

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW 229 OF 2013

**IN THE MATTER OF: AN APPLICATION BY SAMUEL MUCIRI
W'NJUGUNA FOR LEAVE TO APPLY FOR THE JUDICIAL
REVIEW ORDERS OF MANDAMUS AND CERTIORARI**

AND

**IN THE MATTER OF: THE REGISTERED LANDS ACT CHAPTER 300 OF THE LAWS
OF KENYA (NOW REPEALED)**

AND

**IN THE MATTER OF: THE LAND REGISTRATION ACT, NO. 3 OF 2012, OF THE LAWS OF
KENYA**

AND

IN THE MATTER OF: SURVEY ACT CHAPTER 299 OF THE LAWS OF KENYA

BETWEEN

**REPUBLICAPPLICAN
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VERSUS

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

PAMELA MUTEGI,

THE DISTRICT LANDS REGISTRAR, THIKA.....3RD RESPONDENT

THE CHIEF LANDS REGISTRAR.....4TH RESPONDENT

REGINA N. NJUE

THE DISTRICT SURVEYOR THIKA.....5TH RESPONDENT

EPHANTUS M MURAGE,

**THE DIRECTOR OF SURVEYS MINISTRY OF LANDS, HOUSING AND URBAN
DEVELOPMENT.....6TH RESPONDENT**

AND

SAMUEL MUCIRI W'NJUGUNA.....EX PARTE APPLICANT

RULING

1. By a Notice of Motion dated 27th June, 2013, the *ex parte* applicant herein, **Samuel Muciri W'njuguna**, seeks the following orders:
 1. **An order of certiorari be issued against the respondents quashing their decision to reject the ex partes applicant's application for the reparation of subdivisions Nos. 2142 and 2146 within the parcel of land Ndarugu/Kamunyaka/102 and failing to observe the provisions of Section 26(1) of the Registered Land Act Chapter 300 of the Laws of Kenya.**
 2. **An order of mandamus be issued to compel the Respondents to effect and complete the reparation of subdivisions Nos. 2142 and 2146 within the parcel of land Ndarugu/Kamunyaka/102 as per the provisions of section 26 (1) of the Registered Land Act Chapter 300 of the Laws of Kenya.**
 3. **That the costs of this application be awarded to the Applicants and paid by the Regina N. Njue, the District Surveyor Thika, Ephantus M. Murage, the Director of Surveys and Pamela Mutegi, The District Land Registrar, Thika and the in their personal capacities in accordance with the Constitution of Kenya, 2010.**

EX PARTE APPLICANT'S CASE

2. The application is based on the Statutory Statement filed with the Chamber Summons for leave on 27th June 2013 and a verifying affidavit sworn on 27th June 2013 by the applicant.
3. According to the applicant, he is the eldest son of **Arthur Njuguna Muhenia** and a holder of a Power of Attorney in respect of the Title to land parcel No. Ndarugu/Kamuntaka/102 pursuant to which he, though his licensed surveyor subdivided the said parcel of land, then registered in his father's name, the donor of the said Power of Attorney with the intention of subdividing the same to himself and to his siblings. According to him although subdivision Nos. 2142 and 2146 were intended for his two married sisters, the two ultimately declined to accept the said subdivisions before they were transferred to them which action necessitated the applicant to apply for the reparation of the two subdivisions vide a letter dated 18th April 2013 as per the pursuant mutation dated the same day and District Land Registrar, Thika approved the said reparation exercising her powers under section 26 (1) of the **Registered Land Act** Chapter 300 of the Laws of Kenya and the provisos therein. It is deposed that upon the approval of the draft mutation by the 3rd Respondent **J. N. Gatome** Licenced surveyor carried out the ground survey and forwarded the Mutation Forms to the District Surveyor, the 5th respondent for numbering and forwarding the same to the 3rd Respondent. However, the 5th respondent sat on the mutation from for ages and started having meetings with the Director of Surveys with a view to rejecting the already approved reparation and vide her letter dated 14th May 2013, the 5th respondent then purported to return the mutation forms to **M/s Gatome & Associates** for alleged 'non-compliance'.
4. According to the applicant, it is mandatory under the applicable laws that rejections come with reasons for purposes of correction or explanation of the perceived anomalies. Despite the applicant seeking clarification the same has not been forthcoming an action which the applicant attributes to abuse of office by the said 5th respondent. It is the applicant's contention that statutory duty of approval of an application of this nature for the purpose of determining whether the reparation should go ahead and the parcels be given new numbers or retain the original ones is expressly vested in the 3rd Respondent by Section 26 (1) of the **Registered Land Act** Chapter 300 of the Laws of Kenya and not the 5th Respondent hence the applicant is aggrieved by the 5th Respondent's finding that the proposed reparation involves substantial changes of ownership having obviously usurped the role of the 3rd Respondent as laid out in Section 26 (1) of the **Registered Lands Act** Chapter 300 of the Laws of Kenya (now repealed). The applicant is further

