dispute’ between the parcels of land known as Kisumu/Fort Ternan/251 and Kisumu/Ternan/252,without strict compliance with the relevant provisions of all the applicable laws and principles relating to such an exercise , if at all , it should be found necessary review the same after this proceedings.



6. That in the event such leave is granted, the court be pleased, while pending the determination of this proceedings, to order it to operate as a stay of enforcement or implementation of the decision of the 1<sup>st</sup> Respondent complained of and an order requiring the beacons or any other structures placed thereon by the 2<sup>nd</sup> Respondent or his agents, to be removed and at any other or further consequential action or any dealings with or transactions being carried out thereon by the Respondents, or any dealings with or transactions being carried out thereon by the Respondents, or any person acting under them, in relation to that land, whether by way of disposal or alienation to any third party or otherwise undertaking any action thereon, in whatsoever manner which may prejudice the interests of the Applicant in the said parcel of land.
  7. That costs of this Application be ordered to be in the cause.
2. On 2<sup>nd</sup> December 2020, the matter came up for hearing and the Applicant were granted leave as prayed in the Chamber Summons Application and an order that the substantive Notice of Motion be filed within 21 days.
  3. The Ex-parte Applicant filed the Notice of Motion where he sought for the following orders:
    1. That an order of Judicial Review by way of Mandamus compelling the 1<sup>st</sup> Respondent to produce before this court, his report and that of the surveyors, who accompanied him, if any, by which he purported to determine the alleged boundary dispute resolution undertaken on 19<sup>th</sup> August 2020, between the parcels of land known as Kisumu/Fort Ternan/ 251 and Kisumu/ Fort Ternan /252 and the minutes of persons in attendance, and the handwritten statements of the Applicant and the 2<sup>nd</sup> Respondent's representative which he recorded at the site visit and a certified copy of the green card register of the parcel of land known as Kisumu/ Fort Ternan/252.
    2. That an order of Judicial Review by way of certiorari, to bring before this court and quash, the proceedings and decision, if any, of the 1<sup>st</sup> Respondent's purported boundary dispute resolution undertaken on 19<sup>th</sup> August 2020 in which the surveyors who accompanied him, planted beacons 10 meters into the Applicant's parcel of land known as Kisumu/Fort Ternan/ 251, in a parallel line along the entire length of land, claiming that the said portion constituting part of the Applicant's parcel of land, should form part of the 2<sup>nd</sup> Respondent's adjacent parcel of land known as Kisumu/Fort Ternan/252.
    3. That in the event that the Respondents or any of their agents or any person acting pursuant to the decision complained of, have already acted on or otherwise implemented the said decision, in any manner, or taken any action thereon pursuant to that decision, then leave be granted to enable the Applicant seek an order of Judicial Review by way of mandamus compelling the Respondents, their agents or any such person acting pursuant to that decision to restore the status quo as it was before that decision was acted upon, by removing all the beacons and any other structures they may have planted on the Applicant's parcel of land known as Kisumu/ Fort Ternan/251, in purported determination and or implementation of the alleged boundary dispute resolution undertaken on 19<sup>th</sup> August 2020.
    4. That an order of Judicial Review by way of prohibition restraining the 1<sup>st</sup> Respondent from purporting to hear, review and determine the 'purported boundary dispute' between the parcels of land known as Kisumu/Fort Ternan/251 and Kisumu/Ternan/252, without strict compliance with the relevant provisions of all the applicable laws and principles relating to such an exercise, if at all, it should be found necessary to review the same after this proceedings.



