



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

MISC. CIVIL APPLICATION NO. 9 OF 2018

IN THE MATTER OF A APPLICATION BY DAVID OTIENO OHANDO FOR LEAVE TO APPLY FOR PREROGATIVE ORDERS IN THE NATURE OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT CHAPTER 303A

DAVID OTIENO OHANDO.....APPLICANT

-VERSUS-

HENRY OPIYO AKAMA.....1ST RESPONDENT

THE DISTRICT LAND REGISTRAR SIAYA.....2ND RESPONDENT

THE DISTRICT LAND SURVEYOR SIAYA.....3RD RESPONDENT

JUDGEMENT

Exparte Applicants case

The applicant has come to court seeking orders of Judicial Review of prohibition that the court be pleased to grant an order to prohibition prohibiting the 1st and 2nd Respondents from implementing the survey by the 3rd Respondents conducted on the 22nd February 2018.

Moreover, that this Honorable Court be pleased to grant an order of prohibition prohibiting the 1st Respondent from trespassing into and/or in any manner interfering with land parcel NORTH GEM/MALANGA/1132 and/or any portion thereof.

That this Honorable Court be pleased to grant the Applicant an order of certiorari to quash the findings of the survey by the 3rd Respondents conducted on the 22nd February 2018.

That this Honorable Court be pleased to grant the Applicant an order of mandamus to order the 3rd Respondent to conduct a fresh survey taking into consideration the National Road Reserve in the year 1986 when the sale of the land was conducted. That the costs of this application be in the cause.

The application is based on grounds that the 3rd Respondent conducted a fresh survey of the disputed parcels of land NORTH GEM/MALANGA 1132 and 1117. The 3rd Respondent however failed to consider the National Road reserve as it was demarcated the year 1986 when the sale of the land took place and instead conducted the survey from the fresh demarcations of the National Road Reserve. The 1st Respondent has trespassed and encroached onto part of the land belonging to the Applicant despite protests from the Applicant and has even constructed structures on the same.

The 1st respondent had further fenced off the parcel of land that he has encroached into denying the Applicant access to the same. The 1st Respondent has further, in collaboration with the police force of the area, resorted to harassment of the Applicant and his family. That given the age of the Applicant and the constant harassment by the 1st Respondent together with the relevant authorities within the area, the Applicant has been hospitalized.

According to the applicant the issues for determination are whether the 1st respondent has the locus standi in law to act as the legal representative of the registered owner one EliudAkamaOdongo and whether It was lawful and legal for the 2nd and 3rd Respondents to make their respective impugned decision of 22/2/2018 and subsequent reports of 6/3/2018 and 7/3/2018.

On the 1st issue, the exparte applicant argues that the 1st respondent has no locus standi in law to act as the legal representative of EluidAkamaOdongo who is deceased as he has not obtained the grant of representation and as such his action amount to intermeddling and an illegality in law.

Secondly the applicant argues that it was unlawful and illegal for the 2nd and 3rd respondents to make their respective impugned reports over plots number North Gem/Malanga/1117 and NORTH GEM/MALANGA/1132.

On the 1st issue the gravamen of the applicant's submission is that it was necessary to obtain letters of administration before an action could be brought to court. The applicant relies on the famous case of Trustic Union International & Another vs Jane Mbeyu&Another C.A. 4590 (unreported) where it was held that it was necessary to obtain letters of administration before an action could be brought to court. The exparte applicant argues that the 1st Respondent ought to have obtained letters of administration ad litem in order for him to be proper party to the exercise that was carried out on 22/2/2018.

Secondly, the applicant submits that the findings of the 2nd and 3rd Respondents were illegal and unlawful as there was no transmission of the deceased title to the 1st respondent to enable the 1st respondent to obtain capacity. The exparte applicant argues that there were irregularities and therefore the court should quash the findings of the survey by the 3rd respondent.