aggrieved by the 3rd Respondent's negligence or omission to follow up with the 5th Respondent pursuant to the alleged meeting held between her and the 5th Respondent and indicated in the 5th Respondent's letter dated 21st May 2013, together with all other information given by the applicant's Licensed Surveyor's letter dated 3rd June 2013, and actually allowing the 5th Respondent to usurp her powers and duties donated to her by Section 26 (1) of the **Registered Land Act** yet the 5th Respondent has no role whatsoever and undoubtedly not under Section 26 of the said Act.

5. In the applicant's view, the actions of the public officers cited are destructive, malicious and aimed at wasting the said suit land and denying the applicant and his brother the right to effectively and faithfully complete his duties as spelt out in the Power of Attorney donated to him by his aged father which action has also delayed the applicant's siblings from taking possession of and enjoying their allocated parcels. In the applicant's view, the Respondents' actions are contrary to their statutory duties and functions, are in excess of their powers, are discriminatory, unlawful, and contravene the rule of law.

RESPONDENTS' CASE

6. In opposition to the application, the 5th Respondent on 31st July 2013 swore a replying affidavit in which she deposed that the Applicant on or about November 2012 made an application in her office for the subdivision of parcel No. Ndarugu/Kamunyaka/102 situated within her jurisdiction which application was approved and the parcel sub-divided to nine portions and issued with new numbers namely Ndarugu/Kamunyaka/2141, 2143, 2144, 2145, 2146, 2147, 2148 and 2149 and in liaison with the District survey office, the registry index map was on or about March 2013 amended to reflect the mutation and pursuant thereto, some of the parcels were transferred and title issued by her office in respect to 2144 – **Samuel W'Njuguna**, 2145 – **James Komu Njuguna** and 2149 – **Jane Njoki Njuguna**. The Applicant then made another application on or about April 2013 for her office to do a reparation of some of the parcels of land wherein her office approved the draft mutation and, his surveyor after carrying out a ground survey forwarded the mutation forms to the 5th Respondent herein.
7. However, the 5th Respondent after scrutinizing the proposed mutation by the Applicant found it was contrary to the applicable laws and guidelines and specifically the **Land Registration Act** and the **Land Registration Act** and the Land Registrar's handbook in that the Applicant had proposed to add the whole portion of land number 2142 and 0.5 acres from 2146 to his portion number 2144 then the remaining 0.5 acres of 2146 to be added to 2145 which is registered in the name of **Komu Njuguna**. In her view, reparation can only apply to adjoining land and there should be no substantial transfer of land while in the instant case, the proposed reparation applied to parcels that were not contiguous and there was substantial transfer of land hence this necessitated rejection of the application for reparation and the applicant was advised accordingly and given applicable options which he chose not to pursue.
8. To the deponent, the office of the 5th Respondent cannot be said to have been usurping her powers as its input is very crucial especially as Section 23 on reparation applies subject to Section 15 of the **Land Registration Act** on the maintenance of cadastral maps in order to maintain standards set according to the said Act and subsidiary rules under the handbook. It is further averred that the Applicant's allegations that the Respondents acted in a destructive, malicious manner are in bad faith and the rejection of his application in no way translates to discrimination, unlawfulness or contravention of the rule of law. Based on legal advice from her advocate she believes that the instant application is an abuse of the court process and does not warrant judicial review remedies as the Applicant has no justiciable case against the Respondents since this is not a case fit for reparation.

APPLICANT'S REJOINDER

9. In a rejoinder the applicant swore a supplementary affidavit on 27th September 2013 in which he deposed that the 3rd respondent approved the application for reparation of the suit land herein,

after ensuring that in making his application for reparation the applicant had complied to every requirement provided in law and that contrary to the impression offered by the 3rd respondent who is the District Land Registrar, a decision to reparable land or otherwise, legally lies with her and the impression she gives that her decision to reparable was overruled by the district surveyor does not make legal sense since the applicable law which was section 26 of the now repealed Registered Land Act Chapter 300 of the Laws of Kenya and now section 23 of the Land Registration Act, No. 3 of 2012 clearly and specifically provides that the decision to reparable or otherwise lies with the Registrar and in this case the District Lands Registrar, Thika, the 3rd respondent herein, who in paragraph 7 of her replying affidavit readily admits having abdicated her responsibility and handed it over to the district's land surveyor. The applicant urges this Court to take cognizance of the fact that in paragraph 7 of her replying affidavit the 3rd respondent did indeed approve the reparation together with the prepared mutation forms and they were not drafts as she claims and that once approval has been given and the document has moved to the next stage, the 3rd respondent had no power to relent the approval since she had already given the surveyor the authority to do the ground work survey.

