



Republic v County Surveyor of Machakos & another; Mwakavi (Exparte Applicant); Maingi (Interested Party) (Judicial Review Application 2 of 2023) [2024] KEELC 1761 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
JUDICIAL REVIEW APPLICATION 2 OF 2023**

A NYUKURI, J

APRIL 11, 2024

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI,
PROHIBITION AND MANDAMUS BY JAPHETH MUKINYI MWAKAVI**

AND

**IN THE MATTER OF DECISION OF THE MACHAKOS COUNTY SURVEYOR
CONTAINED IN THE REPORT DATED THE 24TH JANUARY 2022**

AND

IN THE MATTER OF LAND REGISTRATION NO. MAVOKO TOWN BLOCK 3/43224

AND

IN THE MATTER OF ARTICLE 25 (C), 47 AND 50 OF THE CONSTITUTION

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT CAP 300 (LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SURVEYOR OF MACHAKOS 1ST RESPONDENT

COUNTY LAND REGISTRAR MACHAKOS 2ND RESPONDENT

AND

JAPHETH MUKINYI MWAKAVI EXPARTE APPLICANT



AND

JACKSON MAINGI INTERESTED PARTY

JUDGMENT

Introduction

1. Pursuant to leave granted by this court, the ex-parte applicant vide a notice of motion application dated 14th March 2023 sought the following orders;
 - a. That the honorable court be pleased to issue an order of certiorari directed to remove into this court and quash the decision/report of the county surveyor Machakos dated 24th January 2022.
 - b. That this honorable court be pleased to issue an order of prohibition to prohibit the respondents from implementing the decision/report of the County Surveyor Machakos dated 24th January 2022 as far as plot No. Mavoko Town Block 3/43224.
 - c. That this honorable court be pleased to issue an order of mandamus compelling the respondents to redo the boundary rectification and verification to plot no. Mavoko Town Block 3/43224 as per the original map and in the presence of the ex-parte Applicant and his private surveyor.
 - d. That this Honourable court be pleased to grant any further orders as it may deem fit to meet the ends of justice.
 - e. That cost of this application be borne by the respondents.
2. The application was based on grounds on the face of it and supported by the affidavit of Japheth Mukinyi Mwakavi, the ex-parte applicant and his statutory statement. He deposed that he was the registered proprietor of all that land known as Mavoko Town Block3/43224 located at Lukenya in Machakos county which is as a result of the subdivision of Mavoko Town Block 3/43224 (hereinafter referred to as the suit property). Further that on or about October 2021, he received summons from the county surveyor through the area chief requiring him to attend boundary verification to be conducted on 8th October 2021, but that the notice was very short and that his parcel of land was not among the ones mentioned, as the surveyor referred to parcels Mavoko Town Block 3/3121; 3135; 7485; 3133 and 3120.
3. He also averred that he received summons again on Monday 13th December 2021 to attend the following day, being 14th December 2021, but that the notice was too short since he needed time to prepare his documents and bring along his surveyor. It was his averment that he had attended the exercise on 24th January 2022, but was not satisfied with the decision of the surveyor since the map used was strange to him, leading to a big chunk of his land being taken away from him. According to him, the map was not tallying with the original map that was first used in the demarcation process and had been in use all through. It was also his averment that the surveyor purported to identify/rectify boundaries based on parcel numbers that no longer existed and in particular parcel number Mavoko Town Block 3/3135 which had since been subdivided to give rise to other new parcels including the applicant's parcel number 3/43224.
4. It was his contention that the surveyor declined to supply him with relevant documents. He argued that the entire process was unreasonable, illogical and biased with the aim of grabbing his land, as the



letters by the surveyors did not list his name or his parcel, nor did the letter prepared by the interested party and addressed to the chief, include his name as those to attend the exercise, yet he was a neighbor and the main party affected by the exercise. The applicant claimed that his constitutional right to a fair hearing was infringed and that he had sought redress from the court. He attached an official search, summons, surveyor's report, map, mutation, and letter by interested party to the area chief.