The Applicant further argues that the claim of the 2nd and 3rd respondents was tainted with fraud collusion or perjury as it is irrational that the 2nd respondent's report came out on 6/3/2018 whilst the report for the 3rd Respondent came out on 7/3/2018 whereas the second defendant had asked the surveyor to determine the boundary by using the mutation that subdivided the land into two. That it was unreasonable for the 2nd Respondent to rely on a surveyor's report that came out later.

1st Respondents Case

The respondent on his part argues that the judicial review application has no basis as the applicant registered a complaint with the land registrar for determination over a boundary dispute, regarding the boundary of the adjacent land parcels NORTH GEM/MALANGA.1117 and NORTH GEM/MALANGA.1132. The matter was heard by the land registrar, in which case the district land surveyor presented maps, showing the mutations upon these parcels.

It was found that the applicant had actually trespassed against the 1st respondent's land. The registrar directed the applicant and 1st respondent to amicably agree on a settlement, but they failed to agree. Therefore, the land registrar made a decision through a report and confirmed the position of the land surveyor on the parcels. The registrar granted 14 days within which to object the decision, but the applicant did not seize the right to object.

In response to the Notice of Motion, the 1st Respondent filed a further affidavit dated 17th October, 2018, detailing the true position on the status of the disputed parcels of land (NORTH GEM/MALANGA/1117 and NORTH GEM/MALANGA/1132).

According to the respondent, the law provides for mechanisms to settle land disputes. It is significant to state that the Land Registrar is given the first mandate to hear and determine land disputes. The Land Registration Act in section 14 confers powers to the Land Registrar, among them in Section 14 (2) (e) the power to hear and determine appeals from the registries. Also, Section 19 of the Land Registration Act provides for fixed boundaries where the land registrar has the powers to fix an issue arising out of a boundary disagreement.

In the instant case, the applicant applied to the Registrar to determine the boundary between him and the 1st respondent. Indeed, the dispute is to be heard and settled by the Land registrar.

Section 86 of the Land Registration Act, which provides for the review of the decision, states that:

“if any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the court and thereupon the court shall give its opinion, which shall be binding upon the parties.”

It is upon this provision that the Court has been mandated to offer the policing role and to direct the tribunals and the quasi-judicial bodies to operate within the law. It is vital to understand that the court does not delve into the merits of the cases. The courts function is to determine whether due procedures were adhered to in order to arrive at a particular decision.

This Court should not interfere with decision of the quasi-judicial body or tribunal if the matter is confirmed to have been subject to fair administrative action. Moreover, the court can only demand that the body adjudicates the matter through fair and legal procedures, which consequently, will cause a proper verdict. The fair Administrative Actions Act, 2015 highlights in Part III of the Act, the circumstances under which Judicial Review is entertained in the Court.

The 1st respondent argues that the 2nd and 3rd respondent adhered to the procedure as can be gleaned from paragraph 13, 14, 19 and 20 of the supporting affidavit to substantive notice of motion.

The 2nd and 3rd Respondent delivered on their mandate and the applicant was allowed 14 days within which to object to the decision of the Land Registrar. The Applicant did not seize the opportunity; and therefore, cannot cry foul, pegging his errors on the 2nd Respondent.

The 2nd Respondent followed the procedures outlined herein above, which is supported by the attachments in the further affidavit dated 17th October 2018. The ex-parte applicant cannot therefore, challenge the merit of the findings of the 2nd and 3rd respondents after they strictly adhered to the procedure.

Further, the local remedies within the law have not been exhaustively exploited. The 2nd Respondent afforded an opportunity for the Applicant and the 1st Respondent to settle the matter through Alternative Dispute Resolution. It is worth noting that it is the Applicant that invited the 1st Respondent to ADR, but failed to engage.

