



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MISC. (JR) CIVIL APPLICATION NO.314 OF 2016**

**KETUPEI OLE ATETI MAYA.....APPLICANT**

**VERSUS**

**THE COUNTY LAND REGISTRAR KAJIADO.....1<sup>ST</sup>RESPONDENT**

**THE COUNTY SURVEYOR KAJIADO.....2<sup>ND</sup> RESPONDENT**

**MOSES MOITAMEI NKIMINIS.....INTERESTED PARTY**

**RULING**

The applicant is the registered owner of all that parcel of land known as LR No. KJD/PURKO/435(hereinafter referred to as “Plot No.435”) while the interested party is the registered owner of all that parcel of land known as LR No. KJD/PURKO/647 (hereinafter referred to as “Plot No.647”). Plot No. 435 and Plot No. 647 are adjacent to each other and the same are registered under the Registered Land Act, Cap.300 Laws of Kenya(now repealed). The applicant and the interested party have had a dispute over the boundaries of the two parcels of land going back to the year 2011. Sometimes in the year 2013 or thereabouts, the applicant referred the dispute to the District Land Registrar, Kajiado for determination. The parties are in agreement that the said land registrar and surveyor indeed visited the site of the suit properties, made inquiries and took measurements for the purpose of resolving the dispute. The parties are however not in agreement as to when the two officers visited the site and whether or not they made a report following that visit. According to the applicant, the officers visited the site on 1<sup>st</sup> April 2014 but failed to provide a report of their findings. On his part, the interested party has contended that the site visit took place on 30<sup>th</sup> January 2014 and that the officers made a report of their findings on 12<sup>th</sup> March 2014.

**The application before the court;**

The applicant moved this court ex-parte on 18<sup>th</sup> November 2016through chamber summons application of the same date seeking leave of this court to apply for judicial review in the nature of mandamus to compel the respondents to release a report of their findings following a site visit to the suit properties which they allegedly undertook on 1<sup>st</sup> April 2014. The applicant also sought an order that leave if granted should operate as a stay of the respondents’decision to conduct another site visit to the suit properties for the purposes of resolving the boundary dispute between the parties. The application came up for hearing before Gacheru J. on 18<sup>th</sup> November 2016, who directed that the same be served upon the respondents for hearing inter-partes. The application was served upon the respondents and the interested party. The respondents did not respond to the application while the interested party opposed the application through a replying affidavit sworn on 18<sup>th</sup> December 2016.

As I have stated above, the applicant has sought leave to apply for an order of mandamus to compel the respondents to release a report of their site visit to the suit properties on 1<sup>st</sup> April 2014. The said leave has been sought on the grounds that the applicant had lodged a boundary dispute with the respondents against the interested party in respect of the suit properties. The applicant paid the requisite fees after which the respondents visited the suit properties on 1<sup>st</sup> April 2014 and conducted inquiries, carried out survey and took measurements for the purposes of determining the dispute. The applicant has contended that following that site visit, the respondents have never released their report or determination of the dispute but have instead issued fresh summons to the parties to appear at the site of the suit properties again for another survey to be carried out. The applicant has contended that the decision of the respondents to undertake another site visit to the suit properties for the purposes of resolving the boundary dispute between the applicant and the interested party constitutes abuse of power and authority for reasons among others that the respondents are yet to release their report on the site visit which took place on 1<sup>st</sup> April 2014 and that the respondents have not given reasons as to what has necessitated the second survey which they intend to carry out. The applicant has contended that the respondents' action complained of is oppressive and vexatious.

