



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**JUDICIAL REVIEW APPLICATION NO. 4 OF 2020**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND SURVEYOR, UASIN GISHU COUNTY.....1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, UASIN GISHU COUNTY.....1<sup>ST</sup> RESPONDENT**

***EX PARTE***

**NATHAN SONGOK.....1<sup>ST</sup> APPLICANT**

**PHILIP K. KIPTAL.....2<sup>ND</sup> APPLICANT**

**KIPKIRONG TIONY.....3<sup>RD</sup> APPLICANT**

**MARY J. KEINO.....4<sup>TH</sup> APPLICANT**

**AARON K. CHEPKWONY.....5<sup>TH</sup> APPLICANT**

**GIDEON K. NDEGE.....6<sup>TH</sup> APPLICANT**

**JONAH K. RUGUT.....7<sup>TH</sup> APPLICANT**

**DAVID K. TUNDURIA.....8<sup>TH</sup> APPLICANT**

**JUDGMENT**

The *Ex Parte* Applicant filed a Notice of Motion dated 27<sup>th</sup> February, 2020 together with a statement seeking for the following orders:

- a) An order of certiorari to remove into Court and quash the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued verbally, refusing to conduct survey on the *Ex Parte* Applicants' parcel of land referenced into as **UASIN GISHU/JABALI/97** without lawful or justifiable cause and without giving any written reasons for the said action.
- b) An order of mandamus directing the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to visit and conduct survey on the *Ex Parte* Applicants' parcel of land referenced into as **UASIN GISHU/JABALI/97** to point out and establish beacons, boundaries, occupation and use thereof within 30 days from the date of judgment.
- c) The costs of this application be borne by the Respondent.

**FACTS**

The *Ex Parte* Applicants are the registered proprietors in common of Land Reference No. **UASIN GISHU/JABALI/97** measuring approximately 33.9 Hectares having purchased the suit land from the Estate of Ismael Chelanga (deceased) when the said suit land had no

boundaries and or beacons.

That the *Ex Parte* Applicants sought to establish the boundaries of the suit land as they were apprehensive that some trespassers had encroached their land.

The *Ex Parte* Applicants paid the requisite survey fees of Kshs. 17,400.00 on 7<sup>th</sup> October, 2018 in order to get the office of the 1<sup>st</sup> Respondent to survey the suit land to establish the boundaries but to date the survey exercise has not been done.

Subsequently the *Ex Parte* Applicants sought to engage the services of the office of the 2<sup>nd</sup> Respondent to help solve a boundary dispute between the *Ex Parte* Applicants and the owners of the adjacent parcels of land and paid the prescribed fees of Kshs. 5,000.00 on 2<sup>nd</sup> August, 2019 but to date the office of the 2<sup>nd</sup> Respondent has not taken any steps to resolve the dispute.

It was the *Ex Parte* Applicant's case that the Respondents' refusal to act without giving them a hearing amounts to a contravention of Article 50 of the Constitution of Kenya, 2010 which guarantees the right to a fair hearing. The Respondents' conduct aforesaid also amounts to an unfair administrative action in contravention to the provisions of Article 47 of the Constitution of Kenya, 2010.

The Respondents filed grounds of opposition dated 16<sup>th</sup> October, 2020 to the effect that the order of certiorari is untenable as there is no published decision to be brought before the Court for quashing, that the *Ex Parte* Applicants need not demand that the Respondents perform their statutory mandate and further that the *Ex Parte* Applicants' Application cannot be sustained noting that the refusal to act cannot be ascertained and no specific individual from the Respondents' offices can be cited for the refusal to act.

Counsel filed submissions in respect of the application.

### **EX PARTE APPLICANTS' SUBMISSIONS**

Counsel for the *Ex Parte* Applicants submitted that the applicant has established the grounds for grant of Judicial Review Orders sought in accordance with the nature and scope of the Judicial Review proceedings as was stated in the decision of **Republic V. Kenyatta University Ex Parte Martha Waihuini Ndungu (2019) eKLR** where it was held that the Judicial Review process concerns itself with the decision-making process, not the decision itself.

