



**Republic v District Land Registrar Vihiga & 3 others; Likholo
(Respondent) (Environment and Land Miscellaneous Application
26A of 2021) [2022] KEELC 3830 (KLR) (5 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 26A OF 2021
A OMBWAYO, J
AUGUST 5, 2022
(FORMERLY KISUMU HCC MISC. APPLICATION NO. 350 OF
2005)
IN THE MATTER OF AN APPLICATION TO APPLY FOR AN ORDER
OF CERTIORARI
AND
UNDER THE LAW REFORM ACT AND UNDER ORDER LIII OF THE
CIVIL PROCEDURE RULES
AND
IN THE MATTER OF REGISTERED LAND ACT CAP 300 SECTION
21 (2) AND IN THE MATTER OF THE BOUNDARY DISPUTE
AND IN THE MATTER OF AN APPLICATION BY EDWARD
LIKHOLO**

BETWEEN

REPUBLIC APPLICANT

AND

DISTRICT LAND REGISTRAR VIHIGA 1ST RESPONDENT

DISTRICT LAND SURVEYOR VIHIGA 2ND RESPONDENT

PETER MULWALWE 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND



JUDGMENT

1. This judicial review application was commenced by way of Chamber Summons Application dated December 6, 2005 where the Applicant herein sought for orders that this Honourable Court be pleased to grant leave to apply for an order of *Certiorari* directed at the Attorney General, the District Land Registrar, Vihiga and the District Land Surveyor, Vihiga to remove into this Honourable Court for the purpose of their being quashed the observations, findings and Ruling dated 26th July 2005 respecting to titles No. West/Bunyore/Embali/1068&929 and West/Bunyore/Ebusiekwe/536 & 537, that leave be granted to operate as stay of the said decision until determination of the Application and costs of this Application be provided for.
2. This court considered the Chamber Summons Application and granted leave to the Ex parte Applicant to file a substantive Application. The Ex parte Applicant filed a Notice of Motion Application dated February 7, 2006 seeking an order of *Certiorari* to remove the High Court for purpose of being its quashed the decision, observations findings and Rulings of the District Land Registrar Vihiga and District Land Surveyor purporting to interfere with the previous boundaries touching and/or falling between parcels No. West Bunyore/Embali/1068 & 929 -Versus- West Bunyore/Ebusiekwe/536 & 537.
3. The Application was based on grounds that the Respondents acted ultra vires the powers vested in the offices of the District Land Registrar and the District Land Surveyor as they failed to consider the best interest of the entire community and the Respondents' action to amend the boundaries and purport to place beacons is contrary to the tenets of natural justice since the interest of the community stable relationship was eroded falling short of their expectations and/or contribution. The Application was supported by the Affidavit of Edward Likhola who filed a Verifying Affidavit instead of a Supporting Affidavit.
4. The Ex parte Applicant herein who deposed and stated that he is the son of the late Justo Ngota who occupied a vast area covering the suit parcels and his father purchased land from one Festo Oyatsi Munialo Oyatsi, Paul Amukoye and Siku Amukoye in 1952. He stated that during Land Demarcation one of the Vendors namely Festo Oyatsi influenced the demarcation exercise and included his name with the Ex parte Applicant on parcel No. West/Bunyore/Ebusiekwe/536 after the death of his father in 1955 and that he realized this after the end of the demarcation period in 1965 and filed a boundary dispute and the then Land Registrar Kakamega came and erected a boundary to the positive acceptance of the entire community.
5. It was the Ex parte Applicant's case that the 3rd Respondent herein lodged another boundary dispute at the Vihiga Land Office and the Land Registrar convened a meeting and formed an opinion which was injurious to the interest of the community members. That despite his protests, the Vihiga Land Registrar had gone beyond his powers in conjunction with District Land Surveyor and amended the boundary. He the alleged that the interests of Asienga Ebole Johnstone have been overlooked as the said Asienga acquired parcel No. West/Bunyore/Ebusiekwe/536 from him. That any action by the Respondents purporting to alter the boundary shall be ultra vires and if condoned the community stands to suffer loss and damage. The Ex parte Applicant prayed that the orders sought be granted.
6. Peter Mulwale the 3rd Respondent herein filed a Replying Affidavit on 15th March 2006 where he stated that the Application does not comply with the mandatory provisions of the Law as it does not include him as interested party.



