



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

JR. ELC NO. 7 OF 2010

EZEKIEL KAMAU

WAINAINA.....APPLICANT

VERSUS

THE LAND REGISTRAR, THIKA

DISTRICT.....RESPONDENT

RULING

The ex-parte applicant Ezekiel Kamau Wainaina sought leave which was granted to apply for an order of Mandamus directed at the respondent, the Land Registrar, Thika District to cause survey, indicate, determine, and fix on the ground the position of the respective boundaries adjoining of the one hand land parcels No.s Loc. 16/Gatura/1301 and Loc. 16/Gatura/1383 and, on the other, land parcels Loc. 16/Gatura/1301 and Loc. 16/Gatura/1298. Upon filing the substantive Notice of Motion the Land Registrar was mandated to perform the statutory duty under Sections 21 and 22 of the Registered Land Act Cap 300 Laws of Kenya and serve the report upon the ex-parte applicant and interested parties and also file the same in court.

There is evidence in this record that indeed the Land Registrar performed the statutory duties and filed the report. In that report the Registrar confirmed, upon visiting the site, that there existed no boundary dispute between the parties but a land claim. The ex-parte applicant is said to have exercised his right of appeal to the Chief Land Registrar who concurred with the ruling of the respondent.

It is the respondent's case that the statutory duty only empowers the Land Registrar to hear parties, determine and indicate the position of an uncertain or disputed boundary. The respondent can only indicate or define the precise position of the boundaries of a parcel or parts thereof. Where one parcel of land is smaller than envisaged in Section 21 of the Registered Land Act aforesaid, and is claiming a portion or extension of the boundary onto another parcel as in the instant case, this becomes a land claim and beyond the jurisdiction of a Land Registrar. It is the respondent's case that having visited the parcels of land as provided under Sections 21 and 22 of the Act, and submitted the ruling which has been acknowledged by all the parties, the statutory duties were fulfilled. Any party who is dissatisfied with the ruling of the respondent and The Chief Land Registrar ought to have moved the court by way of a civil suit and therefore the procedure adopted by the ex-parte applicant is an abuse of the court process.

Learned counsel appearing for the parties herein have filed submissions and cited some authorities. These have been of assistance to the court. The report by the respondent was not conclusive and therefore did

not resolve the issues between the parties. Such a report cannot be executed by way of Judicial Review because it is obvious viva voce evidence would be required to determine the dispute. I would therefore agree, with respect, that the procedure adopted by the ex-parte applicant is misplaced because affidavit evidence cannot resolve the dispute.

In the case of **Jotham Mulati Welamodi versus The Chairman Electoral Commission of Kenya (2002) KLR** the court held, Mandamus is the appropriate remedy for compelling a person to perform the duty imposed by statute which duty he has refused to perform. It was also held that mandamus looks at the present situation and aims at enforcing a duty which has not been done and unlike certiorari mandamus does quash that which has been done. In the instant case, the respondent performed the statutory duty conferred by law. There is nothing that remained for the court to compel the respondent to perform. The District Land Registrar was emphatic that, as no evidence was adduced to show that the boundary has been shifted this dispute should not be treated as a boundary dispute, it is a land claim which is beyond the jurisdiction of that office.

An unsolicited advice was offered to the ex-parte applicant by the District Land Registrar to pursue his claim through the Land Dispute Tribunal or a court of law. With respect, I agree and find that the application before me is misconceived and therefore fails. The same is hereby dismissed with costs to the respondent and interested parties.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of May, 2011.

A. MBOGHOLI MSAGHA

JUDGE