



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JUDICIAL REVIEW APPLICATION NO. 28 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF MANDAMUS BY ALICE MUTHONI CHEGE

IN THE MATTER OF ARTICLE 62 OF THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 14(1) OF THE NATIONAL LAND COMMISSION ACT

IN THE MATTER OF SECTION 3(1)(a), 4 OF THE LAND ACT 2012, LAWS OF KENYA

IN THE MATTER OF SECTION 4 & 5 OF THE PHYSICAL PLANNING ACT

AND

IN THE MATTER OF ENCROACHMENT OF PUBLIC ROAD ADJACENT

TO PLOT NO. 617 DAGORETTI/KANGEMI, OFF THIONG'O ROAD

BETWEEN

ALICE MUTHONI CHEGE.....APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....1ST RESPONDENT

MINISTRY OF LAND AND PHYSICAL PLANNING.....2ND RESPONDENT

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

&

DANIEL MARENGA GACHENGA.....INTERESTED PARTY

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated 9th December 2019, the Applicant herein has sought for the following Reliefs;

i. An order of Mandamus do issue to compel the National Land Commission and the Ministry of Lands and Physical Planning to carry out their duties and ascertain the boundaries of the public road reserve adjacent to Plot no. 617 Dagoretti/Kangemi – off Thiong'o Road.

ii. An order do issue compelling all the people who have encroached upon the Public Road Reserve adjacent to plot no. 617

Dagoretti/Kangemi off Thiong'o Road, to vacate from the said public road reserve and all structures put thereon be demolished.

iii. Cost of the Application be provided for.

2. The subject Judicial Review Application is premised on the grounds contained at the foot thereof and same is further supported by the Statement of Facts dated the 21st of January 2019, as well as the Affidavit in Verification of Facts, which was sworn on the 21st of January 2019. For clarity, the Statement of Facts and the Affidavit in verification of the facts were filed alongside the Chamber Summons Application, which sought for Leave to commence the Judicial Review Proceedings.

3. Following the institution of the subject Application, same was duly served upon the Respondents who thereafter proceeded to and entered appearance as well as filed Grounds of opposition, whereby same opposed the subject Application.

4. For the avoidance of doubt, the 1st respondent entered appearance on 27th of January 2020 and also filed their grounds of opposition on the same date.

5. On their part, the 2nd and 3rd Respondents entered appearance and also filed their Grounds of opposition on the 20th of January 2020.

DEPOSITIONS BY THE PARTIES

APPLICANT'S CASE:

6. Being a Judicial Review Application, the law requires the factual evidence to be contained and/or deposed to in the Affidavit in verification of the statement of facts. In this regard, the facts in support of the current Application are discernible from the Verifying Affidavit sworn on the 21st of January 2019.

7. Pursuant to the said Verifying Affidavit, the Applicant herein has averred that she is the registered proprietor and/or owner of L.R. NO. 617/ Dagoretti/Kangemi, off Thiong'o Road.

8. Besides, the Applicant has further averred that between the suit property and the main road, there exists a public road reserve which lies adjacent to her property as well as L.R. NO. Dagoretti/Kangemi 612-614, respectively, belonging to and registered in the name of the interested party.

9. It is further averred that the interested party herein has encroached onto or annexed portions of the public road reserve and has thereby constructed various structures thereon.

10. Owing to the foregoing, the Applicant avers that same has raised various complaints to the 1st and 2nd Respondents, to enable same to compel the interested party to remove the illegal structures and also to ensure proper disposal of raw sewage, but that the 1st and 2nd Respondents, have been reluctant to act and as a result of the said reluctance, the dispute remains to date.

11. It is the Applicant's further averment that the 1st and 2nd Respondents have the mandate to carry out and implement the issues raised, but have failed and/or neglected to do so, and in this regard, an order of Mandamus thus ought to issue.