5. The application was opposed. Jackson Kiio Maingi, the interested party swore a replying affidavit dated 25th April 2023. He deposed that he was the registered owner of the land known as Mavoko Town Block 3/3120 and that around 2021, he visited the land with his private surveyor, being Mr. Fidelis Mutuku Munyoki of Astute Survey Solutions Limited who surveyed the land and issued him with a beacon certificate. He also averred that the said surveyor had informed him that the road which served as a boundary to his property was supposed to be twenty meters and not nine meters, resulting in him losing about two acres from his land to make way for the road, whereof he did not object.
6. He also averred that the said surveyor had established that the posts of the fence of the neighboring property registered in the name of the late David Nzioka Kitili, but sold to the ex-parte applicant, had encroached onto his property. It was his averment that he approached the ex-parte applicant and requested him to move his fence but the applicant had advised him to request the county surveyor to visit the property and identify the boundaries and that the decision of the county surveyor would be final and binding.
7. The interested party further stated that he visited the county surveyor's offices whereof the latter issued him with notices for the owners of the neighboring parcels so that they could also be present during the survey and that the said notices were all distributed by the village elder to their rightful owners, as directed by the area chief. He also averred that the said survey was conducted on 8th October 2021 in the presence of the area chief, the owners of the neighboring parcels including the ex-parte applicant and that no one questioned the explanations offered by the surveyor or the map which he used. Further that during the survey process, the county surveyor gave all the property owners opportunity to ask questions and to show him their respective boundaries. Also, that the county surveyor confirmed that there is a river between his property and the applicant's. He averred that the county surveyor then issued them with a report dated 5th November 2021.
8. The deponent also stated that they attended the site to complete the survey process once again on 14th December 2021, in the presence of the ex-parte applicant and that the survey report which had findings of the survey as well as a commendation for dissatisfied members was issued. He also averred that he proceeded to fence his property as per the county surveyor's instructions and that he requested the ex-parte applicant to move his fence accordingly. It was also the deponent's assertion that the ex-parte applicant had on 29th May 2022 requested him to forward the reports by the county surveyor, which he did and the applicant told him that he would seek legal redress.
9. It was the interested party's averment that the survey process was done twice in the presence of all the parcel owners, including the ex-parte applicant and that the said applicant did not raise any issue regarding subdivision or the map and the allegations raised in the application were an after-thought. He further deposed that as per the initial map, the property which shares the boundary with his parcel was title number Mavoko Town Block 3/3135 which was owned by one David Nzioka Kitili (deceased), and that the subdivision of the said land does not alter the boundary between the property and his property, being the reason for existence of two maps, before and after subdivisions but that the subdivisions only happened within and not without.
10. It was his deposition that during the period of the dispute, he had been in communication with the ex-parte applicant by WhatsApp and by call and during one of the calls, the applicant had added his private



surveyor to the call, informing him of the plans and requesting him to attend the survey, whereof his surveyor categorically stated that he would not attend and hung up the call. He averred that as per the Whatsapp chats, he had always communicated to the ex-parte applicant of the dates set for the survey works hence he had sufficient notice and he could have informed his surveyor if he so needed.

11. He stated that the ex-parte applicant had failed to demonstrate the prima facie grounds requisite for a judicial review application, as he failed to prove illegality; procedural irregularity and irrationality. Further that the process had followed due procedure with the applicant subjecting himself to the jurisdiction of the county lands surveyor, being present during the process and not raising any questions upon the explanations by the county surveyor.
12. He faulted the ex-parte applicant for approaching the honorable court through judicial review for prerogative writs on the merits of the county surveyor's report, arguing that the court lacks jurisdiction to deal with the merits of the decision of the county surveyor. He also contended that judicial review orders are remedies of last resort and that in the instant case, he had the option of appealing against the said report hence had not exhausted all available remedies. He attached the county surveyor report dated 30th November 2021; beacon certificate; notice dated 8th October 2021; forwarding letter dated 10th September 2021; map; surveyor report dated 24th January 2022; affidavit by one Fidelis Mutuku Mungoki; and WhatsApp communication extracts.
13. The respondents entered appearance but did not file any response, opting to rely on the responses by the interested party. The application was canvassed by way of written submissions. On record are the ex-parte applicants' submissions dated 14th August 2023 and filed on even date as well as the interested party's submissions dated 17th October 2023 and filed on 23rd October 2023.