5. That costs of this Application be ordered to be borne by the Respondents.
4. The Application was based on grounds that the Applicant is the proprietor of the parcel of land known as Kisumu/Fort Ternan/251 measuring about 3.0 Ha or 7.4 acres, situate in the sugar belt zone in Muhoroni constituency where he has continuously been undertaking sugarcane farming since 2001 to date with clear cut demarcation of its boundaries with all its adjacent neighboring parcels of land having lawfully acquired the same upon purchase at a public auction.
5. It was stated that the said parcel of land shares a common boundary with the 2<sup>nd</sup> Respondent's parcel of land known as Kisumu/Fort Ternan /252 with which it has maintained for over 19 years, the existing clear boundary features demarcating the two adjacent parcels of land which has been in existence and was reinforced by the Respondent upon erection of a barbed wire and live fence along the same existing boundary after he purchased from the previous owner. That the boundary has been dutifully maintained peacefully and quietly until recently when the 2<sup>nd</sup> Respondent strangely sought the 1<sup>st</sup> Respondent's intervention to establish where the boundary should be.
6. It was further stated that the purported boundary determination by the 1<sup>st</sup> Respondent arising from his site visit on 19<sup>th</sup> August 2020 does not lie in law as the 2<sup>nd</sup> Respondent's representative upon being asked for a brief statement of the nature of his complaint prompting the boundary dispute exercise indicated that he only needed to establish the correct boundary as a recent purchaser of the adjacent land. That the claim by the 2<sup>nd</sup> Respondent on the Applicant's portion of land would not be available by virtue of adverse possession having accrued prescriptive rights over the said portion to the Applicant and the purported dispute determination cannot confer any proprietorship rights.
7. The decision by the 1<sup>st</sup> Respondent to purportedly determine an 'alleged purported boundary dispute' where there was none, is ultra vires and outside the jurisdiction granted from such an exercise within the meaning is section 18 and 19 of the *Land Registration Act, 2012*. That the entire exercise of purported boundary dispute determination by the 1<sup>st</sup> Respondent on 19<sup>th</sup> August 2020 was biased and a sham with an apparent pre-determined decision by the 1<sup>st</sup> Respondent which do not constitute in law and in fact such a boundary dispute determination as contemplated by law which render the entire exercise as null and void for want of jurisdiction, ultra vires, biased and irrational, unfair and unreasonable as enumerated from paragraph (a)-(i).
8. It was stated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions and omissions render the entire process of determination of the purported boundary as partial, high handed, arbitrary and callous and deprives the 1<sup>st</sup> Respondent of his intended position of a neutral, independent and impartial arbiter and or quasi-judicial tribunal. The purported decision of the 1<sup>st</sup> Respondent to take away the 2 acres of the Applicant's land in the purported boundary determination exercise without giving the Applicant an opportunity to be heard is unconstitutional and that unless an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is immediately issued restraining them and their agents and or servants from implementing the said decision on purported boundary determination, the Applicant stands to suffer immense loss and damage to his subsisting crops on that portion of land.
9. The Application was supported by the Affidavit of JUDE RAGOT, the Applicant herein sworn on 26<sup>th</sup> November 2020.

### **2<sup>nd</sup> Respondent's Replying Affidavit**

10. The 2<sup>nd</sup> Respondent herein filed a Replying Affidavit in respondent the Notice of Motion Application dated 11<sup>th</sup> December 2020 where he deposed and stated that he is a neighbor with the Applicant. He



