



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**JUDICIAL REVIEW MISC. NO. 18 OF 2016**

**IN THE MATTER OF: AN APPLICATION BY COMPLAINANT REHEMA SAID**

**FOR LEAVE TO APPLY FOR ORDERS OF CETIORARI AND MANDAMUS:**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF THE**

**REPUBLIC OF KENYA (CHAPTER 4 BILL OF RIGHTS)**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT (2012)**

**AND**

**IN THE MATTER OF NATIONAL LAND COMMISSION ACT (2012) OF LAWS OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE OF ACTIONS ACT**

**BETWEEN**

**REHEMA SAID (SUING AS THE PERSONAL REPRESENTATIVE OF THE**

**ESTATE OF THE LATE SAID ABDALLA (DECEASED).....APPLICANT**

**AND**

**ANN AMINA HUSSEIN.....1<sup>ST</sup> RESPONDENT**

**(DISTRICT LAND REGISTRAR KAJIADO**

**NORTH DISTRICT.....2<sup>ND</sup> RESPONDENT**

**RULING**

Rehema Said the exparte applicant moved this court pursuant to Order 53 Rule 1 of the Civil Procedure Act for an Order of Cetiorari to quash the decision the decision of the Land Registrar Kajiado North allegedly made on 11/4/2016. In the impugned decision the applicant states that the Land Registrar ordered that there be a reduction of the deceased's parcel of land title referred as Ngong/Ngong/15038 from its initial measurement of 0.0095Ha by approximately 185.5 square metres without granting the deceased's estate an opportunity to be heard.

**The Facts of the Case**

Pursuant to the affidavit of Rehema Said the applicant depones that the deceased Said Abdalla during his lifetime purchased parcel of land title Ngong/Ngong/15038 measuring 0.95Ha as supported by the search certificate marked annexure RS2. That the property was fenced off with cedar posts and a barbed wire to protect his interest. That later the 1<sup>st</sup> Respondent an owner of the adjacent plot and LR Ngong/Ngong/15039 encroached into the deceased's stated parcel of land claiming that the acreage of her land had reduced after a road was constructed next to her property. The applicant vide a letter marked RS3 lodged complaint with the local administration and the Land Registration. Despite the applicant being out of the country the respondents and other people visited the property in January 2016 and later a decision was reached that the deceased's fence had encroached into the 1<sup>st</sup> Respondent's parcel of land.

In essence the applicant deposed that the decision by the Land Registrar adversely affected her rights to private property by reducing the size without an opportunity being given to her to be heard. To register her dissatisfaction, the applicant filed this Judicial Review against the respondents under Order 53 Rule 1 of the Civil Procedure Rules on 6/4/2017. The 2<sup>nd</sup> respondent filed a replying affidavit in answer to the position.

It was ventilated by the 2<sup>nd</sup> respondent that he alluded to a land dispute between the applicant and the 1<sup>st</sup> respondent. That upon making the visit and deliberations it was established that title deed numbers Ngong/Ngong/15038 and 9047 both measuring 0.095Ha were hived off from title number Ngong/Ngong/9047 initially measuring 0.19Ha. That upon the survey on picking the boundaries of the parcels of land by the surveyor they came to the conclusion that Ngong/Ngong/9047 measurement was smaller than what is actually registered in the land registry. That therefore informed their decision to rectify the anomaly.

### **The Applicant's Submissions**

Mr. Maina submitted that the application is grounded on two reasons that the applicant was adversely affected by the decision of the Land Registrar without being given an opportunity of stating his side of the case.

