



**Republic v Land Registrar Kitui County & 2 others; Kisumba (Exparte); Muo (Interested Party)
(Judicial Review E004 of 2021) [2022] KEELC 15291 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15291 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW E004 OF 2021
LG KIMANI, J
DECEMBER 8, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR KITUI COUNTY 1ST RESPONDENT

DISTRICT SURVEYOR KITUI COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

GLADYS KAVINYA KISUMBA EXPARTE

AND

ISAAC MULATY MUO INTERESTED PARTY

JUDGMENT

1. The Ex parte Applicant filed the Notice of Motion application dated 15th November 2021 pursuant to the provisions of Article 165 (6) (7) of the constitution of Kenya, Order 53 Rule 1 (1) (2) (3) of the Civil Procedure Rules, Section 8 (2) Law Reform Act, Section 3 Judicature Act and Section 7, 9 and 10 of Fair Administrative Actions Act and seeks the following orders;

1. That orders of prohibition do issue against the 1st and 2nd Respondents against carrying out boundary verification of Ikutha/Mbitini/288, 49, 46, 50, 99, 34, 202, 207, 51 and 389 in a manner that is in violation of the constitution, the Fair Administrative Actions Act, the due process of the law, the rule of law and natural justice.



2. That orders of mandamus do issue to compel the 1st Respondent to produce file, or supply to the applicant, the adjudication records of Ikutha/Mbitini/288, 49, 46 and 50, under Article 35 of the constitution .
2. The application is supported by the Statement of facts and the verifying affidavit and the attached documents. The Respondents filed grounds of opposition dated 2nd December 2021 while the interested party filed a replying affidavit sworn on 28th June 2022.

The Exparte Applicants case

3. The ex parte applicant claims to be the administratrix of the estate of James Kisumba Ndongi the registered proprietor of Ikutha/Mbitini/288 who was also a purchaser for value of land parcels Ikutha/Mbitini/ 50 and 46. She claims that the deceased had been in permanent uninterrupted occupation, use and possession of the aforesaid parcels of land from 1993 and that after the deceased death she continued with the said occupation. She further complains that she received a letter dated 5th August 2021 from the District Surveyor Kitui County through the area Chief of intended boundary verification and establishment affecting parcel number Ikutha Mbitini/ 288, 49, 46 and 50 among other parcels. That she was surprised since she did not know of any dispute concerning the said parcels of land.
4. The ex parte applicant through her advocate wrote a letter to the 1st Respondent requesting for adjudication records of the parcels of land and official searches under Article 35 of the constitution but the same were not provided and no explanation was given for failure to supply the said documents. She also requested that that the boundary verification process be stopped.
5. That on 21st October 2021 she was served with a letter by the 1st Respondent indicating that they intended to carry out boundary verification and establishment exercise on 22nd October 2021. The ex parte applicant opposed the notice for reasons that some of the persons mentioned in the notice were deceased, the notice was too short, the notice was not specific as to which of the mentioned parcels had boundary issues and the party who had a complaint.
6. She claimed that there was an ownership dispute affecting some of the parcels of land and until the dispute was resolved the boundary exercise ought to have been stopped. The ex parte Applicant attached various affidavits claiming that land parcel Ikutha/Mbitini/ 50 was sold to James Kisumba the applicant's husband and they helped him fence it. The The Respondents case
7. The Respondents filed grounds of opposition and stated that under section 18 of the Land Registration Act the 1st Respondent had the mandate of carrying out boundary verification and the court has no jurisdiction on boundary disputes under section 18 (2). That the jurisdiction of this court has been prematurely invoked and the same cannot be exercised based on speculation and without justifiable cause. It is claimed that the ex parte applicant could only come to court after the boundary verification has been carried out and a report made.
8. The Respondents further claim that the order of mandamus prayed for cannot issue since the 1st Respondent does not hold the adjudication records but that the 1st Respondent registers land based on documents booked at the registry.