- stated that he bought land in the year 2014 from Mr. Hesbon Mitemah and had it registered in his name.
11. That his parcel of land measures 7 acres and holds the same as freehold title free from any encumbrances and that during the process of buying his parcel of land, he engaged a private surveyor one Mr. Paskan to confirm if indeed it had the correct acreage and the surveyor informed him that the Applicant had trespassed into his parcel of land.
  12. He stated he reached out to the Applicant through telephone and requested him to create time so that they can involve the County Surveyor to come and determine their common boundary and this was done in the presence of the Applicant's father Mr. Nesta Ragot and other witnesses. That the Applicant did not appeal against these findings nor seek a resurvey of the said boundaries.
  13. He further stated that in 2015 the Applicant had planted sugarcane on a portion of his parcel of land and he requested him to stop any further work thereon after harvesting the same but has failed to heed on his request and after the beacons were placed to demarcate their common boundaries, the said beacons were physically removed and beacon holes covered which act raised suspicion that the Applicant does not want the boundary dispute to be resolved.
  14. He stated that in 2018, he requested for a new boundary identification process as he waited to build his home and he approached the County Lands Registrar and surveyor who promised to come on 30<sup>th</sup> May 2018 but failed to do so. That the officers failed to come to the ground and upon inquiring, he was advised by the Land Registrar Mr. S. Lukoko Were that the boundary had been established and beacons placed. That since he is based in the United States of America and needed to develop his parcel by building a home and domesticate it by having animals, he decided to fence off a portion of this parcel deliberately leaving off the disputed portion to enable him move forward as he tried to sort the issue.
  15. The 2<sup>nd</sup> Respondent stated that it is not true as alleged by the Ex Parte Applicant that they did fence off his parcel in a manner acknowledging that he owns the disputed portion of land and the Ex Parte Applicant has not had peaceful use and /or occupation of the disputed 2 acre of land and his claim under adverse possession cannot lie in law. That in 2019, his mother visited the sub-county lands office and requested they do come to the suit parcel and resolve the issue and a new boundary dispute was served upon all parties.
  16. It is the 2<sup>nd</sup> Respondent's case that the Ex Parte Applicant did not appear nor send a representative and the County Lands Registrar and Surveyor refused to continue with the process due to his absence and directed that a new date be taken for the exercise to take place. That the new boundary dispute summon was again issued for a boundary dispute problem to be undertaken on 19<sup>th</sup> August 2020 and on the said date and in the absence of the 2<sup>nd</sup> Respondent's representative (his mother), the Ex Parte Applicant and his witnesses, the exercise was conducted by the Land Registrar Mr. Isaac Sabuni and Surveyor Mr. P.K. Rugut strictly by the *Land Registration Act*.
  17. It was stated that it is not true as alleged by the Ex parte Applicant that Land Registrar did not give them a hearing and ordered the surveyor to start work without hearing both parties and looking at the surveyor's report and when the beacons were placed, the said surveyor came to the same conclusion as the previous ones that the Ex parte Applicant had trespassed into his parcel of land about 2 acres and there was need to move back to his side. That upon inquiry from the Land Office at the Awasi after this suit was filed, he was given a copy of the surveyor's report, sketch working and County Lands Registrar Report. He stated that he is not privy to the allegations that the ex parte Applicant has made as against the 1<sup>st</sup> Respondent with regard to getting copies of the documents and cannot comment on the same.



18. It is the 2<sup>nd</sup> Respondent's case that the documents are public documents which are available in the ordinary course of business and if unavailable for one reason or the other, the Ex Parte Applicant ought to have raised the same with the Sub -County Commission or office of the ombudsman. The 2<sup>nd</sup> Respondent went on to state that he was informed by his mother which information he believes to be true that both the County Lands Registrar and Surveyor did carry out their work professionally after hearing both parties and the Applicant was not discriminated against in manner, the Ex Parte Applicant was clearly shown where the boundary of the two parcels are and beacon were placed in his presence, that the Ex parte Applicant vehemently opposed the surveyor's work as carried out and was asked by the County Lands Registrar to bring his own surveyor to counter-check if not satisfied, that it is not true that the Ex Parte Applicant was not involved in the exercise as he fully participated in all deliberations and the surveyor's work was fully carried out in his presence and with full blessings of all parties involved and that at no time did the Ex Parte Applicant sought to cross examine any representative nor did he request to call other witnesses to write their statement on his behalf.
19. It is the 2<sup>nd</sup> Respondent's case that the chain-link placed on his parcel of land, did not indicate that they had ceded any land to the Ex Parte Applicant and was merely for purpose of protecting his property and the documentation presented consistently so that this dispute has been festering from 2015 and it is wrong for the Ex Parte Applicant to allege that there was no dispute or that the Lands Registrar ought to have used his fence as boundary and not the RIM. He stated that the surveyor was right to use the RIM to get boundaries of both parcels of land and the practice instruction is irrelevant given the facts herein.
20. The 2<sup>nd</sup> Respondent stated that it is instructive to note that from 2015-2020, the Ex Parte Applicant has never written any letter to complain that there is no boundary dispute nor did he object to summons issued compelling his attendance on 19<sup>th</sup> November 2020 and at no point did he collude with the 1<sup>st</sup> Respondent to trample on the Ex Parte Applicant rights nor was there any discretion by the Lands Registrar that they should not do any activity on their land until the Applicant brought his own surveyor to counter check what was done. That in any event the Lands Registrar does not have power and therefore could not have raised such illegal directives.
21. It is stated that the [Land Registration Act](#) 2012 specifically section 18-20 empowers the Lands Registrar to resolve all boundary disputes and the work done by the 1<sup>st</sup> Respondent was squarely within all the four sections. That id the Applicant is dissatisfied with the finding then he ought to have filed a civil suit to claim the 2 acres he claims to be his but which in reality are not his as survey is a science and the boundaries are determined on the basis of sound survey method which cannot be faulted. That once the survey exercise was carried out and beacons placed, the said officers function ended and they became functus officio.
22. He stated that there is nothing in law which states that the Applicant ought to have been given the written decision of the Land Registrar and survey report before implementation as implementation is done physically on the ground, boundaries identified and beacons placed. That they did not deliberately collude to make a skewed boundary determination nor was the exercise carried out in a manner which is unlawful, unfair or arbitrary to deprive the Applicant of 2 acre of his land. That he was informed by his mother that after the boundary was identified and beacons placed again on the same night of 19<sup>th</sup> November 2020, the same were removed to his loss and detriment.
23. He also stated that the Land Registrar and Surveyor indicated that they had done their bit and washed their hands after this dispute and on 20<sup>th</sup> November 2020, the Ex Parte Applicant visited the suit parcel with his own private surveyor who took extensive measurement and arrived at the same conclusion.