10. In the applicant's view, the parameters of reparation are clearly laid out in the earlier cited sections and he met all the qualifications hence it is fallacious for the 3rd respondent to purport that my application did not meet the pre requisite antecedent qualifying an application for reparation yet, she fails, in paragraph 8 of her replying affidavit to state the guidelines set out in the **Land Registration Act** 2012 and the Land registrars handbook. According to the applicant, to demonstrate malice, corruption and carelessness in her handling of the matter, the 3rd respondent in paragraph 8 of her affidavit is desperately trying to cover the 5th respondents misdeeds which are captured in the applicant's letter addressed to the Director of Surveys dated 28th May 2013 and the 5th respondent's letter dated 21st May 2013 which is in the court records and which clearly shows in her last paragraph that the district surveyor was seeking advise from the Director of Survey whose advise has up to now not been produced in court. It is his contention that the 5th respondent and her deputy were not happy that the whole survey work was assigned to a private surveyor and the whole problem arises from that bitterness and the whole saga stems from the applicant's rejection of their scheme to do some private work. The applicant contends that the purported argument that it is wrongful to enjoin whole portions of lands to others fails due to the fact that the provisions of the law relating to reparation specifically provide for consolidation of 'contiguous parcels' and that indeed parcel No. 2146 adjoins parcel No. 2145 both of which were to be reparable to **Komo Njuguna** while the other two also adjoin and were to be reparable in the applicant's name. According his belief based on legal advice from his advocates, the applicant avers that once the 3rd respondent agreed to the reparation the only decision left to be made was whether the reparable plots would be registered in the old number or cancelled and a new number be issued for registration.

11. In the applicant's view, the 5th respondent intentionally delayed the whole process of reparation of the suit land before finally usurping the 3rd respondent's powers and rejecting it. Since the portions of land to be reparable are adjoined and still in the name of its original proprietor, **Arthur Njuguna Muhenia** who through power of Attorney donated powers to the applicant it is contended that the reparation of the suit land was not contrary to the **Land Registration Act** 2012, as alleged by the 3rd respondent, since the reparation of the land would not cause any change to ownership. In the applicant's view, power of attorney has been capture by **Justice M. Mutungi** in ELC Case No. 209 of 2013 delivered on 20th September 2013 regarding NDARUGU/KAMUNYAKA/102 hence the 3rd respondent is guilty of withholding material facts especially the fact that these parcels belong to the applicants and there is no transfer from or to a third party. He believes that it is not justifiable in this case for one proprietor to have 2 titles for adjoining properties.

APPLICANT'S SUBMISSIONS

12. On behalf of the *ex parte* applicant it was submitted by **Mr Mureithi** that under section 26 of the repealed **Registered Land Act** Cap 300 only the 3rd respondent had the power to reject or allow

the reparation of land. Having approved the reparation of land of portions no. 2142 and 2146, it was submitted that the 3rd respondent had a duty to ensure that the services provided by herself are efficient and honest. On approaching the said reparation, the 3rd respondent had ensure that each and every requirement had been adhered to by the applicant but despite several correspondence, the 3rd respondent failed, ignored or neglected to respond to the same. In the applicant's view the role of the District Surveyor is not to approve or reject the reparation of land but to determine whether portions of land to be repartitioned would retain their old numbers or issue new numbers to them and that this role only comes after approval of the reparation and completion of the ground work. To the applicant it is erroneous and misleading for the 3rd respondent to allege that the applicant has been advised by the 3rd and 5th respondent since the onus of the said approval rests with the 3rd respondent. In his view the 5th respondent was usurping the powers of the 3rd respondent while the 3rd respondent was covering up the 5th respondent's misdeeds.

