



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

JUDICIAL REVIEW NO. 14 OF 2019

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF SURVEYS.....1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU....2ND RESPONDENT

KIAMBU COUNTY SURVEYOR3RD RESPONDENT

AND

EQUITY BANK(KENYA) LIMITEDAPPLICANT

AND

SOLOMON WERU THEAINTERESTED PARTY

JUDGMENT

The matter for determination is the **Notice of Motion Application** dated **17th October 2019**, by the Applicant herein seeking for orders that;

- a. That an order of prohibition do issue, prohibiting the Respondents from further improperly altering the particulars of the survey records particularly the Registry Index Map Sheet No. 8 relating to Title No. **Ruiru/Mugutha Block 1/T2210**, kept in the custody or presenting for registration a mutation for consolidation or subdivision thereof.
- b. That an order of Certiorari do issue to remove to Environmental & Land Court for the purposes of being quashed the decision of the Respondents to alter the Survey records, the registry Index Map Sheet No, 8 relating to Title No. **Ruiru/Mugutha Block 1 T/2210**, without following proper administrative procedures.
- c. That an order of mandamus do issue to compel the Kiambu County Surveyor and or Director of surveys to cancel, rectify or amend the surveyors records in their custody to remove the markings for the created parcel No. 625 and 626 on the Registry Index Map Sheet No, 8 ad any other record kept by them and return on the survey records particulars relating to Title No. **Ruiru/ Mugutha Block 1/T2210**, to the position or status or demarcation immediately prior to the registration of charge registered on 23rd November 2012.
- d. That the Costs of this Application be provided for.

The Application is supported by the Verifying Affidavit of **Kariuki Kingori**, sworn on **27th August 2019**, and filed on **5th September 2019**. He averred that he is the Legal Manager of the Exparte Applicant. That **Solomon Weru Thea**, is the registered proprietor of **L.R 1/T2210**, who charged the said property registered on **23rd November 2012**, as security for advances of **Kshs.5,000,000/=** .That the registered owner defaulted in the repayment of the loan, prompting the bank to issue demand and statutory notices and the bank sought to realize the charge and sell the charged property. That when the bank sought the services of a valuer, it was noted that **title No. Ruiru Mugutha Block T/2210**, no longer exists on the survey records as it was amalgamated with another title **L.R 1/T2211**, and subsequently subdivided into **L.R 1/T625 and L.R 1/T626**. That the bank’s efforts to seek cancellation of the illegal amendments introduced in the Survey Plan or **Registry Map Sheet No. 8**, as pertain the suit property, but no positive action has been realized . That the said alteration was carried out without the **Chargee’s consent**, whose right had been duly reserved.

Further, that the decision to change or vary the particulars of status of the land title on the Registry Index Map was made improperly and the decision of the **Kiambu County Surveyor** and the **Director of Survey**, was made to manipulate the records is contemptuous and meant to prevent the chargee from exercising the statutory power of sale. That persons who have his own interests have declined to continue with the transaction as it appears that the land does not exist. Further, that the said actions did not follow rules of natural justice and the said decisions are **null and void** and, the **Ex Parte Applicant** stands to suffer irreparable loss, if the said alteration remain in situ

The Application is opposed and the 2nd Respondent swore a Replying Affidavit on **2nd December 2019**, through **Yusuf Isaack**, a Land Surveyor in the County Government. That as per the Registry Index Map (RIM), provided by the Applicant, the amendments column on the far right of the said map indicates that there was a change of boundary and not amalgamation between **2210 and 2211 to 6255 and 6255 AMD/THK/12/11/09**. That the same was amended on **20th December 2010**, which was done by the District Surveyor, District Land Registrar and the Director of Survey. That the charge of boundaries was done way before the registration of the change on **23rd November 2012**, by the Applicant. Further that the process requires that the owner of the property ought to surrender the old title to indicate the new title number and it would appear the new title No. corresponding to **L.R Ruiru/Mugutha Block 1/2210**, would be **T6255** and not **T625**, because according to the map, the numbers given after change cannot be any lower than the initial title Number.