It was counsel's further submission that the *Ex Parte* Applicants are entitled to an order of mandamus which will in effect compel the Respondents to perform their public legal duty in a bid to remedy and or control procedural delays as was held to be the case of **Republic V. Principal Secretary Ministry of Internal Security & Another Ex Parte Schon Noorani & Another (2018) eKLR**.

Counsel also cited the case of **Kenya National Examination Council V Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR** to buttress his argument that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person 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.

Mr. Lagat further submitted that there is no other befitting remedy due to the *Ex Parte* Applicants as was held in the case of **Republic V Director of Surveys & 5 Others Ex -Parte Ndeffo Company Limited [2017] eKLR** . That the decision by 1<sup>st</sup> Respondent to refuse or to fail to carry out a survey exercise with a view of establishing boundaries and beacons on the suit land and the 2<sup>nd</sup> Respondent's decision to refuse or to fail to hear and determine the boundary dispute is tainted with illegality.

Counsel also stated that the respondent's inaction violates Article 47 of the Constitution of Kenya which guarantees the right to administrative action that is expeditious, efficient, lawful, reasonable, procedurally fair and a right to be given a written reason for actions that will adversely affect them. Counsel relied on the case of **Judicial Service Commission V Mbalu Mutava [2015] eKLR** which further expounded the import of Article 47 of the Constitution of Kenya and urged the court to allow the application as prayed.

### **RESPONDENTS' SUBMISSIONS**

Counsel for the respondents opposed the application and relied on the grounds of opposition and submitted that the scope of Judicial Review is concerned with the decision making process and not the merits of the decision as was held in the cases of : **Republic V Public Procurement Administrative Review Board & 2 Others Ex Parte - Sanitam Services (E A) Limited [2013] eKLR, Municipal Council of Mombasa V Republic & Another [2002] eKLR and Seventh Day Adventist Church (East Africa) Limited V Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another [2014] eKLR**.

Mr Kuria submitted that the dispute at hand does not fall within the ambit of Judicial Review and relied on the cases of **Council of Civil Service Unions Versus Minister for the Civil Service (1985) AC 374 and Republic Vs Public Private Partnerships Petition Committee (The Petition Committee) 63 Others Ex Parte AP M Terminals [2015] eKLR** where the grounds of Judicial Review are set out and explained at length which grounds include illegality, irregularity and procedural impropriety.

Counsel also submitted that the applicant has not attached the decision for review in accordance with Order 53 Rule 7(1) and cited the case of **Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR** where the Court declined to issue an order of certiorari where the impugned decision was not attached noting that failure to comply with Order 53 Rule 7(1) renders the proceedings incompetent.

Further that Courts cannot quash non-existent decisions as was held in the case of **Republic V Mwangi S. Kimenyi Ex -Parte Kenya**

Counsel therefore urged the court to dismiss the application with costs.

### **ANALYSIS AND DETERMINATION**

The ingredients of Judicial review are as was stated in the Court of Appeal case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others [1997] eKLR** 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.....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 or 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. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.....These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done.....Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”*

The issue for determination is whether a verbal refusal to act fall under the ambit of judicial review and whether the applicant has established that they deserve the orders sought.

The respondent is under a duty to carry out surveys and put beacons on the boundaries according to the law and regulations. The applicant had paid the requisite fees for the survey works to be carried out and further fees for the resolution of a boundary dispute. Where else is the applicant to get such a service which is the mandate of the Survey office to establish boundaries and records.

An order of mandamus is meant to compel the respondents to perform their public duty which is imposed on them by a statute and where they fail to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. In this case the respondent must be compelled to carry out the duty to survey the land. The respondents have not given a reason for its refusal to act. In this case the applicant is not seeking for an order of prohibition as the act has already happened.

