



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC JR MISC. APPL. NO. 7 OF 2020

KATEPE ENE NCHIROINE.....APPLICANT

-VERSUS-

THE DISTRICT LAND REGISTRAR KAJIADO.....1<sup>ST</sup> RESPONDENT

THE DISTRICT SURVEYOR, KAJIADO.....2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

JUDGEMENT

Through an application dated 3<sup>rd</sup> February, 2020 the ex parte Applicant was granted leave to commence judicial review proceedings against the Respondents. The substantive motion was filed on 4<sup>th</sup> March, 2020. Therein the ex parte Applicant sought for the following orders;

- 1. THAT Order of Certiorari do and is hereby issued to bring into this Honourable Court for the purposes of being quashed;**
  - a. The decision purportedly issued through a Boundary Dispute Settlement Ruling between Katepe Ene Nchiroine Kamau and Paul T. Ole Toimasi delivered on 9<sup>th</sup> October 2019 and bearing the front-page date of 16<sup>th</sup> August 2019 and signing off date of 4<sup>th</sup> October 2019.**
  - b. The various Boundary Dispute Implementation Summons calling the Applicant and any other person to attend a meeting on the site between Katepe Ene Nchiroine Kamau and Paul T. Ole Toimasi of Land Number Kjd/ Dalalekutuk/3395 and Land Number Kjd/ Dalalekutuk/ 23 respectively.**
- 2. THAT an Order of Prohibition do and is hereby issued restraining the Respondents, their agents, servants and/or employees or any other person at their behest from demarcating the land by exercising an access road between Land Number Kjd/ Dalalekutuk/3395 and Land Number Kjd/ Dalalekutuk/23 before the extent of boundaries for Land Number Kjd/ Dalalekutuk /23 have been ascertained.**
- 3. THAT an Order of Mandamus do and is hereby issued compelling the Respondents or their agents, employees, or servants to conduct thorough investigations on the discrepancies appearing on the Maps for Land Number Kjd/ Dalalekutuk/ 3395 and Land Number Kjd/Dalalekutuk/23 and ascertain the extent of their boundaries, their measurements before making corrections on the map to reflect the correct position.**
- 4. THAT the costs of this application be provided for.**

The application is premised on the grounds on the face of it as well as the statutory statement dated 3<sup>rd</sup> February, 2020 and the verifying affidavit sworn on 3<sup>rd</sup> February, 2020 by **KATEPE ENE NCHIROINE KAMAU** where she deposes that she is the owner of Kjd/ Dalalekutuk/ 3395 contiguous to Kjd/ Dalalekutuk/ 23 owned by Paul T. Ole Toimasi. Further, that the different maps reflect different boundary between her land and that for Toimasi. She claims that the 1<sup>st</sup> Respondent commenced investigations and delivered ruling on 9<sup>th</sup> October, 2019 where four witnesses testified. She explains that being the first witness she indicated that she had requested the 1<sup>st</sup> Respondent to determine the boundary between her land and that of Toimasi and informed him that Toimasi uprooted one of her beacons. Further, that Toimasi testified that he subdivided his land No. 23 to form Numbers 585 and 586 respectively which land bordered the road. She contended that one Gideon Ole Sapur who participated in the demarcation, survey and subdivisions of the group ranch asserted that the entire group including officers from Land Adjudication Department did not know the extent of the boundaries of Toimasi's land. Further, he confirmed they did not gain access to land Number 23 to confirm the extent of the boundaries. She reiterated that one Jason Tiesi Sekeiyon confirmed

boundaries of land Number 23 are not certain. She proceeded to highlight the findings of the 1<sup>st</sup> Respondent and insisted there was no evidence to confirm whether Land No. 23 or No. 3395 had encroached on the other. She further explained that the 1<sup>st</sup> Respondent directed parties to maintain status quo but Paul T. Ole Toimasi has already erected a live fence. She reiterates that she will lose part of her land that had crossed the access road. She highlighted the discrepancies in the two maps that were used in determination of the boundary dispute.

She claims that the ruling was delivered on 9<sup>th</sup> October, 2019, but she received it on 13<sup>th</sup> November, 2019 more than a month after its delivery. Further, she instructed an advocate who noted the numerous discrepancies and sought clarification from the 1<sup>st</sup> Respondent on the appeal period as it had different dates but the 1<sup>st</sup> Respondent failed to respond to the same instead threatening her with enforcement summons. She avers that the Respondents ordered her coupled with threats that she would be penalized if she missed meetings but they however failed to turn up as indicated in the summons or communicate the change in meetings. Further, that it is Toimasi who served her with summons a few days to the meeting.

