

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**JUDICIAL REVIEW DIVISION**  
**JUDICIAL REVIEW APPLICATION NO. 1 OF 2023**

**IN THE MATTER OF** an Application by **JOHNSON OTIENO ADERA** for  
Judicial Review Orders of **Mandamus**

**AND**

**IN THE MATTER OF** Articles **10, 47 and 232** of the **Constitution of  
Kenya, 2010**

**AND**

**IN THE MATTER OF** the **Public Service (Values and Principles) Act,  
No. 1A of 2015**

**AND**

**IN THE MATTER OF** the **Law Reform Act, Cap 26 Laws of Kenya**

**AND**

**IN THE MATTER OF** the **Fair Administrative Action Act, No. 4 of  
2015**

**AND**

**IN THE MATTER OF** the **Land Registration Act, No. 3 of 2012**

**AND**

**IN THE MATTER OF** **Order 53** of the Civil Procedure Rules

**AND**

**IN THE MATTER OF THE ASCERTAINMENT AND FIXING OF  
BOUNDARIES OF LAND REFERENCE NOS. SOUTH  
SAKWA/KOGELO/486 & KANYAMKAGO/KAWERE 1/3905**

BETWEEN

REPUBLIC .....  
..... APPLICANT

-VERSUS-

LAND REGISTRAR, MIGORI COUNTY  
.....1<sup>ST</sup> RESPONDENT  
COUNTY SURVEYOR, MIGORI COUNTY .....2<sup>ND</sup>  
RESPONDENT

EX PARTE.....JOHNSON OTIENO  
ADERA

JUDGMENT

A. INTRODUCTION

1. Before this Court is a Notice of Motion dated **25<sup>th</sup> August 2023** brought by the ex parte Applicant, **Mr. Johnson Otieno Adera**, through the firm of **Adera & Kenyatta Advocates**, pursuant to leave granted by the Honourable Court on **14<sup>th</sup> August 2023** (Ong'ondo, J.) in **Migori ELC JR No. 1 of 2023**. The Applicant seeks judicial review orders of **mandamus** to compel the **1<sup>st</sup> Respondent**, the Land Registrar, Migori County, and the **2<sup>nd</sup> Respondent**, the County Surveyor, Migori County, to perform their statutory duty under **Section 19 of the Land Registration Act, 2012** by ascertaining and fixing the boundaries of **Land Reference Nos. South Sakwa/Kogelo/486 and Kanyamkago/Kawere I/3905**.
2. The Motion also seeks a further order of mandamus compelling the **2<sup>nd</sup> Respondent** to issue to the Applicant official payment receipts and cadastral/survey maps for the said parcels of land. The Applicant also prays for costs of the application.
3. The application is premised on the grounds set out on the face thereof, supported by a statutory statement and a verifying affidavit sworn by the Applicant on **25<sup>th</sup> August 2023**, together

with annexures. The Applicant contends that despite applying and paying for boundary ascertainment and fixing of the subject parcels on **10<sup>th</sup> February 2020**, and despite several follow-ups with both the Land Registrar and the County Surveyor, the Respondents have failed, refused, or neglected to perform their statutory obligations.

4. The Applicant avers that the continued failure by the Respondents to act amounts to violation of his rights under **Articles 10, 47 and 232** of the Constitution, the **Fair Administrative Action Act, No. 4 of 2015**, and the **Public Service (Values and Principles) Act, No. 1A of 2015**, which require public officers to provide responsive, prompt, and efficient service to citizens.
5. It is the Applicant's case that the Respondents' inaction has persisted for more than **three years**, rendering him unable to protect his proprietary interests in the suit properties or to take any lawful steps to address encroachment issues. The Applicant further deposes that even after escalating the matter to the **Commission on Administrative Action (the Ombudsman)**, the Respondents still failed to take any action.
6. The record shows that on **10<sup>th</sup> August 2023**, the Deputy Registrar of this Court directed that the Applicant's chamber summons dated **3<sup>rd</sup> August 2023** be placed before the Duty Judge at Homa Bay ELC for directions. Subsequently, on **14<sup>th</sup> August 2023**, Hon. **G.M.A. Ong'ondo, J.**, having perused the ex parte chamber summons, certified the matter as **urgent**, granted **leave** to the Applicant to commence judicial review proceedings for **orders of mandamus**, and directed that the substantive motion be filed and served within **21** days.
7. The matter was thereafter mentioned before **me.** on **18<sup>th</sup> October 2023**, when counsel for the Applicant, **Mr. Deocratius**, informed the Court that all Respondents had been duly served and that the Applicant intended to prosecute the motion by way of **written submissions**. The Court, being satisfied with proof of service,

directed that the application be canvassed through written submissions, the Applicant to file and serve within **14 days**, and the Respondents to respond within a similar period.

8. On **21<sup>st</sup> November 2023**, the matter came up again before this Court. **Mr. Kenyatta**, learned counsel for the Applicant, confirmed that the Applicant had filed and served written submissions and an affidavit of service. There was **no appearance** for the Respondents, nor had they filed any reply or submissions. Consequently, the Court reserved a **judgment date**.

**B. APPLICANT'S SUBMISSIONS**

9. The Applicant, through the firm of **Adera & Kenyatta Advocates**, filed written submissions dated **26<sup>th</sup> October 2023**, urging the Court to grant the orders of **mandamus** sought. Counsel submitted that the **1<sup>st</sup> and 2<sup>nd</sup> Respondents**, being the Land Registrar and County Surveyor respectively, are **public officers** under the **Public Service (Values and Principles) Act, 2015**, and are **statutorily mandated** under **Section 19 of the Land Registration Act, 2012** to ascertain and fix land boundaries upon application by an interested party. It was contended that the Applicant complied with all procedural requirements by lodging a formal request and paying the requisite fees on **10<sup>th</sup> February 2020**, yet the Respondents failed to act, thereby violating **Articles 10, 47 and 232** of the Constitution.
10. Counsel relied on the celebrated case of **Kenya National Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, where the Court of Appeal held that **mandamus** compels the performance of a statutory duty which a public body has failed to perform. He also cited **Republic v Kenya School of Law & Another ex parte Kithinji Maseka Semo & Another [2019] eKLR**, and **Republic v County Government of Migori & Another ex parte Linet Kemunto Ombati [2021] eKLR**, to underscore the principle that public officers cannot shirk their legal responsibilities under the guise of administrative delay. Further reliance was placed on **Article 47(1)** of the Constitution and **Sections 4 and 7** of the **Fair**

**Administrative Action Act**, which guarantee every person the right to prompt, efficient, lawful and procedurally fair administrative action.

11. It was the Applicant's submission that the Respondents' persistent inaction for over three years amounted to **dereliction of statutory duty** and an affront to the rule of law. Counsel emphasized that the Applicant had made repeated written and physical follow-ups and even lodged a complaint with the **Commission on Administrative Action (the Ombudsman)**, but to no avail. He urged the Court to intervene, citing **Republic v Land Registrar, Thika & Another ex parte James Kirwa [2019] eKLR**, where a similar order of mandamus was issued to compel the Land Registrar and County Surveyor to fix disputed boundaries. Counsel therefore prayed that the Court allow the motion, issue the mandamus orders as prayed, and award costs to the Applicant.

C. **ISSUES FOR DETERMINATION**

12. I have carefully considered the Notice of Motion dated **25<sup>th</sup> August 2023**, the verifying affidavit, the annexures thereto, and the written submissions by the ex parte Applicant. The Respondents, despite being duly served, neither filed a response nor appeared in Court. The application is therefore unopposed. Nevertheless, the Court must determine the matter on its merits based on the material before it and the law.
13. Having reviewed the pleadings and submissions, the following issues arise for determination:
  - a) **Whether an order of mandamus should issue to compel the Respondents to perform their statutory duty; and**
  - b) **Who should bear the costs of this application.**

D. **ANALYSIS AND DETERMINATION**

**Issue 1: Whether an order of mandamus should issue to compel the Respondents to perform their statutory duty**

14. The Applicant seeks an order of **mandamus** to compel the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, being the **Land Registrar, Migori County** and the **County Surveyor, Migori County**, to **ascertain and fix the boundaries** of **Land Reference No. South Sakwa/Kogelo/486** and **Land Reference No. Kanyamkago/Kawere I/3905**.
15. It is not in dispute that the Applicant applied and paid for the fixing of the said boundaries as evidenced by the payment receipts dated **10<sup>th</sup> February 2020**, and that more than three years have lapsed without the Respondents undertaking the required statutory exercise. The Respondents, despite service of the application and written submissions, have neither entered appearance nor filed any replying affidavit to explain or justify the delay or failure to act.
16. The Applicant has anchored the application on **Section 19 of the Land Registration Act, No. 3 of 2012**, which imposes a **statutory duty** on the Land Registrar, with the assistance of the County Surveyor, to ascertain and fix boundaries upon the application of any interested person. The said provision, when read together with **Section 18(2)** of the same Act, underscores that the ascertainment and fixing of boundaries is a **mandatory administrative function** within the exclusive purview of the Land Registrar before the Court can assume jurisdiction over any boundary dispute.
17. Further, the Applicant has invoked **Article 47 of the Constitution** and the **Fair Administrative Action Act, No. 4 of 2015**, which collectively guarantee every person the right to **expeditious, efficient, lawful, reasonable, and procedurally fair administrative action**. The Respondents, being public officers entrusted with statutory responsibilities, are bound by **Articles 10 and 232 of the Constitution** to uphold the national values and principles of governance, including responsiveness, accountability, and transparency in public administration.