Submissions by the ex-parte applicant __**

14. Counsel for the ex-parte applicant submitted that the applicant's right to a fair hearing was infringed in the following ways;
 - a. He was not given a notice in advance, as the surveyor's summons do not even contain his name or his parcel.
 - b. He was denied an opportunity to bring an independent surveyor to represent him during the exercise.
 - c. He was even denied a copy of the surveyor's report that showed the result of the exercise and couldn't challenge the same without a copy.
 - d. He was discriminated and treated unfairly since the interested party was given a chance to bring a private surveyor and was supplied with a copy of the surveyor's report while the ex-parte applicant was denied both despite requesting for them severally.
15. It was submitted for the applicant that these violations led to the ex-parte applicant's big chunk of land being excised off and awarded to the interested party, with the report dated 24th January 2022 raising eyebrows as the ex-parte applicant is not listed, nor is any name of the parties present or absent indicated. Further it was their submission that the report does not mention who had encroached into whose land and by what extent, yet the ex-parte applicant's land was excised off. It was reiterated that the respondents were biased, and discriminatory and that the process was materially flawed and aimed to favour the interested party.
16. Reliance was placed on Article 47 of *the Constitution* and the cases of Civil Service Union vs Minister for Civil Service (1985) A.C at 401D and HC Misc App.No.524 of 2017; R vs The Chief Licensing Officer



& Anor, *Exparte Tom Mboya Onyango*. It was their contention that the surveyor had outrightly chosen not to put into consideration the relevant matters, but did the opposite, to the extent of using a map whose parcels no longer existed. They prayed that the application be allowed with costs.

Submission by the interested party

17. On behalf of the interested party, counsel submitted that the application had introduced new grounds in the substantive application, which grounds were not included in the application for leave and the said grounds should not be considered by the court. In this regard reliance was placed on provisions of Order 53 rule 4(1) of the Civil Procedure Rules 2010 and on the case of *Diamond Hasham Laji & another v Attorney General & 4 Others*. It was further submitted that even if the court were to consider the additional grounds, the same would fail as the ex-parte applicant had failed to discharge his evidential burden of proof.
18. As to the merits of the case, counsel referred to the case of *Kenya National Examination Council vs Republic Exparte Geoffrey Gtahrenji & 9 Others*, Nairobi Civil Appeal No.266 of 1996 and submitted that the prayer for an order of prohibition is not available to the ex-parte applicant since the county surveyor had already delivered its decision. It was also argued for the interested party that the remedy of mandamus was not available since the respondent had not failed to determine the dispute as required under the law. Counsel cited the case of *Republic vs Principal Secretary, Ministry of Internal Security & Another Ex-parte Schon Noorani & Another* [2018] eKLR.
19. Regarding the prayer for the remedy of mandamus, counsel argued that the same was unavailable as the surveyor did not fail to determine the boundary dispute and that the applicant is not seeking for the court to compel the respondent to perform his statutory duties.
20. On certiorari, it was submitted for the interested party that the same was not merited since the applicant was challenging the merits of the county surveyor's report, which this court lacks jurisdiction since it is trite law that a judicial review application is not concerned with the merits but the decision making process. Reliance was placed on the case of *Municipal Council of Mombasa v Republic & another* [2002] eKLR. It was submitted that due process was followed since the land registrar is given the first mandate to settle any dispute on land and that he discharged this duty procedurally. They concluded by submitting that the ex-parte applicant failed to prove his case hence the application ought to fail.

Analysis and determination

21. Having considered the application, the response and rival submissions, the sole issue for determination is whether the ex parte applicant has met the threshold for grant of the judicial review orders sought.
22. Judicial review remedies are mainly concerned with the decision making process and not the merits of the decision complained against. In an application for judicial review, the court interrogates the process used in arriving at the impugned decision by considering matters including the legality; rationality; procedural propriety of the decision; and whether the decision maker had the requisite jurisdiction to make the decision in issue.
23. In the case of *Municipal Council of Mombasa v. Republic & Umoja Consultants Civil Appeal No. 185 of 201....*, the court held as follows;

Judicial review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant mattersthe court should not act as a Court of Appeal over the decider which would involve going



into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision.

24. Similarly, in the case of *Pastoli v. Kabale District Local Government Council & Others* [2008] 2 EA 300, the court held as follows;

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 – illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality.irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. the unfairness may be in non observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