That according to the numbers indicated by the Applicant as **T625 and T626**, the same do not appear on the map, and the numbers **T6255** and **T6256** appear on the amendments column number 4. That the County Surveyor within the County Government does not engage in changing of boundaries, and they are only concerned with property meant for public use and such, the particulars of the suit property on the (**Registry Index Map**) have never been in the custody of the County Government, but with the District Land Registrar, and Director of Survey. That it was their recommendation to the Applicant to carry out due diligence by involving both owners of **L.R 1/T2210 and Block T2211**, one of them being the interested party, to explain why the same was done and why the Applicant was never informed. That the 3rd Respondent is better placed to give a proper record, as it is part of the National Government and custodian of the said records. He contended that the 2nd Respondent is wrongly enjoined in the Application and the Court was urged to withdraw its name.

Robert Mugendi, the County Lands Registrar, Ruiru swore a Replying Affidavit on **27th February 2020**, and averred that **L.R Block 1/T 2210**, is currently registered in the names of **Solomon Weru Thea** vide a transfer of land registered on **27th July 2010**. That the same is charged to **Equity Bank Kenya Limited**, and the rights registered on **28th November 2012**. Further that **L.R 1/T2211**, was originally registered in the names of **Hannah Wangari Mwangi**, and she transferred the same to **Simon Kariuki Gakenda**, who is the current registered owner. Further that as per their records, Parcel No. **L.R 1/T2210 and L.R 1/T 2211**, have not been amalgamated and that amalgamation is only done where the two properties are owned by the same person and upon amalgamation, the titles are closed, then surrendered and a new title is issued. Further that the new title deeds issued after amalgamation always has a higher number than the smaller portions that were amalgamated. That their office is not aware of the amalgamation. That upon receipt of a complaint letter dated **9th February 2017**, reference **EBL/LD/TEAROOM/02/17**, the Land Registrar responded to the Applicant's complaints vide a letter dated **22nd February 2017**.

The 1st & 3rd Respondents further filed a further Affidavit sworn by **Anne Mwangi**, the National Government Land Surveyor, Thika. She averred that according to the records, parcels No. **L.R 1/T2210**, and **1/T2211** were not amalgamated as alleged, but that there was a change of common boundary between the parcel of land. That for a change of common boundary to be effected, the Director of Surveys, the proprietors of the parcels of land must appear in persons before the **Land Registrar**, who approves the change. That as per the records, the Interested Party being the registered owner of **L.R 1/T2210**, and **Hannah Mwangi**, being the registered owner of **1/T2211**, changed the boundaries of their suit properties. That a survey was carried out on **9th November 2009**, by **Z.M Muritu**, a licensed surveyors who indicated on pages 3 and 4 of the Mutation Form and the Surveyors office adhered to the instructions to amend the RIM, because the Land Registrar had attested the mutation forms to signify the proprietors had agreed to change their common boundary.

Further, that upon the change of the common boundary, the parcels of land **L.R 1/T2210 and L.R 1/T2211**, were issued with new numbers being **6255 and 6256**, respectively as per the Mutation Form and the RIM. That the changes were effected on **20th December 2010**, and it was the responsibility of the registered owners to surrender the original titles to the Land Registrar for cancellation, in order to allow the issuance of the new titles. That had the Applicant had carried out due diligence at the Director of Survey's office prior to the registration of the charge on **28th November 2012**, the same would have revealed changes in common boundary that had been made by **ten(10)** registered owners. That the Interested Party had a duty to disclose the material facts to the bank, when he took out a loan and offered the suit property as security. That the Surveyors office followed the procedure in effecting the map change through the mutation lodged and approved.

