



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 46 OF 2017 (JUDICIAL REVIEW)

REPUBLIC

EX-PARTE: DICKSON ODONGO OKENO.....APPLICANT

VERSUS

DEPUTY COUNTY COMMISSIONER BONDO.....**1ST DEFENDANT**

COUNTY LAND REGISTRAR BONDO SUB-COUNTY.....**2ND DEFENDANT**

AND

JACK JAKINDA OJUOK.....**INTERESTED PARTY**

JUDGEMENT

The Exparte Applicant is seeking an order of certiorari to quash the order of the Deputy County Commissioner, Bondo, dated 15th June 2017m and the Boundary Dispute Summons dated 21st June 2017 issued by the District Land Registrar Bondo , as well as (ii) the decision by the District Land Registrar Bondo to visit and define the precise position of the boundaries between land parcel No. North Sakwa/ Nyawita / 377, 795, 376, and 796 on 4th July 2017. An order of prohibition prohibiting the District Land Registrar, Bondo, from visiting or defining the precise position of the boundaries between land parcel No. North Sakwa/ Nyawita / 377, 795, 376, and 796 on 4th July 2017 or on any other date until the dispute between the Applicant and the Interested Party and their respective families and/or until the respective estates of Eliakim Okeno Ligembe (land parcel North Sakwa/ Nyawita / 796) and Oburu Ojuok (land parcel North Sakwa/ Nyawita / 376) are properly represented by persons to whom grant of letters of administration have been issued by a competent court.

Applicant's Case

The Applicant states that that his relation to the Interested Party is that they share a great grandfather Odero but have separate grandfathers and therefore separate lines of inheritance. The Applicant claims that his grandfather Ligembe Odero owned all the parcels of land known as North Sakwa/ Nyawita/ 795, 377, 798, as well as a portion of 796.

The subject in dispute is a portion of Parcel 796 which neighbours Parcels 377 and 795. Parcel 377 is registered in the name of the Applicant's father Eliakim Okeno Ligembe, while Parcel 796 is registered in the name of the Interested Party's father Ojuok Odongo.

The Applicant claims that the portion of Parcel 796 lying between Parcel 377 and 795 is part of the homestead of Ligembe Odero and his family has used (ie. has been cultivating) that portion from time immemorial. That the Applicant's father pointed out to him that portion to establish his home according to Luo customs. That they did not know how Ojuok Odongo came to be registered as the proprietor of the portion, but it must have been through fraud, and that they only came to learn about this registration in 2017. That the portion of Parcel 796 runs through and separates his grandfather's and father's homes. That the registration of the portion in the name of Ojuok Odongo is erroneous and he and his estate holds the portion in trust for the Applicant and his brothers.

The Applicant stated that when he commenced fencing of the area he intended to put up his homestead on 7th June 2017, an area supposed to cover portions of both parcel 377 and 796, the Interested Party and his brother attempted to stop him from doing so, claiming ownership of the land. That in 15th June 2017, the 1st Defendant wrote to the Applicant and purported to issue an order stopping the Applicant from constructing the homestead or planting any trees. That the 1st Defendant acted in excess of his powers in issuing such an order.

The Applicant claims that on 21st June 2017, the District Land Registrar Bondo issued a notice to define the precise position of the boundaries between Parcels 377, 795, 376 and 796; and summoned some parties to appear at the site on 4th July 2017 for that exercise. That the Boundary Dispute Summons was issued on the application of the registered proprietor of Parcel 796 who is deceased. That the Applicant believes that the Interested Party is not the legal representative of Ojuok Odongo. That given that the registered proprietors of 377 and 376 are also deceased, there is no way they can be given an opportunity to be heard as required by **Section 19 (2) of the Land Registration Act** unless and until they are represented by their legal representatives possessing grant of letters of administration from a competent court. That the summons is therefore invalid and *ultra vires* the powers of the District Land Registrar and ought to be quashed by certiorari.

That existing and recognised boundary features on the ground which will be vital in determining the dispute are likely to be defaced, compromised or interfered with should the proposed visit by the District Land Registrar take place.

Interested Party's Response

In his replying affidavit, the Interested Party stated that at no time during the lifetime of the subject title owners was there any dispute over the registered titled. That it was not until 2017, long after the death of the Applicant's father and the Interested Party's father that the Applicant brazenly destroyed the common boundary between their respective family land and forcibly took possession of what was the Interested Party's family grazing land.

That if there were any issues of inheritance, these were settled by their fathers and other elders at the time of land consolidation, adjudication and registration, with specific boundaries planted by consensus and remained intact until the Applicant's interruption. That the Applicant's father respected and maintained the established boundaries with all of his neighbours.

That immediately the Applicant destroyed the common boundary, the Interested Party's mother advised him to report the matter to the local administration as a security issue, as their pleas to the Applicant to stop the aggression fell on deaf ears. That when the Assistant Chief, Chief and Deputy County Commissioner's administrative and advisory pleas to the Applicant to stop his activities were ignored, the Interested party sought the assistance of the local Land Registrar and Surveyor to re-establish the demarcated boundaries between the respective families' parcels. That upon the Interested Party's request, the District Land Registrar Bondo/Rarieda issued Boundary Dispute Summons dated 21st June 2017.

The Interested Party asserts that contrary to the Applicant's allegations that the Land Registrar cannot establish boundaries of land parcels where the registered owners are deceased, the Land Registrar can in fact give notice to both owners and occupiers under **Section 19 (1) of the Land Registration Act**. That the solution to the dispute does not lie in the reliefs sought herein by the Applicant but through the very processes that the Applicant want to avoid. That it is necessary that the formal lawful boundaries be restored by the Land Registrar while security is observed during the exercise by the local administration.