She claims that on 27<sup>th</sup> January, 2020 she received a letter from Paul Toimasi through a child indicating that the Respondents were to come on the ground for enforcements, which they did on 28<sup>th</sup> January, 2020 while accompanied by the said Toimasi with a group of armed youth, for purposes of excising the access road.

She states that it is unreasonable, unfair and illegal for the Respondents to implement a ruling marred by irregularities, errors and inconsistencies. Further, her objective was for the Respondents to consult parties, refer to all the maps and confirm the boundaries as they are mandated to do within reasonable time, which they failed. She thus contends that if the ruling is implemented with the discrepancies in the dates and demarcations effected, she stands to lose ten hectares of land to Paul T. Ole Toimasi.

The Respondents opposed the application by filing Grounds of opposition dated 28<sup>th</sup> September, 2020 on 29<sup>th</sup> September, 2020 where they sought for the application to be dismissed with costs. They averred that the ex parte Applicant has not met the threshold for granting judicial review orders of *Certiorari*; the application does not meet the grounds set out in section 7(2) of the Fair Administrative Action Act and contravenes section 13A of the Government Proceedings Act.

The Application was canvassed by way of written submissions.

#### **Applicant's submissions**

The ex- parte Applicant filed her submissions on 15<sup>th</sup> October, 2020 and while responding to the issue as to whether the application contravenes the provisions of Section 13A of the Government Proceedings Act, she contended that the Act only applies to cases of civil nature instituted against the government. To support this argument, she relied on **Section 13(A) (1) of the Government proceedings Act** and the cases of **Commissioner of Lands v Kunste Hotel limited (1997) eKLR**, and **Republic V County Secretary, County Government of Kiambu & another (2020) eKLR**.

On whether the application meets the threshold for Judicial Review, the ex parte Applicant relied on the case of **Republic V Dedan Kimathi University of Technology Ex parte Juma Ombolo Simon [2016] eKLR**, as well as section 18 of the Land Registration Act. She further relied on the case of **Republic v District Land Registrar , Thika Land Office Ex parte Bushline Properties Company Limited; Moses Amoro & Francis Karanja (Interested Parties) (2019) eKLR**, to buttress the argument that the 1<sup>st</sup> Respondent was exercising public powers when rendering the impugned ruling. She further relied on the case **Republic v Secretary of the Firearms Licensing Board & 2 others Exparte; senator Johnson Muthama [2018]eKLR** to advance the argument that the 1<sup>st</sup> Respondent exercised quasi-judicial authority and thus subject to the supervision of this court.

On the threshold for granting JR application, the ex parte applicant argued that the Respondents' acts were *ultravires* as the 1<sup>st</sup> Respondent failed to provide relevant supporting documents and information to support the Ruling and in so doing breached the provisions of Article 47 and section 6 of the Fair Administrative Actions Act. She relied on the cases of **Human Rights Commission & Another v Non-Governmental Organizations Co-ordination Board & Another [2018] eKLR**; **County Government of Nyeri & Another v John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 others [2016] eKLR** and **Section 7(2) of the Fair Administrative Actions Act** to buttress her averments.

On illegality, the ex parte Applicant argued that 1<sup>st</sup> Respondent refused to respond to the letter dated 29<sup>th</sup> December, 2019 which raised the numerous inconsistencies that went to the root of a fair hearing including right to appeal thus abrogating his duties as donated by law. To support her averments, she relied on **Sections 12, 14 and 18 of the Land Registration Act** and the case of **John Wachiuri (supra)**.

On the issue of unreasonableness and proportionality, while relying on the case of **John Wachiuri (supra)** , she argued that there were inconsistencies because all the witness during the hearing could not ascertain the extent of boundaries between Kjd//Dalalekutuk/ 3395 and Kjd/ Dalalekutuk/ 23.

On the question of procedural impropriety, she argued that she was served with summons by Toimasi a party against whom she had a boundary dispute and that the 1<sup>st</sup> Respondent sent summons threatening her with penal actions in the event she failed to attend the meetings but he failed to appear, during the date indicated on the summons nor alert her of the changes but would inform Toimasi.

She claimed the Respondents breached natural justice by failing to grant her a right to appeal their decision. To support these arguments, she relied on the case of **Standard Chartered Financial Services Limited & 2 others V Manchester Outfitters (Suiting Division) Limited (Now Known as King Woollen Mills Limited & 2 others [2016] eKLR**.

She argued that although she was granted 30 days to appeal to the ELC court from the date of the ruling there are different dates from which

the appeal can be reckoned; the front copy is dated 16<sup>th</sup> August, 2019, the signing off page is dated 4<sup>th</sup> October, 2019, the summons for parties to attend delivery of the ruling on 9<sup>th</sup> October, 2019 and she received a copy of the ruling on 13<sup>th</sup> November, 2019.