RESPONDENTS'S CASE:

1ST RESPONDENT'S RESPONSE:

12. The 1st Respondent filed Grounds of opposition dated 23rd of January 2020 and in respect of which same raised four pertinent grounds as hereunder;

i. Section 18(2) of the Land Registration Act, 2012, prohibits this Honorable Court from dealing with a matter touching on dispute as to boundaries of Registered land unless the boundaries have been determined in accordance with the said Section.

ii. It is the office of the Director of survey which is mandated to establish boundaries within the Republic of Kenya.

iii. The orders sought by the Applicant herein are incapable of enforcement and/or implementation.

iv. The Application against the 1st Respondent is misconceived, frivolous and otherwise amounts to an abuse of the due process of the Court.

2ND AND 3RD RESPONDENTS'S RESPONSE:.

13. Similarly, the 2nd and 3rd Respondents also filed Grounds of opposition and in respect of which, same adverted to the following grounds;

i. The Notice of Motion herein constitutes an abuse of the due process of the Court.

ii. *The dispute herein does not warrant the filing of the suit, but instead should culminate to filing of complaint with Land Registrar to establish the boundary dispute.*

iii. *The Applicant has not demonstrated the extent of encroachment by documentary evidence e.g. maps.*

iv. *The Notice of Motion Application is frivolous, vexatious and a waste of Court's time.*

SUBMISSIONS BY THE PARTIES

14. On the 2nd of July 2020, the subject matter came up for mention for directions and on which date the Honorable Court directed that the substantive Application be canvassed and/or disposed of by way of written submissions.

15. In this regard, the parties were ordered to file and serve the submissions within the stipulated timelines.

16. Pursuant to and in line with the directions of the Honorable Court, the Applicant herein proceeded to and indeed filed her written submissions on the 23rd of November 2020 and same are on record. However, the Respondents herein do not appear to have filed their respective submissions, save that the grounds of oppositions which were filed, form part of the Court record.

ISSUES FOR DETERMINATION

17. Having reviewed and/or appraised the Notice of Motion Application dated the 9th of December 2019, as well as the Statement of Facts and the Verifying Affidavit attached thereto, and having evaluated the written submissions filed on behalf of the Applicant and also having taken into account the two sets of the Grounds of opposition filed by the Respondents, I am of the view that the following issues are germane for determination;

i. *Whether the substantive Notice of Motion Application herein is properly titled and whether same is competent.*

ii. *Whether the Respondents herein are legally mandated to perform and/or execute the duties pertaining to the ascertainment of boundaries of public road reserves or at all.*

iii. *Whether the orders of Mandamus can issue in the circumstances of the subject matter.*

ANALYSIS AND DETERMINATION

Issue Number One

Whether the substantive Notice of Motion Application herein is properly titled and whether same is competent.

18. The subject Application touches on and/or concerns judicial review proceedings, which are special proceedings and/or otherwise *sui generis* in nature and therefore governed by the special provisions provided for by dint of **Sections 8 and 9 of the Law Reform Act, Chapter 26, Laws of Kenya.**

19. On the other hand, it is also worthy to note that the manner and/or mode of commencing judicial review proceedings has also been elaborated vide the provisions of **Order 53 of the Civil Procedure Rules, 2010.** For clarity, the said provisions provide that before a substantive Application for judicial review is filed, leave must be sought for and obtained beforehand.

20. Notwithstanding the foregoing, it is worthy to note that at the time of applying for leave. The Applicant who files the Chamber summons, is the citizen and/or subject whose rights and/or interests are said to have been violated and/or infringed upon.

21. However, upon the grant of leave to file and/or commence judicial review proceedings, the substantive Application vide the Notice of Motion must thereafter be lodged in the name of the Republic, which is the Applicant and the subject on whose behalf the Application is lodged becomes the Ex-parte Applicant.

22. In my humble view, upon the grant of leave, the subject, whose rights and/or interests have been violated and/or infringed upon cannot file the substantive Application in own name and purport to be the Applicant. For clarity, orders and/or writs of judicial review are sought for and/or procured in the name of the Republic and not otherwise.