That it is not only the Ex parte Applicant who has trespassed on his parcel of land but also parcel Kisumu/Fort Ternan/254 has trespassed both into his parcel and that of the Ex parte Applicant.

24. He stated that if the Ex parte Applicant follows through and gets back his land from the said neighbor who has trespassed and it's not right for the Ex parte Applicant to say that he is losing out 2 acres of land as he should invite the surveyor to carry out boundary survey with his other neighbors to see where the problem is. He stated that the Application is brought in bad faith and is an abuse of the process of court as most of the complaint made or orders sought do not fall under the ambit of Judicial Review.
25. That both parties had legitimate expectation that the boundary dispute will be resolved once and for all and it is not proper not to have closure on this issue. That the County Lands Registrar and Surveyor had visited the boundary and made same determination on two occasions and therefore the Applicant is guilty of laches and has brought the suit in bad faith.

### **Ex Parte Applicant's Supplementary Affidavit**

26. The Ex Parte Applicant filed a Supplementary Affidavit pursuant to leave granted by this court on 18<sup>th</sup> May 2022 where he deposed and stated that there has never been any boundary dispute disclosed by the 1<sup>st</sup> Respondent to him and the first claim to a boundary dispute arose when he received a boundary dispute summons dated 5<sup>th</sup> August 2020 requiring his attendance on 19<sup>th</sup> August 2020 which is the subject of these proceedings.
27. He stated that upon perusal of the documents produced, there was a report at the request of the 2<sup>nd</sup> Respondent by his private surveyor without the involvement of the Ex Parte Applicant as a party to those proceedings because he was never made aware of any such survey exercise and the documents produced as JO (2)(b) appear to list down names of persons without any disclosure on the face of the list itself, identifying the purpose of the list, the circumstances under which the list was prepared, date of preparation or identity of any other persons listed thereon.
28. That pursuant to the order of this court issued on 18<sup>th</sup> May 2021 requiring the land registrar to provide him with the green card registers for plot number Kisumu /For Ternan /251 and Kisumu/ Fort Ternan /25, the said documents were only availed to him after he served the Land Registrar with the said order. He stated that from a perusal of the respective green card registers of the said parcels of land, it is clear that there is no entry of any record of any boundary dispute that has ever been recorded between the two parcels of land to have been resolved as from 13<sup>th</sup> June 1980 when the registers of the two parcels were opened to date and this status of the register is consistent with his position that indeed there has never been any boundary dispute involving the two parcels of land.
29. The Ex Parte Applicant further stated that the 1<sup>st</sup> Respondent has produced the Land Registrar's report, survey report and sketch drawings of the surveyor which according to him he obtained from the Land Registrar upon his inquiry which appears to be intriguing because on his part he was given access to any of the documents until he served the order despite the fact that he had specifically requested for the same documents from the Land Registrar. He also stated that he noted according to his private surveyor and that of the government surveyors who undertook the survey exercise on 19<sup>th</sup> August 2020, the actual physical survey by those surveyors suggest that according to the map, those boundary features should be moved 10 meters inside his land and if it was to be allowed it would mean that all the boundaries involving all other adjacent parcels of land in that location would have to be altered and moved respectively by those 10 meters proposed by the surveyors into each subsequent adjacent parcel of land.
30. He stated that the problem disclosed by the 1<sup>st</sup> Respondent as explained in the preceding paragraph would not constitute boundary dispute because it is in effect an attempt to alter the existing known