7. It was the 3rd Respondent's case that the Application is defective as it does not have a Supporting Affidavit as required by the Law as it has been brought under the wrong provisions of the law and should therefore be struck off. He stated that the Applicant fully participated and was represented in the boundary dispute proceedings and never objected to its jurisdiction /excesses and he has not annexed any searches of copies of the registrar to show Lands which had the disputes.
8. It was stated that the Application is premature as the Applicant was given a right of Appeal against the decision to the Provincial Land Registrar /Surveyor. That the Ruling was to the effect that the boundary is to be observed on the ground and the Applicant has not stated how he was affected by the said Ruling. That the Applicant should not be heard to claim that his father purchased land from Festo Oyatsi Munialo, Paul Amukoye and Siku Amakoye without any agreements to support the claim and or the parcel numbers he claims to have been bought.
9. It was alleged that the claim by the Applicant herein that one of the vendors influenced demarcation exercise in respect of land parcel no. West Bunyore /Ebusiekwe/536 is a lie he has nothing to support such a claim and the said vendor was not a party to the proceedings. He further stated that there is nothing to prove that the Land Registrar Kakamega erected a boundary after a dispute.
10. It is the 3rd Respondent's case that the allegations that the Land Registrar formed an opinion which was injurious to the to the community members is false as there were no complaints from the community and members of the community are not parties to this suit. He further stated that there is no evidence to show that boundaries have been amended as claimed by the Applicant and the said Asienga Ebole Johnstone who the Applicant claims to have acquired land parcel number West Bunyore/ Ebusiekwe/536 from him is not a party to the suit herein and the Applicant has not attached any evidence to show that the parcel belongs to him.
11. It was further stated that the prayers sought cannot be granted by this court and the application is an afterthought and an abuse of the court process and should therefore be dismissed. This Application was canvassed by way of written submissions as directed by the court.

Ex parte Applicant's Written Submissions

12. The Ex parte Applicant filed his submissions on 2nd February 2022 and raised two issues for determination which include whether the Registrar/Surveyor in their findings were within the law and whether the old Latin *Maxim "Qui prior est tempore potior est jure"* is applicable in this suit.
13. It was stated that the parcels whose boundary are disputed are West Bunyore/ Ebusiekwe/537,536,546,517 and West Bunyore/Embali/929 and 1068. That the acreage computed included the area of overlap in Ebusiekwe in Ebusiekwe 536 and 537 and in Embali 929 and 1068 therefore the total overlap area is 1.6 Ha(3.95Acres).
14. It was submitted that land parcels 536 and 537 belonged to Edward Likholo and boundaries set up in 1952 and were confirmed during demarcation. That the Respondents came and interfered with the same without involving parties and from the evidence the Registrar in altering the map, and the position on the ground, interfered with the status quo of the suit parcels.
15. It was further submitted that the public participation of the community members before the boundary touching on two different communities was ultra vires. Reliance was placed in the case of County Government of Isiolo & 10 others vs Ministry of Interior and Coordination of National Government & 3 Others 2017 eKLR.



16. It was stated that based on the maxim *Qui prior est tempore potior est jure* and the case of S. Arunachalan vs Siran Asari, where legal interest is created first, it will be affected by subsequent equitable claims, in absence of fraud, a section that was registered first during demarcation should not be compromised by a claim of overlap and the finding that it should be subdivided equally in part where the 2 parcels overlap. That the Ebusiekwe boundary came first in place and should be maintained in priority to the Embali boundary. The Ex parte Applicant prayed that the Application be allowed as prayed for.

Respondents Submissions

17. I have perused the file and do confirm that the Respondents herein failed to file their submissions.

Analysis and Determination

18. It is the Ex parte Applicant's case that the Respondents acted ultra vires the powers vested in the offices of the District Land Registrar and the District Land Surveyor as they failed to consider the best interest of the community. The Ex parte Applicant has alleged that the Respondents' actions to amend the boundaries and purport to place beacons is contrary to the rules of natural justice.
19. The 3rd Respondent on the other hand in response to the Ex parte Applicant's allegations stated that the Application is defective as it had not complied with the mandatory provisions of the law as the Applicant did not include him as an interested party and the Applicant filed a Verifying Affidavit instead of a Supporting Affidavit. It is the 3rd Respondent's case that the Ex parte Applicant participated in the boundary dispute proceedings and he did not object to its jurisdiction.
20. It is clear that Judicial Review is not concerned with the merits of the decision being challenged but the decision making process as Lord Diplock in the case of *Council for Civil Service Unions vs. Minister for Civil Service* [1985] A.C. 374, at 401D clearly set the standards of judicial review when he stated that: -

Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'

21. Pursuant to the hearing of a boundary dispute between land parcel number West Bunyore/Ebusiekwe 536,535,537,2200,517,546 and 929 vs West Bunyore/Embali/1068 by the Land Registrar on 14th January 2010, it was the Land Registrar's finding that land parcel number West/Bunyore/Ebusiekwe/536 is registered in the names of Mr. Asienga Ebole Johnstone and it was formerly registered in the names of Edward Likhole before transferring to the current owner. That land parcel number West Bunyore/Embali/929 is registered in the names of Siku Amukhaya (deceased) and the neighbors that is Peter Mulwale and Siku Amukhaya do not have a land dispute between themselves.
22. It was also the Land Registrar's finding that the dispute between land parcel number West Bunyore/Ebusiekwe/536 and West Bunyore/Embali/1068 started after Mr. Peter Mulwale had bought land and wanted to utilize it. That Ex parte Applicant's father bought two pieces of land that is 536 and 537



while the 3rd Respondent bought from Embali Registration section. It was further found out that the 3rd Respondent herein filed a boundary dispute between and the Ex parte Applicant where the then Land Registrar discovered the maps of the two registration sections were overlapping each other and he referred the case to his seniors.

21. The Land Registrar recommended that the current land owner of West Bunyore /Ebusiekwe/536 should be enjoined in the case because the Ex parte Applicant had already surrendered his rights in respect of the said piece of land. That West Bunyore/ Ebusiekwe Registration section was first to be adjudicated so that the land records should be used to determine the current/common boundary and that it is the discretion of the court to order boundary fixed according to the Ebusiekwe registration map on the ground.
22. Since the three boundary disputes herein were determined during the regime of the Registered Land Act, section 21 of the Registered Land Act (now repealed) stipulates as follows:
 - (1) Except where under section 22 it is noted in the register that the boundaries of a parcel have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
 - (2) where any uncertainty or dispute arises as to the position of any boundary, the Registrar on the application of any interested party shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.”
23. There was another boundary dispute that was heard by the District Land Registrar and the report together with the proceedings were filed in court. It was the finding of the Registrar that Registrar together with surveyors had visited the suit properties three times and as per the report of 2014, the surveyor carried out a ground survey and compared with the Registry Index Map measurement and found out that the total overlap by the two parcels of land that is West Bunyore/Embali 1068 and 929 and West Bunyore/Ebusiekwe /536 and 537 IS 1.6 Ha or 0.395 Acres. The Registrar recommended that the disputed area which the two parcels overlap to be shared equally where any of the two parcels overlap.
24. In the case of Biren Amrital 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”.
25. The 2014 boundary dispute was carried pursuant to the Land Registration Act 2012 where the Land Registrar was guided by the following provisions of the Law:

Section 18 of the Land Registration 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*.

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.

26. It is clear that the boundary dispute that was held in 2014 was as a result of the court order. I have perused the report and I do confirm that parties herein were accorded a fair hearing by the Land Registrar as the recommendation was just and fair since there is overlapping of the parcels of land and therefore there was need to have a sub division of the overlapping parcels of land.



27. Although the Ex parte Applicant relied on the maxim of *Qui prior est tempore potior est jure*, this court has established that since the Land Registrar and the Surveyor determined the boundary dispute herein and made a finding that the suit properties overlap, I am of the view that the maxim does not apply in this case.
28. This court is of the view that the Land Registrar and the Land Surveyor acted within their powers in determining the boundary disputes between the parties herein and the process was legal, rationale and fair. This court is of the view that the Ex parte applicant has not met the threshold for grant of Judicial Review Orders and therefore this suit is hereby dismissed with costs to the Defendants.

DATED AT KISUMU THIS 5TH DAY OF AUGUST, 2022

ANTONY OMBWAYO

JUDGE