23. Suffice it to say, that the manner in which judicial review proceedings are titled and/ or commenced, has been the subject of various decisions, including the decision in the case of **Welamondi vs The Chairman Electoral Commission [2002] eKLR** where the Court observed as hereunder;

“Last, but not least, the objection that the Application is made in the name of the wrong person is well merited. In FARMERS BUS SERVICE AND OTHERS V THE TRANSPORT LICENSING APPEAL TRIBUNAL (1959) E.A. 779, the East African Court of Appeal held that prerogative orders are issued in the name of the crown and Applications for such orders must be correctly intitled. On Kenya's assumption of Republican status on 12th December 1964, the place of the crown in all legal proceedings was taken by the Republic. Accordingly, the orders of Certiorari, Mandamus or Prohibition now issue in the name of the Republic and Applications therefor are made in the name of the Republic at the instance of the person affected by the

action or omission in issue.”

24. Other than the improper manner in which the substantive Application has been filed, there is also another critical issue that impacts on the validity of the substantive Notice of Motion Application.

25. In this regard, it is worthy to note that the Reliefs which an Applicant intends to seek and/or pursue in the substantive Notice of Motion, must be spelt out and/or enumerated in the body of statement of facts. Once the statement of facts is filed, leave is then sought in line with the Reliefs contained therein.

26. As pertains to the subject matter, the Applicant herein filed the statement of facts dated the 21st of January 2019 and in respect of which, same sought for the following Reliefs;

i. An order of mandamus compelling the 1st and 2nd Respondents to do their duty and ensure the removal of the illegal structures erected by the interested party on the public road reserve adjacent to the Applicant’s parcel of land known as 617 Dagoretti/Kangemi, off Thiong’o Road.

ii. An order do issue compelling all the people who have encroached upon the public road reserve adjacent to plot 617 Dagoretti/Kangemi off Thiong’o Road to vacate from the said public road reserve, and that all structures put up thereon be demolished.

iii. The 1st and 2nd Respondents to ensure that the interested party disposes of his raw sewage waste as required to curb risk of health to adjacent property owners.

27. Having pleaded the foregoing Reliefs, the Applicant herein could only seek leave of the Honorable Court to commence judicial review proceedings, to propagate the Reliefs contained in the statement of facts and not otherwise.

28. In support of the foregoing position, I am guided by the decision in the case of **The Commissioner General, Kenya Revenue Authority vs Silvanus Onema Owaki t/a Marenga Filling Station [2001] eKLR** where the Honorable Court observed;

“The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by rule 1 (2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case.”

29. Despite having stipulated the nature of the orders that same was intent on pursuing and which are ordinarily contained in the statement of facts, the Applicant herein proceeded to and/or sought leave in respect of completely new Reliefs, which had not been pleaded and/or stipulated in the statement of facts.

30. To be able to understand the distinction between the Relief for which leave was sought for and those that had been pleaded in the statement of facts, I hereby reproduce the relief at the foot of the Chamber Summons as hereunder;

“The Applicant, Alice Muthoni Chege, be granted leave to apply to the High Court for orders of mandamus directed at the 1st and 2nd Respondents to compel them to ascertain the boundaries of the public road adjacent to plot 617 Dagoretti/Kangemi – off Thiong’o Road.”

31. It is evident that the issue of ascertainment of the boundaries of the public road adjacent to plot 617 Dagoretti/Kangemi off Thiong’o Road, is being introduced for the first-time courtesy of the Chamber Summons Application.

32. In my humble view, the Relief being sought at the foot of the Chamber Summons and for which leave was granted, is lacking in foundation and therefore the leave which was granted ought not to have been granted in the first place. In my considered view, the Applicant herein ought to have sought for and obtained Leave to amend the Statement of Facts beforehand, which was not done.

33. Nevertheless, to the extent that leave was so granted albeit irregularly, I am now enjoined to venture and deal with the substantive merits of the Application.

Issue Number Two

Whether the Respondents herein are legally mandated to perform and/o execute the duties pertaining to the ascertainment of boundaries of public road reserves or at all.

34. The Applicant herein has essentially sought an order of mandamus to issue to compel the 1st and 2nd Respondents to carry out their duties and in particular, to ascertain the boundaries of the public road reserve adjacent to plot 617 Dagoretti/Kangemi off Thiong’o Road.