25. In the instant case, the applicant’s complaint is that the county surveyor, Machakos acted irregularly when he excised a portion of his land in a survey exercise where his title was not listed as subject of the impugned survey process. He also faulted the notice given arguing that it was short. I have considered the parties documents. What both parties refer to as the decision of the surveyor is dated 24th January 2022 titled “Boundary identification at Mavoko Town Block 3/3120, 3121, 3135, 71485 and 3113. In that report, the county surveyor Machakos, indicates that the data collected was used to align the boundary of parcel 3120 as per the RIM and that the river and the road serve as boundary between neighbouring and adjacent parcels. It also states that present during the exercise were the area chief and parcel owners. The county surveyor recommended that the boundary established to be maintained and any dissatisfied member to seek legal redress.
26. Having considered the said decision, it is clear that the applicant’s parcel was not listed as one of the parcels to be affected, yet it is not disputed that the applicant was the owner thereof and the decision by the surveyor affected his parcel. This in my view, presented a process that was unfair to the applicant. In addition, having considered the manner in which the surveyor’s report was arrived at, starting from framing the matter as a boundary identification, instead of referring to the same as a boundary dispute, and failing to state the claimant and the respondent, in my view was unfair to the ex parte applicant and violated Article 50 of *the Constitution* since that framing did not clarify with precision, the nature of the case against him, and the person aggrieved, to enable him sufficiently prepare and present his defence accordingly.
27. Most critically, however is the question of jurisdiction. Although the surveyor’s report does not expressly refer to a boundary dispute, it is clear that it dealt with a boundary dispute because it refers to alignment of parcel 3120, and indeed the interested party states in his replying affidavit that the surveyor was settling a boundary dispute. From the response filed by the interested party, it is clear that he was aggrieved with the plots neighbouring his parcel and engaged a private surveyor who prepared a beacon certificate. From there, it was at his instance that the county surveyor issued notices to alleged owners of neighbouring parcels, terming the exercise as boundary identification when the real issue was that the owner of parcel 3120 was aggrieved and had a dispute with his neighbours. I therefore find and hold that the county surveyor Machakos in his report and decision of 24th January 2022, did determine a boundary dispute.



28. Does a county surveyor have jurisdiction to determine a boundary dispute regarding general boundaries, which is the case in this matter? I do not think so. Section 18 of the [Land Registration Act](#) vests jurisdiction of boundary disputes concerning general boundaries in the land registrar and provides as follows;
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](#), Cap. 299.
29. Having considered the search and Mutation forms produced by the applicant in this case, it is clear that the suit property together with all the properties referred to in the surveyor's report, including the interested party's title are all defined by general boundaries, which are approximate boundaries. Therefore, if any of the owners of the parcel numbers stated in the surveyor's report was aggrieved with how the boundary was aligned, they ought to have filed a boundary dispute with the Land Registrar Machakos county, who would then take evidence from the parties, and their chief and neighbours if need be, before making a decision on where the boundaries ought to be. That was not the case herein. I have considered the surveyor's report and there is no reference or indication as to the source of surveyor's jurisdiction in making the report.
30. Jurisdiction is the power to determine an issue or a suit and it flows from [the constitution](#) or statute or both and a court or tribunal or any other office cannot arrogate itself a jurisdiction it does not have. (See Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others in S.C Civil Application No. 2 of 2011).
31. As the county land surveyor Machakos, had no jurisdiction to determine the boundary dispute herein, therefore, in making the report dated 24th January 2022, he acted without jurisdiction and hence that decision is an illegality, null and void. Therefore, the applicant's prayers for orders of certiorari and prohibition are merited.
32. On whether the applicant is entitled to an order of mandamus to compel the respondent to redo boundary rectification and verification, it is trite that an order of mandamus is made where a public officer has declined to perform their statutory duty. The applicant having not demonstrated that he has filed a boundary dispute before the Land Registrar, and that the Registrar has declined to determine that dispute, the writ of mandamus cannot be available to him, as he has not demonstrated that he sought for the performance of that duty and that the same was declined. In any event, the county surveyor has no jurisdiction to rectify and verify a general boundary, which only vests in the Land Registrar.
33. In the premises, I am satisfied that the exparte applicant deserves orders of certiorari and prohibition. I therefore partially allow the application dated 4th March 2023 and make the following orders;



- a. That the honorable court hereby issues an order of certiorari to remove into this court and quash the decision and or report of the County Surveyor Machakos dated 24th January 2022.
- b. That this honorable court hereby issues an order of prohibition, prohibiting the Respondents from implementing the decision and or report of the County Surveyor Machakos dated 24th January 2022 as far as Plot No. Mavoko Town Block 3/43224 is concerned.
- c. The ex parte applicant is awarded costs of this suit to be borne by the interested party.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 11TH DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

No appearance for the applicant

No appearance for the respondent

Court assistant – Josephine