18. The nature of the remedy of **mandamus** has been elaborated in a long line of authorities. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others [1997] eKLR**, the Court of Appeal cited with approval *Halsbury's Laws of England* (4th Edn., Vol. 7, p.111 para 89) as follows: ***“The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right...”***
19. In **R (Regina) vs. Dudsheath, ex parte Meredith [1950] 2 All E.R. 741** at 743, Lord Goddard C.J. stated that: ***“It is important to remember that mandamus is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it.”***
20. Applying the above principles to the present case, the Court is satisfied that **Section 19 of the Land Registration Act** imposes a clear statutory duty on the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to ascertain and fix land boundaries upon request and payment by an affected party. The Applicant has demonstrated compliance by making the requisite application and payment, yet the Respondents have failed to discharge their legal mandate for over three years without explanation.
21. The Court finds that such inaction amounts to **unreasonable delay** and constitutes a breach of the Applicant's right to fair administrative action under **Article 47 of the Constitution** and

**Section 4(1) of the Fair Administrative Action Act, 2015.** The inaction also offends the constitutional values of responsiveness and accountability in public service.

22. Accordingly, this Court is persuaded that the Respondents have failed to perform a public and statutory duty imposed on them by law, and this is an appropriate case for the grant of an order of **mandamus** to compel performance.

**Issue 2: Who should bear the costs of this application**

23. The general principle on costs is well settled under **Section 27(1) of the Civil Procedure Act**, which provides that “*costs shall follow the event unless the Court for good reason orders otherwise.*” The purpose of an award of costs is to compensate a successful litigant for the expense and effort incurred in pursuing or defending a matter.
24. In the present case, the Applicant was compelled to institute these proceedings to enforce a clear statutory obligation which the Respondents failed to perform for over three years despite payment and repeated requests. The Respondents, though duly served, did not respond to the application and offered no explanation for their inaction.
25. On the prayer for **compensation**, I note that while **Section 11(1) (j)** of the **Fair Administrative Action Act** empowers the Court to award pecuniary compensation in appropriate cases, such relief is discretionary and must be supported by evidence of quantifiable loss or demonstrable violation of a constitutional right. In the instant matter, the Applicant has not tendered any specific evidence of loss or damage suffered beyond inconvenience occasioned by the delay.
26. I therefore find that the prayer for **compensation** is not merited in the circumstances and the same is hereby **declined**.

27. As regards **costs**, the Court takes the view that this is a matter that could have been resolved administratively had the Respondents acted within a reasonable time. Considering the nature of the proceedings and in the interest of promoting harmonious engagement between the Applicant and the Respondents in the implementation of this judgment, I direct that **each party shall bear its own costs** of the application.

E. **DISPOSITION**

28. Having considered the Notice of Motion dated **25<sup>th</sup> August 2023**, the verifying affidavit, annexures, and the submissions of the ex parte Applicant, and for the reasons stated above, the Court finds merit in the application to the extent stated. Accordingly, the Court makes the following orders:

- a) An **order of mandamus** is hereby issued compelling the **1<sup>st</sup> Respondent**, the **Land Registrar, Migori County**, in collaboration with the **2<sup>nd</sup> Respondent**, the **County Surveyor, Migori County**, to **ascertain and fix the boundaries** of **Land Reference No. South Sakwa/Kogelo/486** and **Land Reference No. Kanyamkago/Kawere I/3905** within **thirty (30) days** from the date hereof.
- b) The prayer for **compensation** is hereby **declined**.
- c) **Each party shall bear its own costs of this application.**

**It is so ordered.**

**DATED, SIGNED and DELIVERED** virtually at **NAIROBI** on this **22<sup>nd</sup>** day of **October, 2025**.

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**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of: -**

**N/A**.....for the Plaintiff

**N/A**..... for the Defendants

**Philomena W.** Court Assistant

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