



**Kinya v Gathara & another (Environment and Land Judicial Review Miscellaneous Application E001 of 2022) [2022] KEELC 15602 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 15602 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND JUDICIAL REVIEW  
MISCELLANEOUS APPLICATION E001 OF 2022**

**AK BOR, J**

**JUNE 30, 2022**

**BETWEEN**

**CATHERINE KINYA ..... APPLICANT**

**AND**

**SAMUEL GATHARA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RUMURUTI LAND REGISTRY ..... 2<sup>ND</sup> RESPONDENT**

***(IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS AND IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, AND IN THE MATTER OF THE ENVIRONMENT AND LAND ACT AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT AND IN THE MATTER OF THE LAND REGISTRATION ACT AND IN THE MATTER OF ORDER 53 RULE 1 OF THE CIVIL PROCEDURE RULES)***

**RULING**

1. The ex parte Applicant ('the Applicant') brought the application dated April 4, 2022 seeking leave to apply for an order of certiorari to quash the decision and the report of the 2<sup>nd</sup> Respondent on the boundary dispute between the Applicant and the 1<sup>st</sup> Respondent on land reference numbers (LR No) Laikipia/Mbuyu/513 and 577 with 576. Additionally, the Applicant sought leave to apply for an order of mandamus to compel the 2<sup>nd</sup> Respondent to repeat the whole process undertaken to resolve the land boundary dispute in compliance with the law. The Applicant sought to have the leave granted operate as a stay of the 2<sup>nd</sup> Respondent's decision.
2. Catherine Kinya swore the affidavit in support of the application. She averred that the 2<sup>nd</sup> Respondent issued a report pursuant to Section 19 (2) of the *Land Registration Act* regarding the boundary dispute between the Applicant and the 1<sup>st</sup> Respondent in respect of LR No Laikipia/Mbuyu/513 and



Laikipia/Mbuyu 576. She attached a copy of that report which shows that the exercise was conducted on January 26, 2022. Ms Kinya averred that on December 1, 2021 she availed herself at the site but the Respondents failed to turn up. She later learnt that the 2<sup>nd</sup> Respondent visited the site in the company of the District Surveyor and the 1<sup>st</sup> Respondent and proceeded to conduct the exercise without giving her an opportunity to ventilate her case. She added that the 1<sup>st</sup> Respondent had encroached on her land on the strength of the impugned decision. Further, that she commenced subdivision of her land and had started selling the resultant plots and the Respondent's decision is likely to scare away potential buyers. She averred that she had a legitimate expectation that once the mutation forms for her land were registered and approved by the District Surveyor, the possession of her property would not be interfered with.