The Judicial Review Application was canvassed by way of written submissions, which the Court has now carefully read and considered. The Court has also carefully considered this Exparte Applicant's Judicial Review and the annexures thereto, the **Replying Affidavits** by the 1st, 2nd and 3rd Respondents, and the written submissions, cited authorities and the relevant provisions of law and the Court renders itself as follows:-

The Court finds the issues for determination are;

- a) **Whether the Applicants has met the threshold for granting of Judicial Review Order of Certiorari, Prohibition and Mandamus.**
- b) **If so, whether the application dated 17th October 2019, is merited.**

From the outset, it is important to set out the purpose of Judicial Review. In the case of **Municipal Council of Mombasa...Vs...Republic Umoja Consultants Ltd, Nairobi Civil Appeal No.185 of 2007(2002) eKLR**, the Court of Appeal held that:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at. Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review”.

Further circumstances under which orders of Judicial Review can be issued were elaborated *by*

This Court is being called upon to make a determination as to whether the change of boundaries of the properties was procedural and whether it followed due process and to further quash the decision and compel the entry of new boundaries.

As noted by the Respondents, the change of boundaries involved two parties. Only one party therein **Solomon Weru Thea**, who was the owner of **L.R 1 T/2210**, has been enjoined. Any orders granted by this Court will most definitely affect the rights and interest of the owner of **L.R 1 T/2210**. The Court does not know if the said party handed over her title deed and this can only be determined if the party is allowed to present her case.

The rules of Natural Justice which the ex Parte Applicant seeks to rely on can therefore not be used to the detriment of **Hannah Wangari**. It is the Court's considered view that while **Judicial Review** is only concerned with the process for the Court determine whether or not the procedure was followed, the Rules of **Natural Justice** dictates that a party who will be affected by the orders that may be granted ought to be given an opportunity to be heard. Consequently, in the absence of joining **Hannah Wangari**, as a party, the Court finds and holds that it is unable to determine the issues in controversy.

b) If so, whether the application dated 17th October 2019 is merited.

Having held that the issues in controversy cannot be determined in the absence of Hannah Wangari, the Court further finds that it would be improbable to make a determination on the issues without the said party's present. In the case of Local Building and Construction Limited ...Vs... Institute of the Blessed Virgin Mary Loreto Msongari & 2 others [2019] eKLR the Court held that

“Order 1 Rule 9 and Article 159 of the Constitution is intended to ensure that each party is afforded a fair trial guaranteed under Article 50 (1) of the Constitution. But a fair trial does not exist in a vacuum, it is governed by rules which by themselves ensure that each party is given the opportunity to present or defend his case fairly. That is the purpose of a trial court. It must make sure that the parties are given ample opportunity to ventilate the issues arising from their case. What the said rules must not do is to become an end in themselves and impede a fair trial and that is why Article 159(2) (b) of the Constitution provides that justice shall be administered without undue regard to technicalities. When case is decided in accordance with substantial justice as depicted under the abovementioned article, justice will not only be seen, but will be seen to have been done.

It is not in dispute that there exists a misjoinder. The Applicant suggested that for that reason, the whole case should be struck out and dismissed. The above provisions that I have cited suggest otherwise. A misjoinder of parties to a suit cannot defeat the whole case. In the premises, I go by Order 10 Rule 2, as read together with 4 which I think they are of utility to this suit. These provisions give the Court discretion to order the name of a party improperly joined, whether as plaintiff or defendant struck out and the name of any person who ought to have been joined, added.”

The Court appreciates that the information of change of boundaries was not well within the Ex-parte Applicant's Knowledge. As the Court can not strike out the suit for non joinder of parties, the only recourse available is for the Court to order that the said **Hannah Wangari**, be added in the suit for the real and just determination of the suit.

The Upshot of the foregoing is that the Court finds and holds that it is impossible to make a determination of the real questions in controversy due to **non joinder** of a party and as the suit cannot be defeated for that reason, it is only logical that the Court halts the determination of the Application and order the joinder of the said party to be able to make a **just** determination.

Consequently, this Court proceeds to make an order and it is hereby made that the Ex-parte Applicant herein should enjoin or join the said **Hannah Wangari** as a party to this suit so that the real determination of the issues in controversy can be made after the said **Hannah Wangari** has been given an opportunity to be heard.

It is so ordered.

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

L. GACHERU

JUDGE

Court Assistant – Kuyaki