The Interested Party's case

9. On the other hand the interested party states that he is the owner of the land parcel Ikutha/Mbitini/ 202 which he bought before land adjudication and was adjudicated to him. He further stated that he owns land parcel Ikutha/Mbitini/ 50 having bought the same and a title deed issued. He claims



that he has been in actual possession of the two parcels of land for more than 10 years and the dispute herein arose when the ex parte applicant sold portions of her land and shifted the long existing boundaries thereby encroaching on his land. That the encroachment dispute was reported to the local administration who wrote to the Registrar to visit the site and fix the boundaries in accordance with official records. That the land registrar instructed the District surveyor to write to all the affected parties about the boundary verification and establishment on Ikutha/Mbitini/ 202, 50 and 65 through the area chief Ikutha Location requesting the parties to avail themselves for the exercise.

10. The Interested Party states that the ex parte applicant participated in the exercise and the dispute was restricted to land parcels Ikutha/Mbitini/ 202, 50 and 65 and not the other parcels. He states that there was no breach of rules of natural justice nor due process and that the boundaries were verified and clearly defined and a report was forwarded to the Land Registrar for implementation.

Applicant's submissions

11. The ex parte Applicant's counsel submitted and set out the provisions of law that support this courts supervisory jurisdiction and the power to issue the orders sought. Further counsel set out the powers exercised by the Respondents in determination of boundaries under Sections 14,15,16,17,18,19,20,21,22 and 23 of the Land Registration Act and Section 23 (2) of the Survey Act and especially Section 19 that provides for giving notice to owners and occupiers of land when there is intention to fix boundaries. Counsel further submitted on the entitlement to a right to fair administrative action under Article 47 and fair hearing under Article 50 of the constitution of Kenya 2010 and the Fair Administrative Actions Act. The Ex parte Applicant submitted that she is entitled to an administrative action which is lawful, reasonable and procedurally fair but the notice issued by the 2nd Respondent are in violation of the constitution, the rules of natural justice, the rule of law and due process. In particular, there was no reasonable notice as stipulated by Section 23(2) of the Survey Act and Section 4(3) of the Fair Administrative Actions Act.
12. Counsel further submitted that the proceedings herein were triggered by the two letters dated 5th August 2021 and 14th October 2021 respectively issued from the offices of the 2nd Respondent. The ex parte Applicant claims that the notice given in the said letter was too short and inadequate and thus a violation of the rights above stated. The Applicant claims proprietary/beneficial and/or purchaser's rights and interests in Land Parcel Ikutha/Mbitini/288, 49, 46 and 50. She claims to have had no disputes with her neighbor and the letters complained of took her by surprise because Isaac Mulatya Muoki, the interested party was purporting to own Land Parcel Ikutha/Mbitini/50 when the same was purchased by her late husband in 1993 and the family took active possession, occupation and/or use and ownership of the land.
13. Citing and relying on the authorities of *Lloyd v. Mc Mahon*(1987) .C 625,703, *Reg v. Secretary of State for the Home Depart, Ex parte Doody*(1994) A.C 531 and *Republic v Maseno University Staff Disciplinary Committee and Another*(2009) eKLR, the Applicant laid out the principles that an administrative action must be procedurally unfair.
14. As for the order of prohibition sought, the Ex parte Applicant relied on the case of Kenya National Examination Council v Republic, Ex-parte Geoffrey Gathenji Njoroge & 9 others (1997)eKLR where the court stated that prohibition lies not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice and the case of *Amota Nyasae Nyang'era v. Public Service Commission of Kenya & 2 others*(2013)eKLR where GV Odunga quoted from the above case and stated that prohibition looks to the future. The Applicant submitted that the Respondents should do the exercise in compliance with the law and fairness.



15. Regarding the order of mandamus, the Ex parte Applicant submitted that the 1st Respondent is in possession of the Adjudication register and therefore has the records or information requested for and is obliged under Section 7(2) as read with Section 10 of the [Land Registration Act](#) No.3 of 2012 to supply the same on demand to any member of the public upon payments as her counsel quoted from the South African case of *Van Huyssteen v. Minister of Environmental Affairs and Tourism and Others*(1995) 4 L.R.C at page 340 and the case of [Kitbome Mwera Malili v. Munyoki Mwera & others](#)(2019) eKLR.

