



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION NO. 1 OF 2020

IN THE MATTER OF: ARTICLE, 22 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 40,47,50, AND 186 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF: LAND ACT

BETWEEN

JOHN MUCHIRI NDEGWA AND JAMES MWAURA NDEGWA (suing on behalf of themselves and

estate of Samuel Ndegwa

Muchiri).....PETITIONERS

VERSUS

YUSUF ISAACK (SURVEYOR COUNTY GOVERNMENT OF KIAMBU).....1ST RESPONDENT

STEPHEN MAINA MACHARIA.....2ND RESPONDENT

AND

ETHICS AND ANTI CORRUPTION COMMISSION.....INTERESTED PARTY

JUDGMENT

By a **Petition** dated 7th July 2020, the Petitioners herein brought this suit against the Respondents and the Interested Party seeking for orders that;

- 1. A declaration that the 1st Respondent personal has no statutory authority and/or power to adjudicate purported disputes between private persons over private property including land whether in his personal or official capacity.**
- 2. An order of certiorari to quash the decision of 30th/06/2020, by the 1st Respondent purporting to adjudicate the purported boundary dispute on 10th/07/2020, or on any other date.**
- 3. An order of prohibition to prohibit the 1st Respondent from proceeding to carry out his decision purporting to hear,**

determine or align the boundary or otherwise deal with the purported boundary dispute on 10th/07/2020, or on any other date.

4. An injunction to restrain the 1st and 2nd Respondents from interfering with the existing fence, hedges, posts or other features that demarcate the boundary between Ndumberi/Riabai/7320 and Ndumberi/Riabai/849, or entering into, removing the boundary hedge, cutting trees, crops, planting beacons, purporting to issue a beacon certificate, erecting any structure or otherwise interfering with the Petitioner's quiet possession of Ndumberi/Riabai/ 849.

5. A declaration that under Article 79 of the Constitution and Section 25 of the Anti -Corruption and Economic Crimes Act, the interested party is constitutionally and statutorily bound to investigate and conclude the investigation on the report of abuse of office of the 1st Respondent and report in writing and with lawful reasons in event they decide not to investigate or to discontinue with investigation under Article 35(1) of the Constitution and Section 4 and 5 of the Right to Information Act, supply the estate with copy of the request allegedly received the office of Surveyor Yusuf prior to 17/06/2020.

6. An order directing the 1st Respondent within 7 days of the order to supply the Petitioner with;

a) Copies of all comments/assessments made on the alleged request and

b) Copies of all receipts for all revenues/monies collected against the said request.

c) Copies of all other documents forming the basis of the proposed exercise of 10/07/2020

7. Costs of the petition

8. Any other relief that the court may deem fit.

The Petitioners averred that **Samuel Ndegwa Muchiri (deceased)** is the beneficial owner of **Ndumberi/Riabai/849**, while the 2nd Respondent is the owner of **Ndumberi/Riabai/7320**, which borders **Ndumberi/Riabai/849**. That there exists a maintained boundary comprising of hedges, posts and other features demarcating **Ndumberi/Riabai/849** and **Ndumberi/Riabai/7320**. That the 2nd Respondent has tried to destroy the boundary features.

They further averred that the 1st Respondent directed that he would on **23/06/2020**, hear and determine a boundary dispute between the Petitioners and 2nd Respondent relating to **Ndumberi/Riabai/7320**, and **Ndumberi/Riabai/849** and on **22/06/2020**, the Petitioners objected on the grounds that the County Government has no role in boundary dispute and that the request could not have been made by **Samuel Ndegwa Muchiri (deceased)** because he died on **03/08/2000**.

It was their contention that the 1st Respondent acted ultra vires and that they believe that he is colluding with the 2nd Respondent to commit a Corruption Offence Contrary to Section 45(1) (d) of the Anti-corruption and Economic Crimes Act, by failing to protect public property and revenue.

The Petition was opposed and the 2nd Respondent filed a Replying Affidavit dated **5th August 2020**, and averred that from the onset, the Petition exhibits dishonesty, malafides and outright lies. That he is the registered owner of **Ndumberi/Riabai/7320**. He further averred that the two parcels of land have a common boundary and that the said boundary requires alignment. That he approached the 1st Respondent who advised them to do a letter for such requirement. That there exists no dispute and the request to align was meant to only mark the boundary.

The 1st Respondent filed Grounds of Opposition dated **3rd May 2021**, and averred that the Petitioners have not demonstrated any abuse of office by the 1st Respondent and have not presented factual or substantial claim or dispute that has arisen between themselves and the 1st Respondent for adjudication before this Honorable Court.

The Interested Party filed Grounds of Opposition dated **19th January 2021**, and averred that the Commission is established under Section 3 of the **Ethics and Anti-Corruption Commission Act** and it is independent and cannot be directed in execution of its mandate by anybody. That the Commission is not a necessary party in this Petition, and its participation should be dispensed with.

The Petition was canvassed by way of written submissions and the Petitioners through the **Law Firm of Sina Law Advocates** filed written submissions dated **4th November 2020**, and submitted that **Section 19 of Land Registration Act** exclusively vests the Land Registrar with the jurisdiction to hear and determine boundary disputes in the 1st instance. They relied on the case of **Willis Ocholla v Mary Ndege (2016) eKLR**.

