



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

AMENDED JUDICIAL REVIEW APPLICATION

ELC. MISC. APPLICATION NO. 18 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PURSUANT TO ORDER 53(1), (2), (3) & (4) OF THE CIVIL PROCEDURE RULES 2010 OF THE

LAWS OF KENYA

AND

IN THE MATTER OF LEAVE FOR THE ORDERS OF MANDAMUS COMPELLING THE 1ST RESPONDENT TO TAKE ANY APPROPRIATE ACTION TO PREVENT THE 2ND, 4TH AND 5TH RESPONDENTS FROM FURTHER ENCROACHING ON THE APPLICANT’S LAND PURSUANT TO ORDER 53 OF THE CIVIL PROCEDURE RULES, SECTION 8 & 9 OF THE LAW REFORM ACT CAP 26 AND THE FAIR ADMINISTRATIVE ACTION 2015 OF THE LAWS OF KENYA

BETWEEN

RAMPAI OLE SAIDIMU.....EX PARTE APPLICANT

AND

THE DISTRICT LAND REGISTRAR.....1ST RESPONDENT

MUTERO SANTAMO.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

MAGEI SANTAMU SENGE.....4TH RESPONDENT

JOSEPH SANTAMU.....5TH RESPONDENT

JUDGEMENT

What is before Court for determination is the ex parte Applicant’s Notice of Motion application dated the 17th September, 2020 where he seeks the following orders:

1. An order of Mandamus compelling the 1st Respondent herein to take any appropriate action to stop the 2nd, 4th and 5th Respondents from further encroaching and/or trespassing on the Applicant’s portion of land and adhere with the site visit reports by the District Surveyor’s office and the Land Registrar’s report both dated 4th October, 2016 and 17th January, 2017 respectively advising parties to maintain and respect the boundaries as determined.
2. An Order of Prohibition restraining the 2nd, 4th and 5th Respondents herein by himself themselves, his/their agents, his/their servants and legal representatives from further encroaching and/or trespassing on to the Applicant’s portion of land and adhere with the site visit reports by the District Surveyors office and Land Registrar’s report both dated 4th October, 2016 and 17th January, 2017 respectively advising parties to maintain and respect boundaries as determined.
3. That costs of this application be provided for.

The application is premised on grounds set out in the amended statutory statement of facts filed on the 11th June, 2019, and the matters set out in the amended verifying affidavit of Rampei Ole Saidimu as well as the annexures thereon. In the verifying affidavit, the deponent confirms being the registered proprietor of land parcel number Kajiado/Purko/452 which borders the 4th Respondent's parcel of land known as Kajiado/Purko/453. He explains that there has been a protracted boundary dispute between the 2nd, 4th and 5th Respondents and himself over the exact location of their boundary. Further, the 2nd, 4th and 5th Respondents have continuously encroached on his land. He has lodged formal complaints to various offices seeking final redress and on various dates, they were summoned by the Land Registrar including the Land Surveyor for ascertaining the boundary. He contends that the 2nd, 4th and 5th Respondents have failed to abide by the Counsel provided by the Provincial Administration Officers through numerous meetings held involving the said dispute. Further, in 2004, the District Land Surveyor surveyed the land and subsequently prepared a comprehensive report making a final conclusion to the aforementioned dispute. He further explains that on 29th September, 2016 a site visit was conducted by the District Surveyor's office which subsequently prepared a comprehensive report dated 4th October, 2016. He insists despite the above, the 2nd, 4th and 5th Respondents have continued to persist that the boundary dispute was not resolved. Further, the 1st Respondent also prepared a comprehensive report on 17th January, 2017 making a final conclusion to the boundary dispute and advised the parties to maintain and respect the boundaries as determined. He claims the 1st Respondent being a public official has refused and or ignored to perform a public duty and should be compelled to do so. Further, an order of mandamus should compel him to take appropriate action to stop any further encroaching and trespassing on land parcel number Kajiado/Purko/452 and maintain the boundaries as determined. He reiterates that he has made numerous requests to the 1st Respondent to take appropriate action to stop the 2nd, 4th and 5th Respondents from encroaching and or trespassing on his land but he has deliberately refused/declined to adhere to his requests.

The application was unopposed but canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the ex parte Applicant's Notice of Motion application dated the 17th September, 2020 including the Statutory Statement, Applicant's Statement and Verifying Affidavit as well as the annexures thereon, the only issue for determination is whether he is entitled to the orders sought in the said application.