The Interested Party's submissions

16. Counsel for the Interested Party submitted that the dispute arose when the Ex-parte Applicant sold portions of her land and shifted the boundaries, thereby encroaching into the Interested Party's land. Thus, the 1st and 2nd Respondents, through the office of the area chief Ikutha Location wrote a letter dated 5.8.2021 requesting the owners of Land Title Numbers Ikutha/Mbitini/202, 50 and 65 to avail themselves.
17. The Interested Party relied on Sections 18(2) and 19 of the [Land Registration Act](#) 2012 which prohibits the Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land. The Counsel cited the case of [Azzuri Limited v. Pink Properties Limited](#) (2018) eKLR and the case of [George Kamau Macharia & Dexka Limited](#) (2019) eKLR both holding that such boundary disputes pertaining to land with general boundaries fall within the mandate of the Land Registrar to resolve them.
18. Further, that it is trite in law that where the law has given a legal obligation to a department of government, it is important for the Court to let it do its job while relying on the case of [Speaker of National Assembly v Karume](#) (1992) KLR 21 Court stated that if there is a clear procedure for redress prescribed by the [constitution](#) or an Act of Parliament, that procedure should be strictly followed.
19. It is the interested party's final submission that the boundary verification exercise followed due process and no rules of natural justice were breached. The boundaries were verified and are defined and a report was forwarded to the Land Registrar for implementation. If any party was aggrieved the Interested Party feels that the appeal should have been lodged with the Land Registrar first before being brought before the court for determination and that this belated complaint is an afterthought.

Analysis and Determination

20. The legal right to fair administrative action is guaranteed as one of the rights and fundamental freedoms under the Bill of Rights, Article 47 of the [constitution](#) of Kenya 2010 which states that;
1. "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b) promote efficient administration.
21. To give effect to Article 47 (2) above parliament enacted the [Fair Administrative Action Act](#) 2015 and Section 7 (2) gives the court power to review an administrative action or decision on the several grounds stated therein.



22. In the case of *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA the court pronounced itself on the requirements for an order of judicial review which provides every one with a right to Fair Administrative Action thus:

In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.”

23. In the present case, the notice complained of is a letter dated 14th October 2021 and the applicant states that it was served on her on 21st October 2021 while the exercise of ascertainment and establishment of boundaries was to be carried out on 22nd October 2021. She states that the notice was short and not adequate to enable her prepare for the exercise and that the same was contrary to section 4 (3) (g) of the *Fair Administrative Actions Act*.
24. However, it is the courts view that this notice is to be considered in light of a previous notice issued through the letter served on the Applicant dated 5th August 2021. The said letter shows that the ex parte applicant was aware of the intended boundary verification and establishment since the letter indicated the intention of the District surveyor Kitui to visit the suit parcels of land on 28th August 2021. Indeed, she had the opportunity to take action since she instructed an advocate to write the letters dated 7th and 21st August 2021 attached to her affidavit and take any other action that she deemed necessary. The interested party states that on the material day the ex parte applicant attended and participated in the exercise and the exercise was restricted to the three parcels of land listed in the letters that is Ikutha/Mbitini/202, 50 and 65. He further stated that the persons invited to attend did not raise any issues when the surveyor conducted the exercise. The interested party further stated that as a result of the exercise, the boundaries were verified, clearly defined and a report forwarded to the Registrar for implementation. The assertion by the interested party that the exercise was carried out as scheduled was not denied and indeed is confirmed by the ex parte applicant when she states in the verifying affidavit at paragraph 13 “that the exercise was done in violation of the *constitution* , the *Fair Administration Actions Act*, the due process of the law and the rules of natural justice”
25. I have considered the above facts and the 1st prayer in the notice of motion herein which seeks an order of prohibition against the 1st and 2nd Respondents against carrying out boundary verification of **Ikutha/Mbitini/288, 49, 46, 50, 99, 34, 202, 207, 51 and 389** in a manner that is in violation of the *constitution* , the Fair Administrative Actions Act, the due process of the law, the rule of law and natural justice.
26. In the 1st instance the court finds that the boundary verification exercise was not intended to be carried out on land parcels Ikutha/Mbitini/288, 49, 99, 34, 207, 51 and 389 as stated in the application herein. It is clear from the notice issued by the 2nd Respondent that the boundary verification was intended to be carried out on land parcels Ikutha/Mbitini/202, 50 and 65 facts borne out by the contents of the letters dated 8th August 2021 and 14th October 2021. In my view all the other land owners notified to attend the exercise by the Land Registrar were so notified as a legal obligation requiring a notice to be issued to all persons appearing in the land register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute at hand. The claim that the notice issued did not indicate which of the many parcels of land cited had a dispute is therefore not true.
27. Prohibition is defined in the *Black’s Law Dictionary* as;
- “Prohibition is a kind of common-law injunction to prevent an unlawful assumption of jurisdiction ... it is a common law injunction against governmental usurpation, as where one is called *coram non iudice* (before a judge unauthorized to take cognizance of the affair), to answer in a tribunal that has no legal