The respondent’s counsel had argued that a verbal order cannot fall within the ambit of judicial review. In the case of **JOHN KIPKOECH ROTICH & 29 OTHERS V DRINKS REGULATION COMMITTEE EX PARTE JOHN KIPKOECH ROTICH T/A SILENT PUB & 29 OTHERS [2019] eKLR** the court held as follows:

*By the inherent jurisdiction of the Court, section 3A of the Civil Procedure Act under which the Order 53 rules are made saves “the inherent powers of the Court make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”. To defeat a Judicial Review claim on the ground merely that the decision was verbal and therefore not capable of being attached to the Verifying Affidavit is unjust. An injustice may be occasioned on a party by the verbal direction of an administrative body or person in authority, which because of its unwritten nature may not in accordance with the rule for attachment under order 53 rule 7 (1) of the Civil Procedure Rules, be capable of being attached... The verbal decision herein is capable of being quashed... The Respondent having failed, in breach of the Act 47 Constitutional right to fair administrative action, to give written reasons for the decision to close the Applicants’ bars cannot rely on the unwritten state of the decision to oppose its capability of being quashed by being removed to the High Court from quashing, in the terminology of Order 53 Rule 7 (1) of the Civil Procedure Rules. The requirement of lodging a copy of decision on proceedings, which is subject to the saving clause of section 3 of the Civil Procedure Act, could not take away the power of the Court to quash a decision which through unwritten as capable of being enforced as in this case the order to close the bar operation being enforced by the Administration Police. To remedy the threatened injury of closure of the bars without due process, the Court must be able quash the unwritten decision of the Respondent.*

The court should protect the rights of parties who may be injured by the mischief of public servants who give verbal refusal to act on their mandate to avoid accountability. The issue of one’s word against the other would arise without written communication. This mischief must not be allowed to flourish especially with the court’s wide discretion. The Respondents’ refusal to conduct a survey and to resolve a boundary dispute has been proved by the existence of receipts for payment of survey fees dated 7<sup>th</sup> October 2018, a receipt for payment for the resolution of a boundary dispute dated 2<sup>nd</sup> August, 2019 and an Application Form to that effect.

When public Officers are mandated by law and regulations to do certain tasks for the public, it is not discretionary but they are under a duty to perform their without being begged by the citizens. If they have challenges especially with logistics, they should be able to communicate the same to the citizens and the way forward. It is not right for public officers to ignore the parties who seek their services as they are in such offices because of the mandate bestowed on them by the people of Kenya. Whom do they want to serve if not the Kenya citizens?

In the case of **Agricultural Finance Corporation v Land Control Board of Loitokitok & 3 others [2014] eKLR**, Odunga J held that:

*“This clearly imposes a statutory duty on the Board to give its decisions in writing stating the reasons thereof. In this case, it is contended, a contention which though made on oath is not controverted on oath that the decision declining to grant the consent was verbal and that no reasons were given. That being the position, it is clear that the refusal to give the consent was clearly procedural. Apart from that Article 47 of the Constitution similarly obliged the 1<sup>st</sup> Respondent to give its decision in writing with reasons for making the same”.*

The Learned Judge further held that:

*Accordingly, the order which commends itself to me and which I hereby grant is an order of mandamus compelling the 1<sup>st</sup> Respondent to consider the applicant’s application for consent and give the applicant reasons if its decision is adverse to the interest of the applicant within 30 days from the date of service of this order. In default of such reasons, then the Respondent will be deemed not to have any reasons in which event an order of mandamus shall issue compelling the Respondent to issue the said consent.*

I have considered the submission by counsel and come to the conclusion that the applicant deserves an order of mandamus compelling the respondents to give reasons why they have not acted on the applicants ‘request for the survey of **LR No. UASIN GISHU/JABALI /97** and the dispute therein within 14 days and failure of which the respondent to carry out the survey within 30 days the applicant having paid for the services. Each party to bear their own costs.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF AUGUST 2021.**

**M. A. ODENY**

**JUDGE**