Furthermore, the land registrar's decision can be reviewed through an appeal to court that will issue a binding determination. This position is provided in Section 86 of Land Registration Act, 2012. The applicant in the instant case disputed the merits of the Land Registrar's decision, concerning the boundary dispute and not the legal procedure of decision making. Therefore, it is erroneous to approach the Environment and Land Court through Judicial Review to grant the prerogative writs in an instance where merit is the underlying issue. The process was not in dispute and it is apparent on the face of application that the applicant did not refute the decision making process. If anything, it is the applicant whom invited the 2nd and 3rd respondent to determine the boundary dispute and the scrupulously adhered to the procedure and natural justice.

The 2nd respondent filed a replying affidavit whose gist is that the power to determine boundary disputes is vested in the land registrar by dint of section 18 of the Land Registration Act and that this was a boundary dispute that was determined in the presence of all parties. The applicant still has the option to appeal and to seek Alternative Dispute Resolution.

ANALYSIS AND DETERMINATION

The facts of this matter are that on the 22nd day of February 2018 a team of officers from the lands office Siaya made a site visit on the two parcels of land that had a boundary dispute being parcels numbers North Gem Malanga 1132 and North Gem Malanga 1117. Mr David Otieno Ohando the ex-parte applicant herein was the complainant whilst Henry Opiyo Akama the 1st respondent was the respondent. The complainant showed the land registrar the extent of his boundary whereas the respondent asked the land registrar to determine the boundary. The land registrar asked the surveyor to determine whether there was any encroachment by use of the mutation form that subdivided the land into two. The Land registrar found that the ground corresponded with the mutation. The findings were as per the surveyor's report and drawings.

The ex-parte applicant is now challenging the findings by the land registrar and the surveyor.

On the issue raised by the applicant that the 1st respondent did not have letters of administration intestate when he asked for the survey report, I do find that the same is only raised in the submissions and not the notice of motion and therefore it is an afterthought. Moreover, the applicant complained against the 1st respondent before the land registrar and therefore it was the applicant who initiated the action.

In judicial review application a party is bound by the grounds raised in the statement filed with the application for leave. Order 53 rule 4 (1) provides for Statements and affidavits thus:-

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and **no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.**

The import of the above is that parties are bound by their pleadings and that a new issue cannot be introduced in the submissions.

It is my considered view that what was before the Land Registrar was a boundary dispute in respect of parcels numbers NORTH GEM/MALANGA/1117 and NORTH GEM/MALANGA/1132 and that the Land Registrar just required the map of the area to determine the boundaries. The Land Registrar did not require letters of administration ad litem to determine the boundaries.

It is the applicant who complained against the 1st Respondent before the Land Registrar that the 1st Respondent had encroached on his property and therefore the applicant cannot turn around and claim that the 1st Respondent did not have capacity to be sued. In any event this is a complaint based on trespass and therefore one does not require letters of administration to prove trespass.

The Land Registrar was not determining ownership of land but was determining the boundary between two parcels of land and whether the 1st respondent had encroached on the applicant's land.

The grounds for grant of judicial review orders are illegality, procedural irregularity and or irrationality.

In **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] Eklr**, it was summarised that an order of prohibition is usually issued by the 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.

When those principles are applied to the present case, the land registrar obviously has the power or jurisdiction to hear and determine a

boundary dispute. The question is how, not whether, that power is to be exercised.

On the efficacy of an order of Mandamus, HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89.

That learned treatise provides that the order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

I do find that there is no evidence that the Land Registrar relied on the report of the surveyor that was prepared later as there is no surveyor's report annexed to the application. There is no procedural irregularity proved as the parties were notified of the hearing and were heard. The Land Registrar determined the boundary dispute with the input of the Land Surveyor who visited the site and pin-pointed the boundary.

I do find that the decision of the Land Registrar was not Tainted with illegality as the land registrar had the power to hear and determine the dispute. The application appears seeking the courts intervention by going into the merits of the boundary dispute and therefore lacks basis and is dismissed with costs.

DATED AT KISUMU THIS 11th DAY OF FEBRUARY, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE