



Republic v County Land Registrar, Kisumu County & 3 others (Judicial Review Application E004 of 2021) [2022] KEELC 135 (KLR) (5 May 2022) (Judgment)

Neutral citation: [2022] KEELC 135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
JUDICIAL REVIEW APPLICATION E004 OF 2021
A OMBWAYO, J
MAY 5, 2022
IN THE MATTER OF L.R NO. KISUMU/MARERA/2039**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY LAND REGISTRAR, KISUMU COUNTY 1ST RESPONDENT

COUNTY SURVEYOR, KISUMU COUNTY 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

LAWI OHULU WAMBANI 4TH RESPONDENT

JUDGMENT

1. The application before the Court, brought by way of a judicial review seeks to assert a boundary delineation for the suit property, namely LR No Kisumu/Marera/2039. The application seeks the following main orders: -
 - i) An order of mandamus to compel the 1st and 2nd Respondents to visit and fix the boundaries of Kisumu/Marera/2039.
 - ii) An order of mandamus to compel the 1st and 2nd Respondents to indicate whether or not there has been any encroachment on Kisumu/Marera/2039 and if so, to what extent and by the owner or occupant of which parcel of land.
 - iii) An order of mandamus to compel the 1st and 2nd Respondents to visit the location and ascertain the borders properties known as Kisumu/Marera/2039.
 - iv) An order of mandamus to compel the Land Registrar Kisumu to remove the restriction registered on 5/10/2020 in respect of the parcel Kisumu/Marera/2039.



2. The Applicant has adduced evidence in the form of a search certificate and green card to prove that he is the registered owner of the suit property. He has also annexed a sale agreement between him and his sister, one Millie Hellen Awuor Ger to prove that he purchased the suit property.
3. He claims that following purchase of the property, his neighbours, particularly one Henry Adiyi Otiende trespassed by destroying the euphorbia boundary, which caused him to report the matter to the Chief and subsequently, a boundary dispute was declared. He however claims that despite the existence of the boundary dispute, the Registrar did not act until June 2017, but the exercise was not concluded successfully because his said neighbours chased away the surveyor. This event, he claims caused his said neighbours who he terms as the trespassers to create a road through his land and this prompted him to lodge a criminal complaint at Maseno Police Station. He claims that the OCS advised him to proceed with the survey exercise but that the trespassers hired goons who once again sent away the surveyor. He urges that despite demand, the trespassers have failed to indicate the basis for their adamant trespass. Citing Section 18 (2) of the *Land Registration Act* and the case of *Samuel Njoroge Gituku & 6 others v Kenya Rural Road Authority & 5 others* [2017] eKLR and *Maricus Otieno Okwayo vs George Owenge Aluoch* [2017] eKLR and *Willis Ocholla v Mary Ndege* [2016] eKLR he urges that boundary disputes are committed to the Land Registrar for determination in the first instance.
4. Despite service of the application upon the Respondents and despite a previous appearance on behalf of all the Respondents, they have not responded to the application.
5. The objective of judicial review was discussed by Lord Brightman in *Chief Constable of the North Wales Police vs Evans* [1982] 1 WLR 1155 where he noted as follows: -

‘Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.’
6. The Court of Appeal (Akiwumi, Pall, JJ.A. & Bosire Ag. J.A) also outlined the objectives of judicial review proceedings in *Commissioner of Lands v Kunste Hotel Limited* [1997] eKLR as follows: -

‘But it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. (See; R v. Secretary of State for Education and Science ex parte Avon County Council [1991] 1 ALL ER.282, at p. 285).’
7. The Applicant seeks that the lands registrar undertakes a survey of the suit property in order to ascertain the boundaries. He however admits that there have been a number of previous attempts to conduct the survey exercise, only that the same were not carried out successfully, owing to disruption by his neighbours. He names one of these neighbours as Henry Adiyi Otiende. These facts are indicative of the fact that the Applicant’s complaint is not based on the fairness process of carrying out the survey by the Lands Registrar and neither is it based squarely on an omission to act, which as per the Section 2 of the Fair Administrative Actions Act, also constitutes a decision. Although he claimed that the Lands Registrar took long to act, it is clear that the Lands Registrar finally acted, only that his efforts were thwarted by the neighbours. A significant portion of his complaints is on the fact that owing to the disruptions by the neighbours, the survey exercise has been disrupted severally. Materially, the said neighbours have not been enjoined to these proceedings. The Applicant’s case appears to be against the alleged trespassers as opposed to the Lands Registrar. Noteworthy, prayer b of his application seeks to



compel the 1st and 2nd Respondents to indicate whether there has been encroachment and to identify the said encroachers. This thus appears to be a case seeking to enforce one's private rights as opposed to a clear judicial review case.

8. Concerning the claim that the Registrar, without notice, placed a restriction over the said parcel of land, while it is true that Section 76 and 77 of the Lands Registration Act require the Registrar to give notice of the restriction to affected parties. It is, however, noteworthy, from the contents of the search and green card adduced by the Applicant, that the said restriction was instigated by one Mary Oluoch Olwande. Mary Oluch Olwande is said to have been the initial owner of the property, from whom the Applicant's sister bought the suit property. Since this was information readily available to the Applicant, it behoved him to enjoin the said Mary Oluoch Olwande to these proceedings to answer to the application. This is a basic principle of natural justice and fair administrative action. Issuing an order that the restriction be removed would have adverse effects on the said Mary Oluoch Olwande. It, therefore, follows that she should be given an opportunity to be heard before the orders are granted. Generally, the Applicant appears to have mischievously omitted to include key persons as parties to this case and this does not reflect a fair process.
9. The Applicant has failed to lay sufficient basis for the grant of the orders sought and as such, the application should be dismissed. Since the Respondents did not respond to the application, there shall be no order as to costs. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 5TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