and undisputed boundaries of all the instant two parcels of land and all other adjacent parcels of land which have existed since 1980 when respective registers were opened.

### **EX Parte Applicant's Submissions**

31. The Ex Parte Applicant herein filed his submissions on 18<sup>th</sup> August 2021 where he raised the following issues for determination:
  - a) Whether the ex parte Applicant has satisfied the requisite test before an order of mandamus can issue.
  - b) Whether the ex parte Applicant has demonstrated why an order of certiorari should issue quashing the proceedings and decision of the 1<sup>st</sup> Respondent's purported boundary dispute resolution undertaken on 19<sup>th</sup> August 2020.
  - c) Whether an order of prohibition should also issue to the Respondents or any of their agents or any person acting under them pursuant to the decision complained of and already acted on or in any way implemented the said decision.
  - d) Whether the Applicant was given an opportunity to be heard.
32. On the issue of whether an order of Mandamus should issue, the Ex parte Applicant stated that an order of mandamus will issue to compel a person or body of persons who have failed to perform the duty to the detriment of a person who has a legal right to expect the duty to be performed. It is a judicial command requiring the performance of a specified duty which has not been performed. He relied in the case of *Republic vs Nairobi City County & Another Ex parte Tom Ojienda & Associates (2019) eKLR.*
33. He submitted that the alleged that boundary determination by the 1<sup>st</sup> Respondent does not lie in law at all and the 1<sup>st</sup> Respondent was in violation of the *Land Registration Act 2012*, Land Registration Regulations, the Fair Administrative Act 2015 and the *Access to Information Act.*
34. That the 1<sup>st</sup> Respondent being a public officer was bound to follow procedure in executing the functions of his office including adhering to the provisions of the Administrative Action Act which he failed to do so. He stated that he was not given an opportunity to be heard and make any representations nether was he given any written reasons why the administrative action that fundamentally affected his plot Kisumu/Fort Ternan/252 and altering his boundary. That the 1<sup>st</sup> Respondent refused to release documents in his custody that is the report of the surveyors, the green card, the minutes of the person in attendance at the purported boundary dispute resolution on 19<sup>th</sup> August 2020.
35. He stated that he wrote a letter requesting for a certified copy of the green card which request was denied until the court issued an order for the same on 18<sup>th</sup> May 2021. It was the Ex parte Applicant's submission that the 1<sup>st</sup> Respondent violated the Applicant's rights to fair administrative action and his right to access information.
36. He further submitted that there was no boundary dispute as the suit properties had a boundary that was well established and had existed since 1980. That the 2<sup>nd</sup> Respondent knew of this boundary and even reinforced it upon buying his parcel in 2014. He stated that he acquired his parcel on 2001 and found an existing boundary which was marked by trenches.
37. The Ex parte Applicant relied in the case of Judicial Review Misc. No. 18 of 2016 *Rebema Said (Suing as the Personal Representative of the Estate of the late Said Abdalla (deceased) vs Ann Amina Hussein & District Land Registrar Kajiado North District* where the Learned Judge stated that "An essential



element of fair administrative action is the right to be heard. Under section 87 of the Act a wider ambit is provided requiring the Registrar to give an individual an opportunity to state his or her case in respect of matters expressly stated in the *Land Registration Act* before taking a decision.”

