



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Judicial Review 159 of 2011

REPUBLIC.....APPLICA
NT

VERSUS

THE DISTRICT LAND REGISTRAR, KIAMBU.....1ST
RESPONDENT

THE DISTRICT SURVEYOR, KIAMBU.....2ND
RESPONDENT

THE ATTORNEY GEN.....3RD
RESPONDENT

EX-PARTE

S. KAMIRI MACHEHU

AND

THE TOWN CLERK, KARURI TOWN COUNCIL.....INTERESTED
PARTY

JUDGEMENT

The ex-parte applicant S. Kamiri Machehu was granted leave on 8th July, 2011 to commence judicial review proceedings. He complied with the conditions of the leave by filing a notice of motion on 26th July, 2011 in which the substantive prayer is for an order:-

“THAT this Honourable court be pleased to issue an order of PROHIBITION directed at the Respondents herein either by themselves, agents, employees, servants or any other person acting for and on their behalf restraining them from proceeding with the intended destructions, cutting down standing trees and crops growing thereon, the subsisting boundary fence, from encroaching and/or interfering and/or doing any other adverse acts or dealings respecting all those parcels of land known as KIAMBAA/KIAMBAA/T.100 and KIAMBAA/WAGUTHU/299 pending the hearing and determination of the matter herein or until further orders of this Honourable court.”

The ex-parte applicant also prays for the costs of the application. The District Land Registrar, Kiambu;

the District Surveyor, Kiambu and the Attorney General are named as the 1st to 3rd respondents respectively. The Town Clerk, Karuri Town Council is an interested party.

Briefly stated, the ex-parte applicant is the registered owner of the land parcels known as Kiambaa/Kiambaa/T.100 and Kiambaa/Waguthu/299. The interested party who is mandated to maintain roads within the jurisdiction of Karuri Town Council decided to rehabilitate a feeder road adjacent to the ex-parte applicant's parcels of land. In the process the interested party discovered that the ex-parte applicant had encroached on the feeder road. The ex-parte applicant insisted that he had not moved his boundary. As a result of the boundary dispute the ex-parte applicant called upon the 1st respondent to establish the boundary. Through a letter dated 6th April, 2011 the 1st respondent summoned the interested party and the ex-parte applicant to attend a hearing with their witnesses at the disputed land. The hearing was set down for 23rd June, 2011 at 10.30 a.m. From the evidence on record it can be seen that the hearing date was brought forward. After the hearing it was discovered by the 2nd respondent that the ex-parte applicant had encroached on the feeder road by 2 metres. The ex-parte applicant was therefore directed to move his fence by 2 metres.

The ex-parte applicant was not satisfied with the decision of the 1st and 2nd respondents and that is why he has brought these proceedings. According to the supporting affidavit sworn by the ex-parte applicant on 6th July, 2011 and the statutory statement dated the same date, the ex-parte applicant's case is that the interested party wants to illegally and unlawfully expand the road to 6 metres from its original 3 metres. The ex-parte applicant faults the 1st respondent for bringing forward the hearing date for the boundary dispute from 23rd June, 2011 to 28th April, 2011. He claims that the communication of the change of date was done verbally and his efforts to convince the respondents to have the dispute heard on 23rd June, 2011 were brushed aside. The ex-parte applicant further complains that he did not have sufficient notice to enable him oversee the boundary dispute exercise.

The respondents opposed the application through the replying affidavit sworn on 8th November, 2011 by Victor A Machyo the Deputy District Surveyor, Kiambu. The respondents' case is that the hearing date was brought forward from 23rd June, 2011 to 28th April, 2011 due to the public interest in the dispute. The respondents aver that the ex-parte applicant and the interested party were orally notified of the change of the hearing date and the ex-parte applicant appeared with his witnesses and advocate on the hearing date. The respondents further say that after the survey was done it was discovered that the road which was supposed to be 6 metres wide had been reduced to 4 metres by the ex-parte applicant.

The interested party opposed the application through a replying affidavit sworn by the Town Clerk Mr. Patrick Wanyoike Mwaura. The interested party opposes the application on the grounds similar to those of the respondents. The respondents and interested party also oppose the application on the ground that the prayer for an order of judicial review is not appropriate in the circumstances of this case since what the ex-parte applicant seeks to prohibit has already been done.

It is important to start by reminding ourselves that judicial review is not about the merits of the decision but about the process through which the decision is reached. The ex-parte applicant has correctly challenged the process under which the 1st and 2nd respondents reached their decision. His application is therefore properly before this court.

In my view the issues for my decision are:-

- (a) Whether the respondents breached the rules of natural justice;
- (b) Whether the order of prohibition is available to the ex-parte applicant; and
- (c) Who should meet the costs of the application?

It is not disputed that the 1st and 2nd respondents having issued written notice that the boundary dispute

would be heard on 23rd June, 2011 later brought forward the hearing date to 28th April, 2011. This was done orally. It is not clear from the papers filed in court when the new date was communicated to the parties. The respondents informed the court that on 28th April, 2011 the ex-parte applicant attended the hearing with his witnesses and advocate. This fact was never challenged by the ex-parte applicant. It therefore becomes clear that the ex-parte applicant was given sufficient notice about the hearing date. He was also heard and his witnesses testified. In fact he was represented by an advocate. Looking at the papers filed in court, it cannot be said that he was denied a hearing. The rules of natural justice were therefore not breached.

The order of prohibition looks into the future and is meant to stop a public body from undertaking an exercise that may be unlawful and harmful to a citizen. It does not operate to stop what has taken place. Even if the ex-parte applicant had been treated unfairly by the respondents, then I do not think that an order of prohibition would lie in this case. The 1st and 2nd respondents carried out the survey and rectified the boundary. There is nothing remaining to be prohibited. In fact the ex-parte applicant's prayer for an order of prohibition is couched in a manner which suggests he is praying for a temporary injunction. That in itself takes the matter out of the judicial review province. The relief sought by the ex-parte applicant is therefore not appropriate in the circumstances of this case.

At the end of the day it is clear that the application before me lacks merit. The same is therefore dismissed with costs to the respondents and the interested party.

Dated and signed at Nairobi this 27th day of **September** , 2012

W. K. KORIR, J