That the decision making process by the Land Registrar over the dispute was in breach of Article 47(1) of the Constitution and Section 4(3) (1) of the Fair Administrative Act. Learned counsel expanding his argument relied on the decisions in the case of **Livingstone Ntutu V Minister for Lands & 4 others 2014 eKLR, Republic V Umoja Consultants Ltd Civil Appeal No. 185 of 2001, Pastoki V Kabale District Local Government Council & Others 2008 2EA300.**

### **Analysis and Determination**

The powers of Land Registrars are defined and conferred by statute in section 14 of the Land Registration Act No. 3 of 2012. In these Judicial Review proceedings, the 2<sup>nd</sup> respondent visited the boundary dispute between the applicant and the 1<sup>st</sup> respondent as stipulated in section 19 of the Act. On fixed boundaries under section 19(1) the Act provides:

***“If the Registrar considers it desirable to indicate on a fitted 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 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.”***

Section 86 of the Act provides for review of the decision of Registrar it states:

***“If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the court and thereupon the court shall give its opinion, which shall be binding upon the parties.”***

Section 87 provides the definition and meaning of opportunity to be heard.

***“The Act requires that a person be given an opportunity to be heard before a particular thing is to be, or may be done, that person shall be deemed to have been given such an opportunity:***

***(a) If the person attends before the Registrar personally or by an advocate or other agent, and is given such an opportunity; or***

***(b) If the person intimates, personally or by an advocate or other agent, that the person does not wish to be heard; or***

***(c) If the person has been served with a notice in writing specifying the nature of the thing to be done and appointing a day and time not less than seven days after service of the notice at which, if the person attends before the Registrar, the person may be heard. Concerning a matter on which person is entitled to be heard or facts to allow pursuant to such a notice the Registrar shall adjourn the hearing from time to time and notwithstanding failure to attend, may hear that person at any time.”***

It is under these provisions the Registrar has powers to handle and adjudicate boundary disputes. The provisions set out an elaborate regulatory framework on the notice and what it means to have an opportunity to be heard on any matter or thing arising out of a dispute under the Land Registration Act. If the Land Registrar was to move to the boundary dispute area, he was bound to comply with section 19 of the Act and section 87 on right to a fair hearing and due process.

In the realm of Judicial Review, the mechanisms that courts have to exercise discretion are now well settled. The function of a judicial review court is to commit and apply the legal tools to review the impugned decision of a tribunal, authority or person or entity on the lawfulness of the decision making process. The court does not concern itself with the merits of the decision or make an attempt to substitute its decision with that of the tribunal, entity or authority. It is a jurisdiction conferred by the constitution to the High Court to supervise inferior tribunals in what I call policing to keep them within their legal mandate.

In **Republic V Northamber Land Compensation Appeal tribunal Exparte Shaw 1952/ALLER 127-128 Denning L.J** held interalia:

*“The court of the bench has an inherent jurisdiction to control all inferior tribunals not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeking that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the fact of it offends against the law. The Kings bench does not substitute its own needs for those of the tribunal as a court of appeal would do. It leaves it to the tribunal to hear the case again and in a proper case may command it to do so” ...” where the is a right appeal an aggrieved party would be advised and expected to use that avenue rather than Judicial Review. The most basic notion is that judicial review is always and should remain a remedy of last resort. On the other hand, the judicial review court has to recognize the special features and jurisdiction of those tribunals subject of judicial review.”*

The approach taken by our courts has now been put to test when considering the following decisions. In case of **Republic V Commission of Customs Services Exparte Imperial Bank Ltd 2015 eKLR** the court held that:

*“The grounds upon which the court grants judicial review orders are now fairly well settled through the unknown grounds have been recognized not to be exhaustive. The purpose of judicial review proceedings as opposed to the normal Civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.” (See also Republic v Secretary of State for Education and Science Exparte Avon County Council 1991/ALLER 282.)*

*The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. it is meant to uplift the quality of public decision making and thereby ensure for the citizen civilized governance by holding the public authority to the limit defined by the law.*

*Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to individualized discretion, from social controversy to commercial self-interest and anything in between. As a result, judicial review has a significantly improved the quality of decision making process. It has done this by upholding the values of fairness reasonableness and objectively in the in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abused of power and has generally enhanced the rule of law in government business and other public entities.”*

Seen from the above stand point it is a sufficient tool in causing the body in question to remain accountable. The breadth of the language of this dictum is to demonstrate that under judicial review jurisdiction the constitution has donated immense powers for the court to exercise discretion appropriately in order to enforce and secure the enforcement of fundamental rights and freedoms.