38. The ex parte Applicant therefore submitted that the Application be allowed with costs to the Applicant.

## **2<sup>nd</sup> Respondent’s Submissions**

39. The 2<sup>nd</sup> Respondent filed his submissions on 11<sup>th</sup> February 2022 where he adopted the issues raised by the Ex parte Applicant where on the 1<sup>st</sup> issue, he submitted that prayer 1 and 3 of the Notice of Motion Application dated 11<sup>th</sup> December 2020 have been overtaken by events and cannot be granted by this court and he relied in the case of *Republic vs County Secretary Nairobi City County & Another Ex Parte Applicant Tom Ojienda & Associates (2019) e KLR*.
40. On the 2<sup>nd</sup> issue, he stated that as a general rule the order of certiorari will issue if the decision is made without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with or for such like reasons. He relied in the case of *Council of Civil Service Unions vs Minister for the Civil Service (1984) All ER 935*.
41. He stated that the evidence before court by the ex parte Applicant does not show that the 1<sup>st</sup> Respondent acted without jurisdiction or in excess thereof nor did he fail to observe rules of natural justice. That the letter dated 7<sup>th</sup> June 2018 from the 1<sup>st</sup> Respondent officer indicate that the beacons for the parcels of land were restored by the District Surveyor Nyando on 8<sup>th</sup> December 2015 and a report submitted to him to that effect and the evidence tendered shows that the 1<sup>st</sup> Respondent acted within his mandate.
42. That it is clear that both parties were heard on 8<sup>th</sup> December 2015 when the ex parte Applicant was represented by his father while the 2<sup>nd</sup> Respondent was represented by his mother and on 19<sup>th</sup> November 2020 when the exercise was once again conducted by the 1<sup>st</sup> Respondent. He further submitted that rules of natural justice were not breached and that the Ex parte Applicant complained that he was not allowed to question witnesses and his other witnesses were not heard and this fact remained unproven. Reliance was placed in the case of *University of Ceylon vs Fernando (4), 1960 1 ALL ER 631*.
43. On the third issue, the 2<sup>nd</sup> Respondent submitted that the exercise to determine the boundary has already been carried out and a determination made by placing beacons on the boundary and therefore it would not be efficacious to issue such an order. He relied in the case of *Kenya National Examination Council vs Republic Ex parte Geoffrey Gathenji Njoroge & Another* Civil Appeal No. 266 of 1996(CAK) 1997 eKLR.
44. On the fourth issue, the 2<sup>nd</sup> Respondent stated that as regards the issue of the right to be heard, the Ex parte Applicant was heard and/or his representative was heard before the boundaries were demarcated.
45. The 2<sup>nd</sup> Respondent prayed that the Application be dismissed with costs.

## **Analysis and Determination**

46. This court has looked into the pleadings, the evidence on record and the submissions filed by the parties and is of the view that the following issues need to be determined:
- a) Whether the ex parte Applicant has satisfied the requisite test before an order of mandamus can issue.



b) Whether the ex parte Applicant has demonstrated why an order of certiorari should issue quashing the proceedings and decision of the 1<sup>st</sup> Respondent's purported boundary dispute resolution undertaken on 19<sup>th</sup> August 2020.

c) Whether an order of prohibition should also issue to the Respondents or any of their agents or any person acting under them pursuant to the decision complained of and already acted on or in any way implemented the said decision.

d) Whether the Applicant was given an opportunity to be heard.

**Whether the ex parte Applicant has satisfied the requisite test before an order of mandamus can issue.**

47. The Ex parte Applicant in prayer 1 of his Notice of Motion sought for an order of mandamus compelling the 1<sup>st</sup> Respondent to produce before this court, his report and that of the surveyors, who accompanied him by which he purported to determine the alleged boundary dispute resolution undertaken on 19<sup>th</sup> August 2020 between the suit properties and the minutes of the persons in attendance and the handwritten statements of the Applicant and the 2<sup>nd</sup> Respondent's representative which he recorded at the site visit and a certified copy of the green card of the parcel of land know as Kisumu/Fort Ternan/252.

