



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**JUDICIAL REVIEW CASE NO. 2 OF 2021**

**CORAM: HON. R.E. ABURILL J**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND REGISTRAR, SIAYA.....1<sup>ST</sup> RESPONDENT**

**COUNTY SURVEYOR, SIAYA.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**AND**

**FREDRICK OTIENO OBONYO.....1<sup>ST</sup> EXPARTE APPLICANT**

**MILDRED AKINYI OTIENO.....2<sup>ND</sup> EXPARTE APPLICANT**

**RULING**

1. The application dated 22<sup>nd</sup> October 2021 by the applicants Fredrick Otieno Obonyo and Mildred Akinyi Otieno brought under certificate of urgency seeks leave of this court to be granted to the exparte applicants to apply for Judicial Review orders of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, County Land Registrar, Siaya County and County Land Surveyor, Siaya County to visit and fix the boundaries of West Alego/Sigoma/Uranga/1251. Whether or not there has been encroachment on the said parcel of land and if so, to what extent and by the owner of the occupant of which parcel of land.
2. The Applicants also seek for leave to apply for an order of Mandamus to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents named above to visit the subject parcel of land and ascertain the borders properties in the application as West Alego/Sigoma Uranga/1251.
3. The application filed by D.J. Okoth & Co. Advocates is supported by the verifying affidavits sworn by the applicants and the statutory statements.
4. I have considered the application, verifying affidavits and the annexures thereto.
5. From the onset, it is clear that the subject matter of the dispute is a boundary dispute which is a land dispute between the parties.
6. Article 162(2)(b) of the Constitution and Section 13(1) and (2) of the Environment and Land Court deal with establishment and jurisdiction of the Environment and Land Court (ELC).
7. The court is vested with exclusive original and appellate as well as Judicial Review jurisdiction to hear and determine disputes relating to the use and occupation of, and title to, land.
8. Under Section 13(1) of the Environment and Land Court Act, the Court has original and appellate jurisdiction in land matters stipulated in Article 162(2)(b) of the Constitution and matters stipulated in Section 13(2) of the Act or any other law applicable in Kenya relating to environment and land.

9. Under Section 13(7) of the Environment and Land Court Act, the orders that the court may make include damages, compensation, specific performance and prerogative orders. Prerogative orders are Judicial Review orders and Mandamus is one of the Judicial Review remedies. Land boundaries are provided for under Sections 8 & 19 of the Land Registration Act and the Survey Act.

10. The jurisdiction of the court in handling boundary disputes is limited to the matter being handled by the Land Registrar and Surveyor and the definition of 'Court' under Section 2 of the Environment and Land Court Act is ELC and other courts (gazetted subordinate courts) having jurisdiction on matters relating to land.

11. Therefore, the Constitution having clearly established a specialized court and vested it with jurisdiction to hear and determine disputes relating to Environmental and Land, and the same Constitution at Article 165(5)(b) having express provisions barring the High Court from hearing and determining disputes reserved for the courts established under Article 162 (2) (a) and (b) of the Constitution, namely, the Environment and Land court and the Employment and Labour Relations Court, it is clear that this court is devoid of any jurisdiction to consider this matter. The filing of this matter in this court was misplaced. Jurisdiction is conferred by the Constitution and statutes not by parties. In **Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011**, the Supreme Court delivered itself as follows on the issue of jurisdiction:

***“A court’s jurisdiction flows from either the Constitution or legislation or both.”***

12. Furthermore, a court of law cannot arrogate itself the jurisdiction that it does not have as it will be acting in vain. Without jurisdiction, a court of law must down its tools and do no more. In the locus classicus **Motor Vessel ‘Lilian S’** [1989] KLR 1 case, Nyarangi, JA stated, inter alia:

***“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

13. The Supreme Court pronounces itself as follows regarding matters jurisdiction of courts in **In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011**:

***“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”***

14. For the above reasons and for want of jurisdiction, I decline to entertain this matter. I would have struck the application so that the applicants lodge their claim before the court with relevant jurisdiction. However, as there is an Environment and Land Court in Siaya which is newly established and as the striking out will occasion an extra expense to the applicants for grave mistake caused by their advocate filing pleadings in a wrong court, I invoke the provisions of Article 48 of the Constitution on access to justice and direct that this matter be refiled before ELC Siaya without paying any extra fees for the application to be considered by the learned ELC Judge.

15. Accordingly, this file is closed from the High Court and referred to ELC, Siaya for consideration.

16. Orders accordingly.

**Dated, signed and delivered at Siaya this 3<sup>rd</sup> Day of November, 2021**

**R.E. ABURILI**

**JUDGE**