cognizance of the cause. It arrests the proceedings of any tribunal, board, or person exercising judicial functions in a manner or by means not within its jurisdiction or discretion.” Benjamin J. Shipman Handbook of Common-Law Pleading S 341, AT 542 (Henry Winthrop Ballantine ed., 3d ed. 1923).

28. I have further considered the confirmed undisputed facts set out above that the boundary verification exercise complained of was proceeded and carried out as planned, the boundaries were verified, clearly defined and a report forwarded to the Registrar for implementation. In the above circumstances I do find that an order of prohibition cannot issue as prohibition looks to the future and cannot be issued to quash a decision which has already been made whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice. Prohibition could only issue to prevent the making of a contemplated decision and not decision already made.
29. This position was confirmed in the case of *Kenya National Examination Council v Republic ex part Gatthenji Njoroge & 9 other* [1997] eKLR, where the Court stated the grounds upon which such an order may issue as follows;

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...”

Is the Applicant entitled to an order of mandamus?

30. The ex parte applicant claims that through her advocate she wrote a letter to the 1st Respondent requesting for adjudication records and searches of the parcels of land Ikutha/Mbitini/288, 49, 46 and 50 under Article 35 of the *constitution* but the same were not provided and no explanation was given for failure to supply the said documents. It has been argued by Counsel for the Respondents that the Applicant ought to apply for the land adjudication records from the Director of Adjudication and Settlement, Ministry of Lands Physical Planning, Ardhi House, Nairobi. This seems to be the position taken by the Land Registrar Kitui and the same is endorsed on the exparte applicant’s advocate’s letter dated 17th August 202.
31. Access to information is one of the fundamental rights and freedoms guaranteed under Chapter Four Article 35 of the *constitution* of Kenya 2010. It provides that;
10. Every citizen has the right of access to
- a) information held by the State; and
 - b) information held by another person and required for the exercise or protection of any right or fundamental freedom
32. Section 4 of the *Access to Information Act* 2016 provides for the procedure to access information. The section provides;
- 1) “Subject to this Act and any other written law, every citizen has the right of access to information held by—



