



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO  
Civ Misc Appli 32 of 2005**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE DISTRICT LANDS REGISTRAR (KERICHO).....1<sup>ST</sup> RESPONDENT**

**MUSA RONO.....2<sup>ND</sup> RESPONDENT**

**BOYOT RONO.....3<sup>RD</sup> RESPONDENT**

**EZEKIEL KIRUI.....4<sup>TH</sup> RESPONDENT**

**AND**

**CHEPKWONY KIPLANGAT RONO.....SUBJECT**

**RULING**

The applicant, Chepkwony Kiplangat Rono, sought and was granted leave to apply for the judicial review orders of prohibition to prohibit the Kericho District Land Registrar from de-registering the registered road of access and registering a new one pursuant to a ruling made by the said Kericho District Land Registrar on the 3<sup>rd</sup> of March, 2005 where he determined the dispute that was referred to him by the applicant in respect of parcels No. ***Kericho/Kiptugumo/283, 284, 286 and 287***. The grant of the said leave stayed the giving of effect of the said ruling by the District Land Registrar.

On the 11<sup>th</sup> of May, 2005, the applicant filed a substantive motion under **Order LIII Rule 1(2) and 3(1) of the Civil Procedure rules**. In the said notice of motion the applicant has sought a prohibitory order of this court to prohibit the District Land Registrar, Kericho from giving effect to his ruling made on the said 3<sup>rd</sup> of March, 2005. The applicant’s complaint is that the said intended deregistration of the registered road of access was prejudicial and unprocedural. He is further aggrieved that the said decision had no legal basis and amounted to an act of interference in his proprietary right on his parcel of Land *i.e.* ***Kericho/Kiptugumo/284***. The application is supported by the annexed affidavit of the applicant.

The application for judicial review is opposed. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have sworn a replying affidavit in opposition to the application. They contend that the decision to move the road from its registered position to the current position was made more than thirty (30) years ago by the owners of the affected parcels of land, who included the applicant. They deponed that the said decision was

necessitated by the fact that the registered road was impassable due to its terrain and its ruggedness. They further deponed that after the said decision to relocate the road was made, the road was duly relocated and a new accessible road created traversing the parcels of land owned by the applicant and the respondents. They deponed that the said road, although then not registered, has been in use for the said long period. The registered road, although not deregistered, has not been in use since the actual relocation was made on the ground. They deponed that the decision of the Land Registrar gave effect to an existing arrangement on the ground and should therefore not be disturbed. They urged this court to disallow the application for judicial review.

At the hearing of the application, Mr. Orina, learned counsel for the applicant reiterated the contents of the application made by the applicant. He submitted that the position which the District Land Registrar had sought to relocate the new road was fertile land whilst the position where the “old” road was registered was rocky. He submitted that the replying affidavit filed by the respondents was fatally defective as it offended the Provisions of **Order XVIII rule 5 of the Civil Procedure Rules**. He argued that the applicant has proved that the District Land Registrar acted in contravention of the Law by arriving at a decision on the basis that the applicant had consent to the transfer of the said road of access while in actual fact the applicant had not given any such consent. He urged the court to allow the application for judicial review.

Mr. Kirui, learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents opposed the application. He reiterated that the contents of the replying affidavit and submitted that the decision of the Kericho District Land Registrar in registering the road was an endorsement of a fact which already existed on the ground as the “new” road of access was moved to its current position more than thirty (30) years ago and the same had been in use since then. He submitted that the position where the road of access is currently registered was rocky and impassable. He argued that the applicant had not been prejudiced in any way by the re-location of the road to its current position because he had lost no land and had instead benefited by the fact that the current road of access had promoted development in the area. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the applicant had not been prejudiced by the fact that the replying affidavit had minor defectives which should be overlooked by the court. He urged this court to disallow the application.

I have read the pleadings filed by the parties to this application for judicial review. I have also considered the rival submissions that were made before me by the counsel for the applicant and by the counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. I will first deal with a procedural complaint that was raised by the applicant as regard the replying affidavit which was sworn by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It is true that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents swore what they referred to as a “joint affidavit.” No such affidavit exists in law. An affidavit is written evidence made under oath. It cannot therefore be sworn by two people. The **Oaths and Statutory Declarations Act (Cap 15 Laws of Kenya) (Section 16)** and **Order XVIII rule 5 of the Civil Procedure Rules** envisages that an affidavit shall be sworn by one person, in the first person.