In his affidavit in opposition to the application, the interested party has admitted that the suit properties are adjacent to each other and that there has been a boundary dispute between him and the applicant. The interested party has admitted further that the dispute was referred to the respondents for determination. The interested party has contended that the respondents visited the suit properties on 30<sup>th</sup> January 2014 and made a report concerning their visit on 12<sup>th</sup> March 2014. The interested party has contended that the applicant who has been aware of this report all along has put all sorts of huddles on the way of the respondents to prevent the implementation of the said report. The interested party has annexed to his affidavit a copy of a report of the site visit which was conducted on 30<sup>th</sup> January 2014 prepared by the 2<sup>nd</sup> respondent on 12<sup>th</sup> March 2014. The interested party has also annexed various summonses which have been issued to the parties subsequent to that report for the purposes of its implementation and the applicant's response to the same. The interested party has contended that no site visit took place on 1<sup>st</sup> April 2014 and as such the report sought by the applicant cannot be produced by the respondents. The interested party has contended further that this court has no jurisdiction to entertain the applicant's application since the applicant has not exhausted the laid down machinery for dispute resolution set out under the Land Registration Act, 2012.

When the application came up for hearing before me on 7<sup>th</sup> December 2016, Mr. Nzaku appeared for the applicant while Mr. Koin appeared for the interested party. In his submission, Mr. Nzaku reiterated the contents of the applicant's affidavit that was filed in support of the application. Mr. Nzaku submitted that since the applicant had paid for the site visit which took place on 1<sup>st</sup> April 2014, the respondents should be compelled to produce the report of that visit. In his submission in reply, Mr. Koi relied on the interested party's replying affidavit and submitted that the applicant had not exhausted the inbuilt dispute resolution mechanism provided under the Land Registration Act 2012 and as such the judicial review has been sought by the applicant prematurely.

I have considered the applicant's application and the replying affidavit filed in opposition thereto by the interested party. I have also considered the submissions by the advocates appearing for the parties. What is before me is an application for leave to file an application for judicial review. In the case of R. Vs. IRC ex-parte Federation of Self- Employed (1982) AC 617 at page 643, Lord Diplock stated that:

*“The need for leave to start proceedings for remedies in public Law is not new. It applied previously to applications for prerogative orders though not to civil courts for injunctions or declarations. Its purpose is to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints of administrative error, and to remove uncertainty in which public offices and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review is actually pending even though misconceived.”*

In the case of Njuguna vs. Minister for Agriculture (2000)1 EA 184, it was held that:

*“The test as to whether leave should be granted to an applicant for judicial review is whether without examining the matter in any depth there is an arguable case that the reliefs might be granted on the hearing of the substantive application.”*

What I need to determine in the application before me are;

- i) Whether the applicant has established a prima facie case of violation of fair administrative action?
- ii) Whether the applicant has exhausted all the other remedies available to him if any before seeking judicial review?
- iii) Whether the leave sought should be granted?

On the material before me, I am not satisfied that the applicant has established a prima facie case against the respondents. The applicant has contended that the respondents visited the suit properties with a view to resolving the boundary dispute between the applicant and the interested party on 1<sup>st</sup> April 2014 but failed to make a determination on the dispute. The applicant has not placed any evidence before the court in proof of the alleged visit to the suit properties by the respondents on 1<sup>st</sup> April 2014. The interested party in his replying affidavit has stated that the respondents indeed visited the suit properties but on 30<sup>th</sup> January 2014 and made a report following that visit. The interested party annexed to his affidavit, a copy of the summons showing that the site visit took place on 30<sup>th</sup> January 2014. The interested party also annexed a copy of the report prepared by the 2<sup>nd</sup> respondent following the said site visit on 30<sup>th</sup> January 2014. The applicant did not file a further affidavit in response to these allegations made in the interested party's affidavit. The same were therefore not controverted. I am in the circumstances inclined to believe the averments contained in the interested party's affidavit that the site visit took place on 30<sup>th</sup> January 2014 and that a report of that visit was made on 12<sup>th</sup> March 2014 and that what remained was the implementation of the said report. That being my view on the matter, there is no basis for the leave sought herein in that there was no site visit on 1<sup>st</sup> April 2014 and as such no report from such meeting can be produced by the respondents and furthermore, a report has indeed been produced following the site visit by the respondents to the suit property. Even if it is assumed for argument sake that the interested party's version of the events is not correct, judicial review is not the best forum to determine disputed facts. I am of the view that the applicant has not made out a case for judicial review.