- a) the State; and
- b) another person and where that information is required for the exercise or protection of any right or fundamental freedom.
- 2) Subject to this Act, every citizen's right to access information is not affected by—
- a) any reason the person gives for seeking access; or
- b) the public entity's belief as to what are the person's reasons for seeking access.
- 3) Access to information held by a public entity or a private body shall be provided expeditiously at a reasonable cost.
33. Section 5 of the *Act* further provides that a public entity should facilitate access to information held by it. Under section 8, a citizen who wants to access information should do so in writing with sufficient details and particulars to enable the public officer understand what information is being requested. The *Act* is also sufficiently clear that the information should be given without delay and at a reasonable fee, notwithstanding why the citizen wants to access information. Section 9 states that a decision on the request to access information should be made and communicated within 21 days. The communication should include whether the public entity has the information and whether it will provide access to the information.
34. On the above basis, the right to access information is inviolable because it is neither granted nor grantable by the state. This is a right granted by the *constitution* and is protected by the same Constitution. In the case of *Nairobi Law Monthly v Kenya electricity Generating Company & 2 Others (supra)* the Court stated of what the state should bear in mind when considering the request to access information.;
- The...consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the State with regard to provision of information.
- The Court then went on to state;
- “... State organs or public entities ... have a constitutional obligation to provide information to citizens as of right under the provisions of Article 35(1)(a)... they cannot escape the constitutional requirement that [they provide access to such information as they hold to citizens.”
35. Further to the above rights Sections 7(2) and Section 10 of the *Land Registration Act* No.3 of 2012 respectively provide that:
- “7(2). The Registrar shall, upon payment of the prescribed fee, make information in the land registry accessible to any person.”
- “10. Subject to the *constitution* and any other law regarding freedom of and access to information, the Registrar shall make information in the register accessible to the public by electronic means or any other means as the Chief Land Registrar may reasonably prescribe.”
36. In the present case it has been argued by Counsel for the Respondents that the Applicant ought to apply for the land adjudication records from the Director of Adjudication and Settlement. However, it is the position of the court that the 1st Respondent ought to have supplied the Applicant with the information and records sought that was in his/her possession and custody. The *Land Adjudication Act* provides for the documents that ought to be in the custody of the 1st Respondent relating to the



adjudication process. Section 27 provides for finalization of adjudication register, subject to appeals and states under subsection 3 that the adjudication register and a list of appeals are to be forwarded to the Chief Land Registrar and it is these documents that are used to register and issue title deeds. Section 27 states;

- (1) The adjudication officer shall from time to time alter the adjudication register to conform with any determinations of objections under section 26 of this Act.
- (2) If the adjudication officer considers that to alter the adjudication register would incur unreasonable expense, delay or inconvenience, he may, instead, recommend to the Minister that compensation be paid and the Minister may make such payment of compensation out of moneys provided by Parliament as he thinks fit.
- (3) When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—
 - (a) alter the duplicate adjudication register accordingly; and then
 - (b) certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
 - (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.

1. “When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall:
 - a. alter the duplicate adjudication register accordingly; and then
 - b. certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
 - c. forward the adjudication register to the Chief Land Registrar together with a list of the appeals

37. Section 28 provides for the Action to be taken by the Chief Land Registrar upon receiving the register and the list of appeals and states;

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register. Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.”



38. Further to this, Section 34 of the [Land Registration Act](#) No 3 of 2012 provides for searches and copies and states that;

“A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”

39. Similarly, Sections 7(2) and Section 10 of the [Land Registration Act](#) No.3 of 2012 respectively provide that:

“7(2). The Registrar shall, upon payment of the prescribed fee, make information in the land registry accessible to any person.”

“10. Subject to the [constitution](#) and any other law regarding freedom of and access to information, the Registrar shall make information in the register accessible to the public by electronic means or any other means as the Chief Land Registrar may reasonably prescribe.”

40. It is thus clear from the foregoing that there are records documents and information that are in the custody of the 1st Respondent who had a duty in law, upon request as was made by the Ex parte Applicant, to supply.

41. I therefore find that the Notice of Motion dated 15th November 2021 partly succeeds and make the following orders;

1. Prayer No. 1 of the Notice of Motion dated 15th November 2021 be and is hereby dismissed.
2. Orders of mandamus do issue to compel the 1st Respondent to produce, or supply to the ex parte applicant, the adjudication records of Land Parcel **Ikutha/Mbitini/288, 49, 46 and 50**, under Article 35 of the [constitution](#) .
3. Each party to bear their own costs of the suit.

DELIVERED, DATED AND SIGNED AT KITUI THIS 8TH DAY OF DECEMBER, 2022.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Judgement read in open court and virtually in the presence of-

Musyoki - Court Assistant

M/s Maritim for the Ex parte Applicants

N/A for the Respondents

Mr. Mwalimu for the interested parties