35. To be able to appreciate the import of the relief sought, it is important then to decipher the scope and/or mandate of the 1st and 2nd Respondents, and thereafter ascertain whether same are bestowed with the mandate to ascertain boundaries.

36. As concerns the 1st Respondent, the mandate and/or scope of her jurisdiction are stipulated vide the provisions of **Article 67(2) of the Constitution of Kenya, 2010** which provides as hereunder;

“National Land Commission.

67. (2) *The functions of the National Land Commission are—*

(a) to manage public land on behalf of the national and county governments;

(b) to recommend a national land policy to the national government;

(c) to advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;

(d) to conduct research related to land and the use of natural resources, and make recommendations to appropriate authorities;

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

(f) to encourage the application of traditional dispute resolution mechanisms in land conflicts;

(g) to assess tax on land and premiums on immovable property in any area designated by law; and (h) to monitor and have oversight responsibilities over land use planning throughout the country.”

37. On the other hand, as concerns the 2nd Respondent, it is worthy to note that same is the Ministry and thus it is charged with the generation of policies and the enforcement of such policies, to facilitate effective utilization of land for sustainable development. For clarity, the Ministry does not engage or indulge itself in the determination of inter-alia boundaries.

38. From the constitutional and statutory mandate of the 1st and 2nd Respondents, same are not conferred with the duty of conducting and/or carrying out boundary delineation and/or ascertainment, whatsoever.

39. Conversely, the duty and/or mandate to carry out boundary delineation and/or ascertainment is conferred upon the office of the Land Registrar by dint of the provisions of **Section 18 and 19 of the Land Registration Act, 2012**, which provide as hereunder;

“18. Boundaries

(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).

19. Fixed boundaries

(1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries

(2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”

40. In my humble view, the 1st and 2nd Respondents are not bestowed with the statutory mandate to do what the Applicant herein seeks and in this regard, it would thus be foolhardy to decree and/or grant the orders sought, thus directing the said Respondents to perform and/ or execute a Duty that does not belong to same.

41. With respect, a Court of law does not act in futility. Consequently, the orders sought herein are misconceived and otherwise legally untenable.

Issue Number Three

Whether the orders of mandamus can issue in the circumstances of the subject matter.

42. Having found and held that the 1st and 2nd Respondents are not mandated under the law to carry out and/or undertake the exercise of boundary delimitation and/or ascertainment, the question that then begs the answer is whether an order for mandamus can then issue in the circumstances.

43. Before endeavoring to answer the question, it is imperative to take note of the decision in the case of **Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997]** where the Court held as hereunder;

The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“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 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.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made 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.”

What do these principles mean? They mean 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.”

44. Given that the 1st and 2nd Respondents are not conferred or bestowed with the power to perform that which the Applicant is seeking, it is therefore apparent that to grant the orders sought would be tantamount to compelling the 1st and 2nd Respondents to commit an illegality.

45. Clearly, a Court of law cannot direct or compel a body or state agency to indulge and/or engage in illegalities. Such kind of an order would be inimical to public policy, rule of law and general administration of justice.

46. To vindicate the foregoing observation, I am privileged to rely on the decision in the case of **Republic v Kenya Civil Aviation Authority & another ex-parte Elite Earthmovers Limited [2017] eKLR** where the Court observed;

“56. It is therefore clear that for an order of mandamus to go forth the applicant must satisfy the Court that the Respondent has a legal duty whether statutorily or at common law which the applicant expects the Respondent to fulfil and the Respondent has failed to do so. In other words, mandamus cannot issue against a person or authority for performance of a duty that the Respondent is not mandated or obliged to perform.”

FINAL DISPOSITION

47. By now, it has become evident that the Notice of Motion Application dated the 8th of December 2019, which suffers from inherent statutory defects, does not disclose a reasonable cause of action.

48. Accordingly, the Notice of Motion Application dated 9th of December 2019, be and is hereby Dismissed with costs.

49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

N/A for the Parties, despite being aware of the Date.