The exparte application petition in sum is that the 2<sup>nd</sup> respondent convened a meeting to fix a boundary dispute in respect of LR Ngong/Ngong/3907 without giving her an opportunity to defend herself. Secondly, the outcome of the Dispute Resolution Committee under the Chairmanship of the Land Registrar violated and infringed the applicants right to a fair hearing.

In essence what the exparte applicant was echoing is the express provisions of section 4 of the Act as read together with Article 47 of the constitution on a right to a fair Administrative Action. Section 4 of the act compels the administrator to accord affected persons an opportunity to attend proceedings in person or in company of an expert of his choice, a chance to be heard, an opportunity to cross-examine persons who gave adverse evidence against him. Further the section provides for notice of a right to review or appeal against the decision where applicable.

As stated in **Halsbury’s Laws of England, Judicial Review Volume 61 of 2010 5<sup>th</sup> Edition at 939** it was held that:

*“The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard is a fundamental principle of justice.....”*

*“The nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage and it may be unfair not to require the inquiry to be conducted in judicial spirit of its outcome is likely to expose a person to legal hazard or other substantial prejudice.....”*

Applying the above principles to this case I am satisfied that this is one case where the writ of certiorari should issue against the 2<sup>nd</sup> respondent decision. Purely by relevant facts the exparte applicant is a legal representative of the Estate of the deceased. The background of this case is a boundary dispute between LR Ngong/Ngong/15038 and LR Ngong/Ngong/15039 which are adjoining plots. The deceased Said Abdallah the registered proprietor died leaving behind his dependants as stated in the letter by the Chief dated 25/10/2016.

A dispute had arisen between the two proprietors regarding the Land Registration Kajiado North to re-fix the boundaries. In response to the intention by the disputants the Land Registrar convened a meeting comprising the surveyor, the interested parties and other members on 26/1/2016. According to the report a decision was reached to re-establish the boundaries between LR. Ngong/Ngong/15028 and 15039. In the report it is indicated that the exparte applicant was represented by Said Abdallah but in a supplementary affidavit by the exparte applicant she has annexed a copy of the death certificate that Said Abdallah passed on in 2008. He therefore did not resurrect on 26/1/2016 to participate in the proceedings on the boundary dispute as the minutes of the meeting of the Land Registrar seems to allege.

The applicant has further deponed in the affidavits that she was out of the country on the diverse dates when the committee visited the site under the guidance of the 2<sup>nd</sup> respondent. From the perusal of the notice of motion evidence is clear that the applicant nor her representative did not participate in the proceedings of 26/1/2016 which re-fixed the boundaries afresh. The applicant therefore avers that the decision is unconscionable which implies that she is not obliged to be bound by it.

An essential element of fair administration action is the right to be heard. Under section 87 of the Act a wider ambit is provided requiring the Land Registrar to give an individual an opportunity to state his or her case in respect of any matters expressly stated in the Land Registration Act before taking in a decision made on 26/1/2016. The applicant who had legal and beneficial interest in title LR. Ngong/Ngong/15038 was never served with the notice of the meeting nor provided an opportunity to ventilate her case on the boundary dispute. There is an oddity here on the facts of the case that the right to fair administrative action under Article 47 of the constitution as expanded in section 4 of the Fair Administration Act: that the rights of every person to be heard before any individual measure which would affect him or her adversely is taken.

Having arrived at this conclusion the Land Registrar Order on the impugned decision of 26/1/2016 is hereby quashed. The effect of the order is that the Land Registrar ought to revisit the dispute taking into account and acting in compliance with section 19 as read together with section 87 of the Land Registration Act No. 3 of 2012. The costs of this application be in the cause.

**Dated, delivered and signed in open court at Kajiado on 1<sup>st</sup> November, 2018.**

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**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Chege for the applicant – Present

Respondent - Absent