The ex parte applicant further argued that she risked losing her property arbitrarily and had legitimate expectation that the 1<sup>st</sup> Respondent would furnish her with documents relied upon in arriving at the ruling but the same were denied by the Respondents. She relied on the cases of **Re Estate of Said Abdalla (Deceased) (2018) and Republic V Land Registrar, Kajiado North District & 3 others (2018) eKLR** to support this argument.

### **Respondents' submissions**

The Respondents filed their submissions dated 11<sup>th</sup> November, 2020 where they stated that the Land Registrar complied with Section 19 of the Land Registration Act and Regulation 40 of the Land Registration (General) Regulations, 2017. They argued that this is evidenced by the fact that the ex parte Applicant filed a boundary dispute with the Land Registrar; summons were issued to the affected parties; the parties were heard and summoned to attend ruling on 9<sup>th</sup> October, 2019 vide summons dated 11<sup>th</sup> September, 2019 whereby the said Applicant admits to being present during the delivery of the said ruling.

The Respondents argue that the application does not meet the threshold for granting Judicial Review and as such orders sought cannot issue. To buttress this argument, they submitted that the Land Registrar had the jurisdiction to make the impugned decision; both parties were granted a chance to present their cases and that the Land Registrar considered relevant matters and made a determination. They relied on the cases of **Kenya Re- Insurance Corporation v National Land Commission (2018) eKLR and section 19 Land Registration Act** to buttress their averments.

They reiterated that the ex parte applicant is not entitled to the orders sought as she has not provided evidence to demonstrate that the Land Registrar's decision was made with bias, procedural impropriety, ulterior motives, failure to consider relevant matters, abuse of discretion, unreasonableness, and violation of legitimate expectation. They relied on the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR and Section 7(2) of the Fair Administrative Action Act**.

In conclusion, they submitted that the ex parte Applicant was granted 30 days within which to file an appeal to the ELC court as per Regulation 40(6) of the Land Registration (General) Regulations, 2017 but failed, consequently the Registrar proceeded to implement the ruling under Regulation 40(7).

### **Analysis and Determination**

Upon consideration of the Notice of Motion dated the 4<sup>th</sup> March, 2020 including the Statutory Statement dated the 3<sup>rd</sup> February, 2020, the verifying affidavit, Grounds of Opposition as well as rivaling submissions, the following are the issues for determination:

- Whether the ex parte Applicant is entitled to the Judicial Review orders sought?
- Who will bear the costs?

As to whether the ex parte Applicant is entitled to the Judicial Review Orders sought. The ex parte Applicant has sought for orders of Certiorari, Mandamus and Prohibition to quash the decision of the Land Registrar (1<sup>st</sup> Respondent) in respect to the determination of the boundary dispute over land parcel numbers **Kjd/ Dalalekutuk/3395** and **Land Number Kjd/ Dalalekutuk/ 23** respectively. Further, she has sought for orders to quash the summons by the Land Registrar to implement the impugned Ruling. It is not in dispute that the ex parte Applicant is the proprietor of land reference number **Kjd/ Dalalekutuk/3395** while Paul Ole Toimasi is the owner of land parcel number **Kjd/ Dalalekutuk/ 23**. The two parcels of land had a boundary dispute culminating in the Land Registrar exercising his mandate as per section 18 and 19 of the Land Registration Act to determine it. This is the basis of the judicial review application as the ex parte applicant is aggrieved by the said decision and highlighted various discrepancies during the said process.

The Court in the case of **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** described judicial review as follows: 'Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the **Commissioner of Lands –versus Hotel Kunste [1997] eKLR**. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See **David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR)**. JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See **Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR**. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See **Zakayo Michubu Kibwange case (Supra)**. The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'

In the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal highlighted circumstances under which a party can seek an order of mandamus, and cited with approval, Halsbury's Law of England, 4<sup>th</sup> Edn. Vol. 7 p. 111 para 89 and stated thus:**

**"The order of mandamus is of 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 or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”**

Further in the case of **Municipal Council of Mombasa – v- Republic & Umoja Consultants Ltd Civil Appeal No.185 of 2001** it was held that :

**“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 the 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 matters.... The 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.”**

See also the Ugandan case of **Pastoli –v- Kabali District Local Government Council & Others (2008) 2EA 300-301.**