3. The 1<sup>st</sup> Respondent instructed an advocate who filed a notice of appointment of advocate together with a notice of preliminary objection. The objection taken is that this court lacks jurisdiction to entertain the matter and that the 1<sup>st</sup> Respondent was wrongly joined to the suit. The 2<sup>nd</sup> Respondent did not file any documents.
4. The court directed parties to file written submissions. The Applicant submitted that for leave to be granted, she had to demonstrate that she has an arguable case and that the actions by the 2<sup>nd</sup> Respondent are subject to judicial review. On the issue of whether she has an arguable case, she submitted that a ground of challenge is arguable if it is capable of being the subject of sensible arguments in court in the sense of having a realistic prospect of success (see the decision in [Sharma v Brown Antoine \(2007\) 1 WLR \(780\)](#)). She submitted that had she been afforded an opportunity to be heard she would have presented the mutation forms for Laikipia Mbuyu/577 to demonstrate that before land was subdivided, the beacons were fixed and the mutation was approved by the District Surveyor. She added that the rules of national justice dictate that no one should be condemned unheard and that she has an arguable case with high chances of success.
5. On the issue of whether the 2<sup>nd</sup> Respondent's actions are subject to judicial review she submitted that Section 19 (2) of the [Land Registration Act](#) which empowers the Land Registrar to fix certain boundaries requires that a registered proprietor be given an opportunity to be heard. Further, that being a statutory body or office, the 2<sup>nd</sup> Respondent's powers are donated by statute and orders of mandamus can issue against it.
6. The 1<sup>st</sup> Respondent filed submissions in support of his preliminary objection. He submitted that this court lacks jurisdiction to hear and determine this matter and relied on Section 9 (2) of the [Fair Administrative Actions Act](#) which stipulates that the court should not review administrative action or decisions under the Act unless the mechanisms for review or appeal and remedies available under any written law have been exhausted. He submitted that there has been no appeal or application for review before pursuing the remedies under judicial review. The 1<sup>st</sup> Respondent referred to Section 3 (1) of the Fair Administrative Actions Act and argued that he does not fall under the office referred to under that section. He urged that his name should be struck out from the proceedings and he be awarded costs.
7. In response to the submissions on the preliminary objection, the Applicant submitted that Section 9 (2) of the Fair Administrative Act does not provide for any internal mechanisms under the relevant statute which is the [Land Registration Act](#). She submitted that the 1<sup>st</sup> Respondent failed to point out the relevant channels for internal appeal or review which he contends the Applicant should have exhausted before moving this court. She maintained that the only remedy available was to appeal against the decision of the registrar to the court or to apply for judicial review as she did in this case. On the addition of the 1<sup>st</sup> Respondent as a party, she submitted that the 1<sup>st</sup> Respondent was the beneficiary of the impugned decision because he encroached on the Applicants land on the strength of the 2<sup>nd</sup>



- Respondent's decision and that he would continue to enjoy the benefit of that decision unless the court grants an order of stay.
8. The issue for determination is whether this court should grant leave to the Applicant to commence proceedings for judicial review for orders of certiorari and mandamus to issue against the Respondents. The court notes from the documents which the Applicant exhibited that there was a boundary dispute regarding parcel numbers Laikipia Mbuyu/513, 576 and 577 and that the Land Registrar went to visit the land in dispute. According to the letter dated October 15, 2021 from the Rumuruti Land Registry which was addressed to Nahashon Mwaura Njenga and the Applicant, the exercise to ascertain the boundaries for the land in dispute was to be undertaken on December 1, 2021 at 11.00 am. The District Surveyor's report dated March 3, 2022 does not indicate when the site visit was done but only states that the site was visited and the boundary demarcated in the presence of witnesses without stating the names of the witnesses who were present.
  9. Section 19 of the *Land Registration Act* enjoins the Land Registrar to give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries. The Registrar is required to give all the persons appearing in the register an opportunity to be heard before causing the boundaries to be defined by survey. The Applicant contends that she was not afforded an opportunity to be heard yet her land adjoins the boundaries in question. The Applicant ought to have been heard before the decision on the matter was arrived at. This is what the Applicant will have to prove during the hearing of the substantive application.
  10. The 1<sup>st</sup> Respondent contended that the Applicant had failed to exhaust other remedies and internal mechanisms before moving this court without stating what those other remedies and mechanisms are. Section 19 of the *Land Registration Act* does not mention other remedies. The 1<sup>st</sup> Respondent is a necessary party to these proceedings because he will be affected by the decision the court will make in these proceedings.
  11. The Applicant is granted leave to apply for orders of certiorari to quash the decision of the 2<sup>nd</sup> Respondent contained in the report on the boundary dispute between the Applicant and the 1<sup>st</sup> Respondent relating to land reference numbers Laikipia Mbuyu/ 513, 577 and 576; and an order of mandamus to compel the 2<sup>nd</sup> Respondent to repeat the whole process to resolve the boundary dispute.
  12. The leave granted will operate as a stay of the 2<sup>nd</sup> Respondent's decision.

Costs shall be in the cause.

Delivered virtually at Nanyuki this June 30, 2022.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Moses Ndira for the Applicant

Ms. Keren Mwangi for the 1<sup>st</sup> Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the 2<sup>nd</sup> Respondent

