



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO.419 OF 2009**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY ALICE MUKULU KYAA (as the legal administrator ad litem of the estate of the late BENJAMIN KYAA KIOKO) FOR AN ORDER OF MANDAMUS**

**AND**

**IN THE MATTER OF THE LAND ADJUDICATION ACT CAP 284**

**AND**

**IN THE MATTER OF THE IMPLEMENTATION OF THE JUDGMENT/FINDING AND/OR DECISION OF THE MINISTER FOR LANDS AND SETTLEMENT IN LAND APPEAL NO.100 OF 2008**

**REPUBLIC  
VERSUS**

**THE DISTRICT SURVEYOR**

**MAKUENI**

**DISTRICT ..... 1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**LINUS KILONZO NDIVO ..... INTERESTE PARTY**

**EX-PARTE**

**ALICE MUKULU KYAA (suing as the legal administrator of the estate of the late **BENJAMIN KYAA KIOKO**)**

**RULING**

This is a Judicial Review application. In the application **Alice Mukulu Kyaa**, hereinafter “**the applicant**” seeks for an order of Mandamus to issue to compel;

***“the District Surveyor, Makueni District to implement in strict interpretation the Minister’s decision made on 28th January, 2009 by the District Commissioner Makueni District in Land appeal No.100 of 2008 (Benjamin K. Kioko Vs. Linus K. Ndivo in respect of plot number 254 KIVANI ADJUDICATION SECTION”.***

The applicant also prays that the costs of the application be provided for.

The application is informed by the following uncontested facts; the applicant is the administrator of the estate of her husband, **Benjamin Kyaa Kioko**, deceased. On 30<sup>th</sup> May, 1972, the District Magistrate’s Court at Kilungu fixed the boundary between plot number 254 hereinafter “**the suit premises**” belonging to the interested party and 259 belonging to the deceased in Kivani Adjudication section. The decision was that since there were about 15 paces between two trees which each party claimed as boundary between the two parcels of land, the same should be shared equally with each party surrendering 7½ paces. Subsequent thereto, **Linus Ndivo “the interested party”** mounted objection case number 439 against the deceased at Kivani Adjudication Section which was allowed. On 6<sup>th</sup> May, 1991, the deceased mounted an appeal to the Minister for Lands and Settlement in case number 100 of 2008 against the decision in the objection proceedings. On 28<sup>th</sup> January, 2009 the District Commissioner on behalf of the Minister of Lands and settlement delivered his judgment in the appeal and ruled that the boundary earlier marked by Kilungu District Magistrate’s court be reinstated. In May, 2009 the applicant requested the District Surveyor, Makueni District one, **Mr. Peter M. Ndonye** to implement the Minister’s decision. On 18<sup>th</sup> June, 2009, the District Surveyor purported to implement the Minister’s decision, but did not do so in strict compliance with the said decision but ensured that a portion of the applicant’s plot number 259 was wrongfully shifted to the suit premises and in favour of the interested party. Notwithstanding her further request to the District Surveyor to implement the said decision in accordance with the manner the District Magistrate’s Court at Kilungu had marked the boundary, he had refused and or neglected to do so. Since then the interested party had without any justifiable cause interfered with the said portion of the plot swallowed by the suit premises. The applicant in the premises stood to suffer irreparably. It is her conviction that the District Surveyor and interested party are colluding to take away a portion of her land.

On the basis of the foregoing, the applicant sought and obtained leave from **Waweru J.** on 11<sup>th</sup> May, 2010 to commence this judicial review proceedings in the nature of mandamus. Pursuant to the leave so granted, the applicant mounted the substantive notice of motion on 31<sup>st</sup> May, 2010.

The motion was duly served on the respondents and the interested party. The first to respond was the interested party. In a replying affidavit dated 7<sup>th</sup> November, 2011, he deponed where pertinent that the applicant had deliberately misled all the courts and tribunals involved in this dispute. The Minister relied on the applicant’s evidence who wrongly and deliberately misled the tribunal that the boundary of the parcels of land in dispute had been determined by Kilungu Law Courts in 1972. In that case the deceased was not a party but a witness. That case involved a dispute between the interested party and one, **David Sudi** regarding the boundary on the other side of the suit premises. As a matter of fact the boundary between the interested party’s suit premises and applicant’s land parcel No.259 had always been straight. If anything it is the applicant who had been encroaching on the interested party’s suit premises at the point of water source. At one point, the interested party reported a case of malicious damage to property against the applicant and her sons at Makuyu Police Station. The police visited the site, invited Agricultural Officers to carry out damage assessment. The applicant and her sons were subsequently arrested, admitted the offence, compensated him and adhered to the boundary. Otherwise, it is the misleading information regarding the Kilungu Law Court’s decision that the applicant wants to capitalize on for her benefit.