13. It was therefore submitted that the 3rd respondent having approved the application for reparation which allowed the applicant's surveyor to do some ground work at a considerable cost, it would be unjust to frustrate the said reparation under the guise of non-compliance as alleged by the 5th respondent. To the applicant the actions of the 3rd respondent go contrary to the provisions of Article 47 of the Constitution and this Court has a constitutional duty to enforce the rights of every citizen. In support of the submissions, the applicant relied on **Ridge vs. Baldwin [1963] 2 All ER 66.**

RESPONDENT'S SUBMISSIONS

14. On behalf of the respondent it was submitted by **Ms Mbilo** that the issues arising herein in regard to exercise of the powers of the Land Registrar and the Applicant is bound by the provisions of section 86(1) of the Land Registration Act that in any dispute arises the Registrar is to state a case. Further judicial review jurisdiction is a special jurisdiction so is the jurisdiction of the Land and Environmental Court and hence this application should be dismissed and the case of **United States International University (Usiu) vs. Attorney General [2012] eKLR** was cited in support of this submission.
15. It was further submitted that ***Land Registration Act*** No. 3 of 2012 does not define reparation though under section 23 it can be defined to mean the grouping of fragmented plots to ensure better use of land hence the plots must be sharing a boundary that is contiguous. It was submitted that the Land Registrar has a discretion to allow or decline application for reparation and in considering the same it is bound by the provisions of section 15 of the same Act to liaise with the office of survey and ensure boundaries and survey is up to standards of the law. Apart from that he has to ensure that the reparation should not involve substantial changes of ownership, which would be effected by transfers carrying out reparation. It was submitted that the parcels of land which were sought to be re-partitioned were not contiguous hence reparation was not possible. Apart from that the reparation involved substantial transfer of land. To the respondents their action was in compliance with the law. In their view under section 23, reparation is subject to the role of the survey office under section 15 of the ***Land Registration Act***.
16. It was further submitted that the order of mandamus cannot issue to compel the exercise of a discretionary power let alone its exercise with a view to arriving at a particular result. In support of this submission the respondents relied on **Jotham Mulati Welamondi vs. Chairman of the Electoral Commission of Kenya Misc. Case No. 81 of 2002** and **Kenya National Examinations Council vs. Republic Civil Appeal No. 266 of 1996.**
17. On the issue of costs, it was submitted that judicial review remedies are only available against public bodies hence costs cannot be ordered against the respondents in their personal capacities.

DETERMINATION

18. I have considered the foregoing. Since the issue of jurisdiction has been raised, it was held in **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law draws tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.”

19. It is therefore on this note that I wish to begin the determination of the issues raised herein.

20. The respondents’ issue on jurisdiction as I understand it is twofold. The first ground for questioning the jurisdiction of this Court is the existence of the Land and Environmental Court. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

.....

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

21. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

22. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

23. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

24. The Court however appreciates that under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** and this includes courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “*determine the jurisdiction and functions of the courts contemplated in clause (2)*”, Parliament did enact ***The***

Environment and Land Court Act, 2011 which Act commenced on 30th August 2011. These proceedings were commenced on 27th June 2013. Section 13 of the said Act provides as follows:

	(5)	Delet ed
<i>The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.</i>	(6)	Delet ed
<i>In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—</i>		<i>In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—</i>
<i>(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;</i>		(a)
<i>(b) relating to compulsory acquisition of land;</i>	(b)	<i>interim or permanent preservation orders including injunctions;</i>
<i>(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and</i>	(c)	<i>award of damages;</i>
<i>(e any other dispute relating to environment and land.</i>	(d)	<i>compensation ;</i>
<i>Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.</i>	(e)	<i>specific performance;</i>
<i>In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.</i>	(g)	<i>restitution;</i>
	(h)	<i>declaration; or</i>
	(i)	<i>costs.</i>

- and determine the instant dispute which revolves around “land use planning”.
26. Under Article 160(1) of the Constitution the judiciary is subject to the Constitution. Since the Constitution has expressly divested the High Court of the powers to hear and determine disputes which fall squarely within the jurisdiction of the courts with similar status established pursuant to Article 162(2) of the Constitution, this Court would be acting in the excess of its jurisdiction if it entertained such disputes.
27. Since the subject matter herein falls within the jurisdiction of Environment and Land Court as established under the ***Environment and Land Court Act*** and since the remedies sought herein are capable of being granted by the said Court, it is my view that this Court has no jurisdiction to entertain his matter and grant the orders sought herein.
28. Where the Court has no jurisdiction, the Court has to down its tools and it is trite that a matter filed in a Court or Tribunal without jurisdiction is a nullity and is incapable of being transferred since in law it does not exist and it is trite that where an act is a nullity it is void and if an act is void, then it is in law not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken pursuant thereto must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**
29. In the premises I find that this application ought to have been filed in the Environment and Land Court and having so found it is unnecessary and imprudent for me to deal with the other issues raised herein.

ORDER

30. In the results the Notice of Motion dated 27th June, 2013 is struck out with costs to the respondents

Dated at Nairobi this 10th day of February 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Mururu for Mr Mureithi for ex parte applicant.