48. That the Ex parte Applicant in prayer 3 sought for an order of mandamus compelling the Respondents, their agents or any such person acting pursuant to that decision to restore the status quo as it was before that decision was acted upon by removing all the beacons and any other structures, they may have planted on the Applicant's parcel of land known as Kisumu/Fort Ternan/251 in purported determination and or implementation of the alleged dispute resolution undertaken on 19<sup>th</sup> August 2020.

49. *Kenya National Examinations Council ...Vs... Republic Ex parte Geoffrey Gathenji Njoroge* Civil Appeal No. 266 of 1996, the court stated that;

... 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. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application 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... These principles mean that an order of mandamus compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the



law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”\*

50. The 2<sup>nd</sup> Respondent in his Submissions stated that prayer 1 and 3 of the Notice of Motion have been overtaken by events as the minutes of the site visit of 19<sup>th</sup> August 2020 together with the survey report of the District Surveyors and all relevant workings have been placed before this court. This court has looked into annexures JO (V) and (D) of the 2<sup>nd</sup> Respondent’s Replying Affidavit and do confirm that the same have been furnished to the court and the Ex parte Applicant as well and therefore I agree with the 2<sup>nd</sup> Respondent that prayer 1 and 3 have been overtaken by events.

**Whether the ex parte Applicant has demonstrated why an order of certiorari should issue quashing the proceedings and decision of the 1<sup>st</sup> Respondent’s purported boundary dispute resolution undertaken on 19<sup>th</sup> August 2020.**

51. In the case of *Biren Amritlal Shah & Another –vs- Republic & 3 others* (2013) eKLR the Court of Appeal reiterated the position that Judicial Review is not concerned with the merits of the decision but rather the fairness of the process in reaching the decision. The court held that:

Judicial Review is not concerned with reviewing the merit or otherwise of a decision by a public entity, in respect of which the application for review is made, but the decision, making process itself. It is important to note in every case, that the purpose of Judicial Review is to determine whether the application was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question”.

Section 18 of the *Land Registrar Act* No. 3 of 2012 provides as follows: -

18. (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary;

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the *Survey Act*.

52. Further Section 19 of the same Act provides as follows: -

19. (1) If the Registrar considers it desirable to indicate on a field 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.

Section 87 further provides:

Meaning of ‘opportunity of being heard’.

- (1) If this Act requires that a person be given an opportunity to be heard before a particular thing is to be, or may be done, that person shall be deemed to have been given such an opportunity—
  - (a) if the person attends before the Registrar personally or by an advocate or other agent, and is given such an opportunity; or
  - (b) if the person intimates, personally or by an advocate or other agent, that the person does not wish to be heard; or
  - (c) if the person has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which, if the person attends before the Registrar, the person may be heard.
- (2) If a person or an advocate or other agent on the person’s behalf attends before the Registrar concerning a matter on which the person is entitled to be heard, or fails to attend pursuant to such a notice, the Registrar may, adjourn the hearing from time to time, and, notwithstanding failure to attend, may, hear that person at any time.

53. The *Land Registration (General) Regulations*, 2017 provides as follows:

40. (1) An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form LRA 23 set out in the Sixth Schedule.
- (2) The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph (1).
- (3) The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
- (4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
- (5) The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
- (6) Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.