The Respondents did not see the need to counter the applicant’s and or interested party’s allegations. In other words they did not file any papers in opposition to or in support of the application.

When the application came up for inter partes hearing before me on 8<sup>th</sup> November, 2011, **Mr. Kimeu** and **Mr. Ngala**, learned counsel for the applicant and interested party respectively, agreed to canvass the application by way of written submissions. Subsequently they filed and exchanged written

submissions which I have carefully read and considered alongside cited authorities.

My take on the application is as follows. It is common ground that on 30<sup>th</sup> May, 1972, the District Magistrate's court at Kilungu marked and fixed boundaries between the suit premises and plot number 259 belonging to the deceased despite the interested party's submissions to the contrary. The boundary was fixed to the effect that since there was about 15 paces between two trees which each party claimed as a boundary, it subdivided the portion equally giving each party 7.5 paces and placed or fixed the boundary accordingly. It is also common ground that the said decision was never the subject of any appeal. Nor has the ensuing decree been set aside, varied or vacated. So that to date the said judgment and decree still stands. It is also common ground that following objection proceedings under the Land Adjudication Act, the Minister for Lands on 28<sup>th</sup> January determined that the boundary be as the District Magistrate's court had ruled. Again there is no evidence that the decision of the Minister aforesaid has been varied quashed and or set aside. Therefore the same once again still stands. It is instructive that under the Land Adjudication Act, vide section 29, such decision is final. That being the case, this court is bound to honour and act on the decision as long as it has not been set aside.

The allegations by the interested party that the applicant misled the tribunal into believing that Kilungu District Magistrate's court had determined the boundary in issue while the truth of the matter is that the case touched on a different boundary between **Daudi Sudi** and the interested party, are coming too late in the day. Such allegation and or evidence should have formed the basis of an application to quash the decision of the tribunal and or minister. In the premises those allegations are irrelevant for purposes of this application. What matters in applications of these nature, is whether there is a valid order capable of enforcement and whether such order has been enforced by those charged with such responsibility. Of course mandamus applies to public bodies and cannot issue where discretion is involved. Mandamus may be claimed in an action where there is a breach of duty. The person seeking mandamus must show that there resides in him a legal right to performance of a legal duty by a party against whom the mandamus is sought or alternatively that he has a substantial personal interest and the duty is not permissive but imperative and must be of public rather than private nature. As a general rule, a distinct demand for action and, an unequivocal outright refusal is a prerequisite for the grant of an order of mandamus.

In this case there is no doubt that the District Surveyor is being asked in his official capacity to enforce a decision. The complaint by the applicant is that though the District Surveyor attempted to enforce the order, the purported enforcement was contrary to the terms of the order and decision.

According to the judgment of Kilungu District Magistrate's Court,

***"...There are about 15 paces between these two trees and because there is no sufficient evidence to prove either party boundary, there is no other alternative other than to this portion of 15 paces to both parties giving 7½ paces."***

As for the minister, he concluded;

***"This dispute should have ended long time ago when Kilungu court in case No.L.38 of 1972 (copy attached) ruled and marked boundaries, but the respondent in this case has been interfering with the boundary just as the appellant has claimed. This appeal is allowed the boundary earlier marked by Kilungu court to be reinstated..."***

From all the foregoing all that the District Surveyor is required to do is to reinstate the boundary as earlier marked by Kilungu District Magistrate's Court. This is not a difficult order to comply with. In fact there is even a certified true copy of the original settled boundary in the statutory statement of the applicant. That is what the District Surveyor should do.

If indeed it is the case of the interested party that the District Surveyor implemented the decision of the minister and nothing remains to be implemented, one would have expected the surveyor to say so and not the interested party. Again if indeed the order and or decree had nothing to do with land parcel 259

and or the suit premises, why then was it necessary for the surveyor to come on board. What the applicant is saying is that the implementation was contrary to the decision of Kilungu District Magistrate's Court and was skewed in favour of the interested party. To that extent, it cannot be said that the implementation of the decision was done as required.

In the premises, I would allow the application and direct the District Survey Makueni to fix the boundary between the two parcels of land in accordance with the decision of Kilungu District Magistrate's court dated 30<sup>th</sup> May, 1972. In other words, the boundary should run through the middle of two trees. Guidance may be sought from annexure 2 of the verifying affidavit sworn by the applicant. The District Surveyor must do so within the next 45 days from the date of the ruling. I make no order as to the costs of these proceedings.

**Ruling dated, signed and delivered at Machakos, this 15<sup>th</sup> day of February, 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**