The 1st Respondents filed his written submissions on **13th July 2021**, through **Natalia S. Sanaet** for **County Government of Kiambu**, and submitted that no laws have been breached, no rights have been infringed, and there was no abuse of office thus the Petition should be struck off.

The Interested Party filed its written submissions on **7th June 2021**, through **Olga Ocholla**, and submitted that the Petitioners have not presented factual or substantial claim that have arisen between themselves and the interested party, which calls for adjudication before this Court. That Petitioners have not demonstrated how their constitutional rights have been infringed upon. It relied on the case of **Anarita Karimi Njeru v Republic (No.1) (1976-80) 1KLR**.

The 2nd Respondents filed his submissions on 27th January 2021, through the Law Firm of G.N Thiongo Advocates, and submitted that the Petitioners will suffer no loss in any way if the boundaries were to be aligned.

The Court has carefully read and considered the Petition, the Replying Affidavits, the written submissions and relevant provisions of law and finds that the issues for determination are;

1. Whether this Court has jurisdiction to hear and determine prayers sought in the nature of Judicial Review.

2. Whether the Petitioner is entitled to the orders sought.

1. Whether this Court has jurisdiction to hear and determine the Prayers sought in the nature of Judicial Review.

The Court on its own Motion has called into question its jurisdiction in determining various orders sought by the Petitioners in their Petition, in particular prayers number 2,3 and 4. To give effect to **Article 162 (2) (b)** of the **Constitution**, Parliament enacted the **Environment and Land Court Act and Section 13** of the said Act which provides as follows:

(1) The Court shall have original and Appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land.

It is trite that jurisdiction is everything and without it, the court has no option but to down its tools. See the case of *The owners of the Motor Vessel 'Lilian S'...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1*, where the Court held that:-

"..Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

It is apparent that Judicial Review jurisdiction is the power granted to Courts to review the lawfulness of an enactment or decision, action, failure to act in relation to public function. See the case of *Grain Bulk Handlers Ltd..Vs...J. B. Maina & Co. Ltds & 2 Others (2006) eKLR*, where the Court held that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is legality of such decisions."

The Petitioners' herein has sought for an order of **Certiorari** to quash the decision of 30/06/2020, by the 1st Respondent purporting to adjudicate the purported boundary dispute on 10/07/2020, and an order of **Prohibition** to prohibit the 1st Respondent from proceeding to carry out his decision purporting to hear, determine or align the boundary or otherwise deal with the purported boundary dispute on 10/07/2020.

Therefore, the prayers sought fall under the ambit of Judicial Review. The question is whether this Court has jurisdiction to deal with Judicial Review matters.

The creation of **Environment & Land Court** is provided by **Article 162(2)(b)** of the **Constitution** which provides that: -

"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of and title for land".

Further **Article 162(3)** of the **Constitution** provides that: -

"Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)."

Flowing from the above provisions, Parliament enacted the **Environment & Land Court Act, No.19 of 2011**, which came into effect on 30th August 2011. **Section 13** of the **Environment & Land Court Act** sets out the jurisdiction of the **Environment & Land Court**. One such issue is disputes relating to boundaries.

Further **Section 13(7)** provides that in exercise of its jurisdiction, the **Environment & Land Court** shall have power to make any order and grant relief as it deems fit and just including: -

a)

b) **Prerogative orders.**

The Orders granted in Judicial Review falls under the **prerogative Orders**. Therefore, from the above provisions of law, the Court has jurisdiction to deal with Judicial Review Matters that relate to land and especially disputes related to boundaries. Consequently, the court finds that it has jurisdiction to deal with the instant matter.

2. Whether the Petitioner is entitled to the orders sought.

The Court notes that both parcels of land are not in dispute and the only dispute is with regards to the boundary issue as alleged by the Petitioners. It was the 2nd Respondent averment that the two parcels of land have a common boundary, and that the said boundary requires alignment.

As the burden is upon the Petitioners' to prove their case, they have not elaborated to this Court whether the adjudication that was to be carried out on 10th July 2020, came to pass, and neither have they demonstrated to the satisfaction of this Court that the **Interested Party** should have been a party to these proceedings.

Be that as it may, the Court finds that the Interested Party was not a necessary party to this Petition at all.

Furthermore, the Petitioners have sought for Constitutional reliefs and reliefs in form of Judicial Review. It should be noted that where there are other statutory avenues to seek reliefs, then parties are bound to exhaust the provided mechanism. See **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004**, in which it was held that:-

“...where there is a parallel remedy, Constitutional relief should not be sought, unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court’s process.”

It was similarly held in **Republic vs. National Environment Management Authority [2011] eKLR**, that where there is an alternative remedy and especially where Parliament has provided a statutory Appeal procedure, it is only in exceptional circumstances that an order for Judicial Review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment:

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge.”

Having considered the available evidence, the Court finds that the Petitioners came to court too early before exhausting all the avenues provided by Section 19 of the Land Registration Act.

Further, the Land Registrar has an obligation under **Section 19** of the **Land Registration Act** to ascertain and fix boundaries upon an application by any Interested person. The Petitioners herein have not shown that they did apply to the Land Registrar to ascertain the boundaries and the Land Registrar neglected or failed to do so.

For the above reasons, the Court finds that the Petitioners' Petition herein dated 7th July 2020 is **not** merited. Consequently, the Court dismisses the said Petition entirely with no orders as to Costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Kuiyaki