However according to the circumstances of this case, I would hesitate to strike out the said replying affidavit. The matter in dispute is land. It would only be fair that matters affecting disputes as to land should be decided on the merit and not on procedural technicalities. In the particular circumstances of this case, I am prepared to overlook the indiscretion of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent in deponing to the said replying affidavit. **Order XVIII Rule 7 of the Civil Procedure Rules** allows this court to receive an affidavit sworn for the purposes of being used in a suit notwithstanding that the said affidavit may have defects. In this case, the defects in the said replying affidavit did not prejudice the applicant, who in any event, had an opportunity of knowing in advance the case being put forward by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent in this application for judicial review. I will therefore allow the said replying affidavit to remain on record.

Now to the substantive issues in dispute. The **Registered Land Act (Cap 300 of the Laws of Kenya)** gives the Land Registrar power to hear and determine matters involving the determination of boundaries and roads of access (**See Section 21 and 22 of the Registered Land Act**). In the instant case, the applicant made a complaint to the Kericho District Land Registrar seeking to have an unregistered road

closed and in its place the registered road which had remained disused to be re-opened. The re-location of the said road of access affected five parcels of land, namely **Kericho/Kiptugumo/288,286,284 and 283 and 857**. It is apparent that when the complaint was made to the District Land Registrar all the owners of the affected parcels of land were informed and participated in the proceedings. The owners of the said affected parcels of land have been enjoined in these proceedings as respondents. The Kericho District Land Registrar heard the dispute and resolved that the registered road which was not under use was to be deregistered and the road which had been informally set up by the owners of the said parcels of land was to be registered as a road of access. The applicant was aggrieved by the decision of the Kericho District Land Registrar and has filed this application for the judicial review orders of prohibition before this court.

The issue for determination by this court is whether the Kericho District Land Registrar acted in excess of his powers or in disregard of the law when he made the decision to deregister the disused road of access and order the registration of an informal but used road of access. As stated earlier in this ruling, a District Land Registrar had powers to hear and determine boundary disputes in respect of land registered under the **Registered Land Act (Cap 300 Laws of Kenya) (See Sections 21 and 22)**. The District Land Registrar also has power to determine a road of access in an area where land is registered under the **Registered Land Act**.

In hearing and determining boundary disputes, the District Land Registrar is however required in law to hear the parties by, inter alia, applying the rules of natural justice. A party must be given sufficient notice of the hearing date. He must be allowed to ask any questions that he deems relevant to his case including being given a chance to call his witnesses. He has a right to demand that he be heard by an impartial tribunal. He must make his decision within the confines of the law that grants him jurisdiction. If the District Land Registrar makes a decision in breach of any of the above procedural and substantive requirements, his decision shall be amenable to be reviewed by the High Court when an application for judicial review is made. As was held by Lord Greene M.R. in **Associated Provincial Picture Houses vs Wedesbury Corporation [1947] 2 All ER 680** at page 682.

***“Decisions of persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no person or body properly directing itself on the relevant law and acting reasonably could have reached that decision.”***

In the instant application, the applicant has made no allegation that the rules of natural justice were breached when the District Land Registrar heard and rendered his decision on the issues that he was required to determine i.e. the road access. The applicant has made no complaint that the District Land Registrar acted in excess of his powers when he heard and determined the said dispute as relates to the road access. The applicant has made no complaint that the District Land registrar disregarded the law when he heard and determined the issues that were presented to him for determination. Indeed the facts of this case clearly point to the fact that, it is the applicant who made the complaint to the District Land Registrar and was satisfied in the matter in which the proceedings were conducted until the decision was rendered by the said District Land Registrar.

The complaint by the applicant appears to be that the District Land Registrar had not considered his complaint to the effect that the informal or “*temporary*” road of access which was being used by the owners of the parcels of land in question ought to have been moved to where the abandoned registered road was situate on the ground. The applicant however overlooked the fact that the District Land Registrar had powers to deregister a road of access and order registered a new road of access pursuant to the representations made to him. It is evident that the applicant has been using the road of access that he wants moved for a very long time. There is no justifiable reason why the applicant wants the “*informal*” road of access which has now been formalized by being registered to be deregistered. Similarly there was no justifiable reason why the applicant desires to have the road of access reverted to its position on the ground when the said “*road of access*” is no road at all as it is impassable. The application for judicial review by the applicant clearly lacks merit and is a case of sour grapes.

The said application for the judicial review orders of prohibition is hereby dismissed with costs to the 2<sup>nd</sup>

and 3<sup>rd</sup> respondents.

**DATED at KERICHO this 30th day of October 2006**

**L. KIMARU**

**JUDGE**