The ex parte Applicant in his submissions reiterates his averments in the amended verifying affidavit and amended statement of facts and contends that he is the registered proprietor of land parcel number Kajiado/Purko/452 hereinafter referred to as the 'suit land'. Further, that the Respondents' do not have any beneficial interest over the suit land and that the 1st Respondent had authority to determine the boundary dispute. To support his arguments, he relied on the following decisions: **Eldoret ELC Case No. 65 of 2013, Christopher Kitur Kipwambok Vs Vipulratilal Dodhia & 3 ORS and Kisumu ELC Case No. 222/15 Victoria Distributors Vs Joseph Abwao Nyawir.**

It is not in dispute that the ex parte Applicant is the proprietor of the suit land which has been embroiled in a boundary dispute spanning over a decade with Kajiado/Purko/453. It has emerged that on 17th January, 2017, the Land Registrar, Kajiado finally determined the said dispute and scheduled to place beacons after 30 days, from the said date of the Ruling if no party preferred an Appeal. The Applicant claims the Land Registrar, Kajiado has failed to do so and he now seeks for orders of Mandamus including Prohibition to compel the 1st Respondent to maintain boundaries between Kajiado/Purko/452 and 453 as had been determined. He contends that despite numerous requests, the 1st Respondent has declined to do so, and he has hence failed to perform his public duty. Further, this is a breach of the principles of natural justice. On perusal of the Comprehensive Report of the Principal Land Registrar dated the 17th January, 2017, I note he clearly indicated that at the expiry of 30 days together with the District Surveyor, they would proceed to fix the two beacons as determined, if no objection would have been filed. In this instance, the Respondents have not controverted the Applicant's averments nor indicated that the 2nd, 4th as well as 5th Respondents filed an objection in respect to the said report. I note it is more than four years since the said boundary dispute was determined. The Ex parte Applicant avers that despite several requests to the 1st Respondent, who is the Land Registrar, he has failed to act as per the determination made in the aforementioned report.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

“Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’...By ‘illegality’ as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By ‘irrationality’ I mean what can now be succinctly referred to as “Wednesbury unreasonableness”...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.”

The Court in the case of **Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR** while dealing with observed 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 v/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.'

While 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, 4th 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.”

In line with the standards set in the aforementioned decisions, I will proceed to decipher whether the 1st Respondent's actions in failing to implement his decision dated the 17th January, 2017 by fixing beacons between land parcel numbers Kajiado/Purko/452 and 453 after 30 days from the said date was rational, reasonable and that he observed the basic rules of natural justice. I note the Land Registrar is the one mandated in law to deal with boundary disputes before the same can be handled in Court. On perusal of the impugned Land Registrar's report dated the 17th January, 2017 in respect to the boundary dispute proceedings, I note all parties participated and the District Surveyor also undertook measurements of the disputed boundary. He proceeded to deliver his Ruling which excerpt I wish to highlight. **“The Land Registrar therefore determines the boundary between the two land parcels as beacons B and D. At the expiry of 30 days from the date of this ruling the Land Registrar and the District Surveyor shall move to fix the two beacons if no objection shall have been filed in the High Court. The parties are advised to maintain and respect the boundaries as determined. Any party aggrieved has a right to appeal to the High Court within 30 days from the date of this ruling.”**

The ex parte Applicant claims he has severally sought for the implementation of this Ruling by the Land Registrar but this has been in vain. Further, the 2nd, 4th and 5th Respondents have persisted in interfering with the said boundary. As per the proceedings herein, I note none of the Respondents filed any response 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 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.

From the facts as presented including my analysis above while associating myself with the aforementioned decisions as well as the cited legal provisions, I find that failure by the 1st Respondent to efficiently as well as expeditiously implement his Ruling dated the 17th January, 2017, after 30 days as indicated therein, amounted to ‘procedural impropriety’. I further find that the 1st Respondent's refusal to heed to several requests from the ex parte Applicant seeking for the implementation of the Ruling dated the 17th January, 2017, contravened 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. I find that the ex parte applicant actually had a legal right to the performance of a legal duty by the 1st Respondent. Further, it was imperative upon the Land Registrar to implement his Ruling as this duty is governed by statute.

To my mind, I find that the 1st Respondent's actions after determining the boundary dispute but blatantly declining to fix the beacons is irrational and infringed on the ex parte Applicant's rights. It seems to me the ex parte Applicant was not accorded fair treatment as required by the law.

I note the ex-parte Applicant sought for orders of prohibition against the 2nd, 4th and 5th Respondents who are not public officials. It is trite that remedy of judicial review is only available to a party against actions of a public official. I opine that the ex parte Applicant has a remedy to seek for restraining orders against the said Respondents in a civil suit. In the circumstances, I will decline to grant the prohibition orders as sought. Based on my analysis above, I find the Notice of Motion dated the 17th September, 2020 partially merited and will proceed to allow it in the following terms:

- i. An order of Mandamus be and is hereby issued compelling the 1st Respondent herein to take any appropriate action to stop the 2nd, 4th and 5th Respondents from further encroaching and/or trespassing on the Applicant's portion of land and adhere with the site visit reports by the District Surveyor's office and the Land Registrar's both dated 4th October, 2016 and 17th January, 2017 respectively advising parties to maintain and respect the boundaries as determined.
- ii. That the costs of this application are awarded to the ex parte Applicant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF OCTOBER, 2021

CHRISTINE OCHIENG

JUDGE