The Interested Party stated that in any event, he had now obtained grant of letters of administration in respect of his late father and was therefore competent to canvass issues regarding Parcel 796.

The Interested Party's mother also swore an affidavit in response in which she stated that the Applicant is making outrageous allegations regarding the history of the subject land which were transacted when the Applicant was a minor and could not have participated in the processes that resulted in the land demarcations that eventually constituted the existing ground boundaries of the various land titles.

The Interested Party's mother asserted that there was no fraud involved in the registration of her late husband as the proprietor of Parcel 796 as the whole exercise was carried out openly and through common consensus of all parties involved including the Applicant's father.

Interested Party's Submissions

Counsel for the Interested Party submitted that the Applicants made unsubstantiated allegations on the process of registration of the Interested Party's father as the proprietor of Parcel 796. That the unsupported allegations made by the Applicant were specifically challenged by the detailed affidavits of the Interested Party and his mother, both of which had not been countered by the Applicant.

Counsel submitted that it was the height of irony for the Applicant to go to court to castigate the Interested Party for lacking a grant of letters of administration while the Applicant himself had no stated legal capacity to sue on behalf of his father Eliakim Okeno Ligembe, the registered owner of Parcel 377. That to the extent that the Applicant has no capacity to sue, the claim herein was a non-starter and ought to be dismissed.

Counsel contended that the 1st Defendant did not act in excess of his powers in issuing administrative directions to the Applicant. That it was necessary for the Interested Party to report the Applicant's forced possession of their land.

On the Applicant's allegation that the Boundary Dispute Summons was invalid and *ultra vires* the powers of the Land Registrar, Counsel submitted that **Section 19 (1) of the Land Registration Act** was framed with the intention to include situations where the Land Registrar established disputed boundaries between occupiers.

Counsel submitted that the orders sought would have the effect of barring the adjudication on the disputed encroachment and legitimized the Applicant's unlawful annexation of Parcel 796. That the Interested Party has now been clothed with a grant of letters of administration intestate in respect of his father's estate.

Counsel submitted that moreover, the basis for the application for orders of certiorari were lawful therefore the application should fail. Counsel cited the case of ***Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300** for the proposition that to

succeed in an application for Judicial Review, the applicant must show that the decision or act complained of is tainted with illegality and procedural impropriety.

*** The Applicant has failed to serve written submission to date, despite a court order issued on 25th October 2019 directing the Applicant to file submissions within 14 days failing which the suit would be deemed as dismissed.**

Issues for Determination

1. Whether suit should be dismissed for non-compliance with court order

The court order of 24th October 2019 directing the Applicant to file written submissions had not been complied with by the Applicant. However, the order also directed the Interested Party to serve the court order within 2 days. The Interested Party has not indicated whether he has served the court order and has not filed an affidavit of service as evidence of the same. Therefore, it would be pre-mature to dismiss the suit without establishing whether the Applicant was served by the Interested Party and knowingly failed to comply.

2. Whether letter from the 1st Defendant is invalid

While the Interested Party insisted that the letter from the 1st Defendant was merely advisory and administrative in nature and related to maintaining law and order, the 1st Defendant pronounced himself on the dispute and, even without giving the Applicant an opportunity to be heard, purported to issue an order stopping the Applicant from carrying out any activities on the subject land, even stating that **“This order remains in force effective today date 15th June 2017 till further notice.”**

The 1st Defendant’s order was *ultra vires* his powers and therefore invalid since the jurisdiction to hear and determine disputes relating to environment and land lies with the Environment and Land Court by virtue of **Article 162 (2) of the Constitution and Section 4 of the Environment and Land Court Act.**

Further, it is the Land Registrar by virtue of **Section 19 of the Land Registration Act**, who can make a determination as to the precise position of disputed boundaries of a parcel of land. The 1st Defendant should not have gone beyond referring the matter to the District Land Registrar and proceeded to issue an order based on complaints by the Interested Party.

3. Whether the Boundary Dispute Summons is invalid

Section 19 (1) of the Land Registration Act provides:

“...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.”

The *Black’s Law Dictionary 9th Ed.* defines an interested person as **“A person having a property right in or claim against a thing, such as a trust or a decedent’s estate.”**

The Interested Party herein, as one of the sons of the deceased registered owner of Parcel 796 with a property interest in his late father’s estate, fits within this definition of an interested person and therefore had the standing to request the Deputy Land Registrar to ascertain and fix the boundaries of Parcel 796 in relation to the adjoining parcels.

Further, the notice under **Section 19 (1) of the Land Registration Act** applies to both the owners and the occupiers of the land adjoining the boundaries in question. The Deputy Land Registrar brought the Boundary Dispute Summons to the attention of the occupiers of Parcels 377 and 376, therefore the assertion that the notice was invalid because the registered proprietors of those parcels were deceased holds no water.

The upshot therefore is that the Boundary Dispute Summons issued by the Deputy Land Registrar Bondo/Rarieda District was proper in law and the process of ascertaining and fixing the boundaries in dispute can take place and involve both the owners of the affected parcels and the occupiers who are interested persons.

4. Appropriate Orders

The upshot of this is that the ex parte- Applicants succeeds only in respect of the order of the Deputy County Commissioner dated 15th June 2017 and therefore a Judicial Review order of *certiorari* is hereby issued quashing the said order being *ultra vires*. All the prayers for orders in respect of the Boundary Dispute Summons issued by the Deputy Land Registrar Bondo/Rarieda District, and the decision to visit and define the precise position of land parcels North Sakwa/ Nyawita/377, 795, 376 and 796 are declined. The applicant to be paid 1/3 of the costs.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2020.

In the presence of:

No appearance for Exparte Applicant

No appearance for Respondent

Mr. Manuari for Interested Party.

A.O. OMBWAYO

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JUDGE