- (7) Upon expiry of thirty days, the Registrar shall-
- (a) cause to be defined by survey the precise position of the boundaries in question;
  - (b) file a plan approved by the authority responsible for survey of land containing the necessary particulars; and
  - (c) make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.
- (8) A dispute for determination of a boundary and or parcel shall, ' unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.
54. It is the Ex parte Applicant's case that on 19<sup>th</sup> August 2020 while the surveyors were undertaking their work, the Land Registrar remained with them and engaged him and his mother to give their own account of the status of the boundary between the two parcels of land which he recorded in his own handwriting and he sought to cross examine the 2<sup>nd</sup> Respondent representative or call any other witness to write their statements but the Land Registrar declined and indicated that there was no dispute between the parties hence no need to ask questions or call any other witnesses and directed that the surveyors work would be enough to determine the matter.
55. The Ex Parte Applicant alleged that the Surveyors undertook their work without anyone's input and after an hour they called the parties to show them where the boundary and the map should be and where they had placed the beacons running in a parallel line about 10 meters inside his side of the plot. The Ex parte Applicant further stated that he protested and pointed out that the process was unfair as they had been excluded from participating.
56. The 2<sup>nd</sup> Respondent on the other hand in his Replying Affidavit stated that the Land Registrar and the Surveyors carried out their work in a professional manner after hearing both parties, that the Ex parte Applicant was clearly shown where the boundary of the two parcels of land are and the beacons in his presence and at no time did the ex parte Applicant sought to cross examine the 2<sup>nd</sup> Respondent's representative nor did he request to call other witnesses to write statements on his behalf.
57. This court has carefully looked at the Surveyors report and from the findings of that report, the District Surveyor found out that there was an encroachment on parcel number Kisumu/For Ternan/251 and Kisumu/Fort Ternan/252 by land parcel Kisumu/Fort Ternan/254. Based on the above provisions of the law, it is this court's finding that the boundary dispute was determined as per the requirements of the law as parties were present and or represented by their agents/representatives, all parties herein were given an opportunity to be heard based on the minutes dated 24<sup>th</sup> November 2020.

**Whether an order of prohibition should also issue to the Respondents or any of their agents or any person acting under them pursuant to the decision complained of and already acted on or in any way implemented the said decision.**

58. The Ex parte Applicant sought for an order of Judicial Review by way of prohibition restraining the 1<sup>st</sup> Respondent from purporting to hear, review and determine the purported boundary dispute between the suit properties without strict compliance with the relevant provisions of all the applicable laws and principles relating to such an exercise.



59. In the case of Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 other [1997] eKLR, the Court stated the grounds upon which such an order may issue as follows;

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, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.

60. Pursuant to section 19 of the *Land Registration Act* 2012, the Registrar issued a notice to the parties after the 2<sup>nd</sup> Respondent herein made an Application to the Registrar to have the boundary between the suit parcels to be ascertained. The Registrar issued the notice in form of summons requiring parties to appear before him. Regulation 40 (6) of the Land Registration (General) Regulations, 2017 requires that if a party is aggrieved by the decision of the Registrar to appeal the decision to the court. The Ex parte Applicant herein did not appeal the decision of the Registrar however, he opted to file this Judicial Review Application seeking to challenge the process of determination of the boundary dispute.
61. This court is of the considered view that based on the Surveyor's report, it was clearly established that the suit properties have been encroached by land parcel number Kisumu/Fort Ternan/254. The parties herein ought to have taken necessary steps and invite the registered owner of land parcel number Kisumu/Fort Ternan/ 254 so that they can ascertain the extent of the encroachment and have the boundary fixed.

#### **Whether the Applicant was given an opportunity to be heard.**

62. Section 4(3) and (4) of the *Fair Administrative Action Act*, 2015 lays down the procedure to be adopted by decision makers as follows in this regard:
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
- (a) attend proceedings, in person or in the company of an expert of his choice;
  - (b) be heard;



- (c) cross-examine persons who give adverse evidence against him; and
- (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

63. The Ex parte herein alleged that he was not accorded a fair hearing yet as per the above provisions of the law the Respondents took the necessary steps as required and the *Land Registration Act 2012* to have the boundary dispute determined. The Ex parte Applicant was issued with a notice by the Land Registrar with reasons why there was need to have the boundary between the two suit properties fixed.
64. Although the Ex parte Applicant outlined in paragraph (vii) of the Notice of Motion Application that the process was biased, unfair, ultra vires and irrational, this court is of the considered view that the Land Registrar took the necessary steps required in determining the dispute as each party was given an opportunity to be heard, the principles of boundary disputes were followed and the report from the surveyor was available to all parties. This court finds that the procedure used by the Land Registrar in arriving at the decision was fair and reasonable and he acted within his powers in determining the dispute. In the upshot, this Judicial Review Application is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 13<sup>TH</sup> DAY OF MAY, 2022.**

**ANTONY OMBWAYO**

**JUDGE**

This JUDGMENT has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