In line with the standards set in the aforementioned decisions, I will proceed to decipher whether the 1<sup>st</sup> Respondent's actions in determining the boundary dispute was rational, reasonable and that he observed the basic rules of natural justice. Before proceeding, the key question we need to ponder is whether the ex parte Applicant was granted a due process by the Land Registrar to hear and determine the boundary dispute. I note the Land Registrar is the one mandated in law to deal with boundary disputes before the same can be handled in Court. The ex parte Applicant admits participating in the boundary dispute proceedings but contends that the decision from the said proceedings was not properly communicated hence interfering with her right to appeal. On perusal of the Land Registrar's report in respect to the boundary dispute proceedings, I note it bears two dates. At the front page, it is dated the 16<sup>th</sup> August, 2019 while at the back page, it is signed off on 4<sup>th</sup> October, 2019 but as per the summons notifying the parties on the delivery of the Ruling, it indicates the same would be done on 9<sup>th</sup> October, 2019. The ex parte Applicant claims she received the typed proceedings on 13<sup>th</sup> November, 2019 more than one month after the Ruling had been delivered after the period of appeal had lapsed yet the 1<sup>st</sup> Respondent had indicated that any aggrieved party could appeal in 30 days. The ex parte Applicant further claims summons for the implementation of the impugned decision were not properly served upon her as the same was brought by Paul ole Toimasi who was a party to the dispute. Further, there were different maps relied upon by the Land Registrar which had discrepancies. As per the proceedings herein, I note the Respondents only filed Grounds of opposition and no replying affidavit to controvert the various averments by the ex parte Applicant.

Article 47 of the Constitution provides that: **‘(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) 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’.**

While Article 50 guarantees a person a right to fair hearing and Article 40 provides for right to property. Further, Section 7 of the Fair Administrative Actions Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to— (a) a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Subsection (2) provides that a court or tribunal under subsection (1) may review an administrative action or decision on any of the grounds listed in the said section.

Based on my analysis above while associating myself with the aforementioned decisions as well as the cited legal provisions, I find that failure by the 1<sup>st</sup> Respondent to properly inform the ex parte Applicant of the exact date of the Ruling to enable her lodge an appeal within 30 days as required by law amounted to ‘procedural impropriety’. Further, the 1<sup>st</sup> Respondent has not denied that when the ex parte Applicant's legal representative sought clarity on certain issues in respect to his Ruling, he failed to respond to their said letter and instead proceeded to implement the impugned Ruling. The 1<sup>st</sup> Respondent has further not denied using the services of Paul Ole Toimasi a party to the proceedings, to serve summons upon the ex parte Applicant. To my mind, even if he convened the boundary dispute hearing where the ex parte Applicant participated, I find the discrepancies in his actions after the hearing, contravening the Rules of Natural Justice as well as the provisions of the Section 7 of the Fair Administrative Action Act including Articles 40, 47 and 50 of the Constitution which I have cited above. I opine that a right to Appeal is a constitutional right which each party has. Further, failure to allow an aggrieved person to lodge an Appeal against a Public Officer's decision, demonstrates that there was lack of procedural fairness on the part of the said officer. To my mind, I find that the 1<sup>st</sup> Respondent's actions after hearing the boundary dispute *were tainted with irrationality. It seems to me the ex parte Applicant was not accorded fair treatment as required by the law.* Based on my analysis above, I find the Notice of Motion dated the 4<sup>th</sup> March, 2020 merited and proceed to allow it in the following terms:

i. An Order of Certiorari be and is hereby issued quashing:

a. The decision purportedly issued through a Boundary Dispute Settlement Ruling between Katepe Ene Nchiroine Kamau and Paul T. Ole Toimasi delivered on 9<sup>th</sup> October 2019 and bearing the front-page date of 16<sup>th</sup> August 2019 and signing off date of 4<sup>th</sup> October 2019.

b. The various Boundary Dispute Implementation Summons calling the Applicant and any other person to attend a meeting on the site between Katepe Ene Nchiroine Kamau and Paul T. Ole Toimasi of Land Number Kjd/ Dalalekutuk/3395 and Land Number Kjd/ Dalalekutuk/ 23 respectively.

ii. An Order of Prohibition be and is hereby issued restraining the Respondents, their agents, servants and/or employees or any other person at their behest from demarcating the land by exercising an access road between Land Number Kjd/ Dalalekutuk/3395 and

Land Number Kjd/ Dalalekutuk/23 before the extent of boundaries for Land Number Kjd/ Dalalekutuk /23 have been ascertained.

iii. An Order of Mandamus be and is hereby issued compelling the Respondents or their agents, employees, or servants to conduct thorough investigations on the discrepancies appearing on the Maps for Land Number Kjd/ Dalalekutuk/ 3395 and Land Number Kjd/Dalalekutuk/23 and ascertain the extent of their boundaries, their measurements before making corrections on the map to reflect the correct position.

iv. THAT the costs of this application are awarded to the ex parte Applicant.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21<sup>ST</sup> APRIL, 2021**

**CHRISTINE OCHIENG**

**JUDGE**