The interested party has contended further that even if the applicant had made out a case for judicial review, the applicant has an alternative remedy to judicial review. The interested party has contended that the proceedings before the respondents were being undertaken under sections 18 and 19 of the Land Registration Act 2012. Section 86 of the Land Registration Act 2012 provides that any person aggrieved with the decision of the 1<sup>st</sup> respondent can seek a review of the same by stating a case for the opinion of this court. The interested party has contended that the applicant should have exhausted that remedy before coming to seek judicial review of the respondents' decision complained of. Section 9(2) of the Fair Administrative Action Act, 2015 bars this court from entertaining the applicant's intended application for judicial review until the applicant has exhausted the remedies accorded to it under the Land Registration Act aforesaid. The applicant did not respond to the interested party's submissions on this issue of alternative remedy to judicial review.

The position of the law has been that the existence of an alternative remedy is not a bar to judicial review save that, the court would only entertain an application for judicial review in exceptional circumstances where an alternative remedy exists. See, the decision of the Court of Appeal in the case of Republic vs. National Environment Management Authority (2011) eKLR. This is the same position that was taken by Mutungi J. in the case of Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining and 9 others (2015) eKLR. The need to exhaust alternative remedies before judicial review is sought is now a statutory imperative under the Fair Administrative Action Act No. 4 of 2015 which came into force on 17<sup>th</sup> June 2015. The Act was enacted to give effect to Article 47 of the Constitution of Kenya, 2010 which is on the following terms:-

*“47 (1) Every person has the right to administrative action that is expeditious, effective, 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.”*

Section 9(1) of the Fair Administrative Action Act, 2015 provides that:

*“Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Articles 22(3) of the Constitution.”*

Section 9(2) of the said Act provides that:

*“The High Court or subordinate court under subsection 1 shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under other written law are first exhausted (emphasis mine).”*

It is clear from the foregoing that where there are internal mechanisms such as review or appeal or where a written law provides for a remedy for an administrative action or decision, this court is barred from entertaining any application for judicial review of such action or decision unless it is satisfied that such remedies have been exhausted. The court has no discretion in the matter save where due to exceptional circumstances an applicant has sought exemption from the provisions of section 9(2) of the Fair Administrative Action Act, 2015 pursuant to section 9(4) of the said Act.

As I have stated above, the Land Registration Act has provided the applicant with a remedy of stating a case for the opinion of this court against the decision of the 1<sup>st</sup> respondent. The applicant has not satisfied me that it had exhausted that remedy before approaching this court for leave to apply for judicial review of the 1<sup>st</sup> respondent’s decision in question. The applicant has also not satisfied me that exceptional circumstances exist in this case that would justify the exemption of the applicant from the provisions of section 9(2) of the Fair Administrative Action Act, 2015 neither has the applicant applied for such exemption. If leave sought by the applicant is granted, the applicant’s application for judicial review would offend the provisions of section 9(2) of the Fair Administrative Action Act, 2015 aforesaid. I am of the view that the legislature had good reason for requiring persons aggrieved by administrative actions to first exhaust alternative remedies before applying for judicial review. In the case of Speaker of the National Assembly vs. Karume [1992]eKLR, the court stated that; *“In our view there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”*

Due to the foregoing, even if the applicant had made out a case for judicial review, which he has not, I would not have exercised my discretion in favour of granting the leave sought. The applicant should have exhausted the remedies provided under the Land Registration Act 2012 before moving this court for judicial review. For the foregoing reasons, the Chamber Summons application dated 18<sup>th</sup> November 2016 is dismissed with costs to the interested party.

**Delivered and Signed at Nairobi this 24<sup>th</sup> Day of January, 2017**

**S. OKONG'O**

**JUDGE**

**In presence of**

**NA            for the Applicant**

**N/A           for the Respondents**

**N/A           for the Interested Party**

**Kajuju       Court Assistant**