

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCL JUDICIAL REVIEW NO.E012 OF 2024

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS
OF CERTIORARI, PROHIBITION AND MANDAMUS AGAINST THE
DECISION OF THE COUNTY LAND REGISTRAR KISUMU CONVEYED
VIA A LETTER DATED 20TH SEPTEMBER 2024 EXPRESSING AN
INTENTION TO AMEND THE REGISTRY INDEX MAP, BASED ON
PHYSICAL FEATURES I.E SISAL PLANTATIONS EXISTING ON THE
GROUND.

AND

IN THE MATTER OF KISUMU/KONYA/9645

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF SECTION 9(1) OF THE FAIR ADMINISTRATIVE
ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT

CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 23 (3F), 40 & 50 OF THE

CONSTITUTION OF KENYA 2010,

BETWEEN

REPUBLIC APPLICANT

VERSUS

THE REGIONAL SURVEYOR, NYANZA..... 1ST RESPONDENT

THE DIRECTOR OF SURVEYS, KISUMU CONTY....2ND RESPONDENT

THE LAND REGISTRAR, KISUMU 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

ROSE OMOLLO 5TH RESPONDENT

AND

CYPRENE ATIENO ODUOGO EX PARTE APPLICANT

J U D G E M E N T

Pursuant to leave granted on 15th November 2024, the ex parte Applicant filed the Judicial Review application herein vide the Notice of Motion dated 6th December 2024. The Notice of Motion expressed to have been brought pursuant to the provisions of articles 47 and 159 2(d) of the Constitution of Kenya, 2010,

sections 4, 7, 9 and 10 of the Fair Administrative Actions Act, 2015, sections 1A, 63(e) 3A of the Civil Procedure Act, Order 51, Rule 6 and Order 53 Rules 1, 2 and 3 of the Civil Procedure Rules seeks for orders that: -

- 1) the court be pleased to grant the ex parte applicant order of Certiorari directed at the Land Registrar, Kisumu quashing his decision of amending the Registry Index Map sheet Number 11 to conform with the situation on the ground and delineating the boundaries between the parcel number KISUMU/KONYA/6638, KISUMU/KONYA/837 and KISUMU/KONYA/9645 in accordance with the physical features on the ground i.e. sisal plantation and that the wall built by the ex parte applicant has encroached on the 5th Respondent's land parcel number KISUMU/KONYA/6638.
- 2) the honourable court be pleased to grant the ex parte applicant an order of Prohibition, prohibiting the Regional Surveyor Nyanza and the Director of Surveys Kisumu from implementing the decision of the 3rd Respondent dated 20th September, 2024 and amending the Registry Index Map Sheet number 11 to conform with the

situation on the ground and delineating the boundary between the parcel numbers KISUMU/KONYA/6638, KISUMU/KONYA/837 and KISUMU/KONYA/9645 in accordance with the physical features on the ground i.e. sisal plantation.

- 3) An order of Mandamus compelling a fresh survey and delineation of boundaries according to the original Registry Index Map.
- 4) An order of costs of the application.

The application was supported by the averments in the Supporting Affidavit sworn by the ex parte applicant on 6th December, 2024. The ex parte applicant deposed that on 15th February, 2024 she purchased a portion of land measuring approximately 0.24Ha which was originally KISUMU/KONYA/9221 from the legal registered owner, TERESIA OMUONO ORIEMA and sub-divided the same to create land parcel numbers 9646 and 9645 and obtained title to the same on the 21st February, 2024. That the seller disposed of an additional portion measuring 0.03Ha to her.

That after the purchase she learnt that there was a boundary dispute lodged by the 5th Respondent at the Land Registry Kisumu

pursuant to which a meeting was held on 1st August, 2024. That during the meeting, there was no active involvement of measuring by the 2nd Respondent and that despite this, a report was made. That her parcel of land number KISUMU/KOGONY/9645 is not surrounded by any sisal plantation in a manner to warrant the boundary to be delineated in conformity with the sisal plantation that are non-existent.

That the 3rd Respondent issued a letter dated 20th September, 2024 wherein it had recommended that the perimeter wall which the ex parte applicant had erected had encroached on the 5th Respondent's parcel of land parcel No. KISUMU/KONYA/6638 without giving the extent of the encroachment, and further that the registry index map of the said parcels be delineated in accordance with the sisal plantation on the ground. That in coming up with the report, the 3rd Respondent was not guided well as the letter failed to disclose the measurements and dimensions of encroachment and the sisal plantation do not exist on the ground.

That should the decision of the 3rd Respondent be implemented, the ex parte Applicant stands to lose a substantial portion of his parcel No. KISUMU/KONYA/9645.

That the decision-making process was devoid of procedural soundness with respect to guaranteeing fair administrative action and was marred with a myriad of illegalities as the 3rd Respondent disregarded the laid down procedures.

That the dispute is time sensitive in nature and that the nature of the dispute is such that any statutory body appointed to resolve the same cannot render an effective, impartial or dispassionate decision thus the essence of reviewing the decision of the Land Registrar.

That the Respondents shall suffer no prejudice if the present application is allowed.

Response by the 1st to 4th Respondents

Grounds of Opposition dated 13th February, 2025 were filed by Felix Kajo Senior Litigation Counsel on behalf of the 1st to 4th Respondents. Their case is that the application is bad in law and incurably defective. That the prayers sought are not available in the circumstances. That the 3rd Respondent properly invoked its jurisdiction as by law vested under section 18 of the Land Registration Act, 2012. That the impugned decision of the 3rd Respondent is legal, rational and bereft of any procedural

impropriety. That the decision complied with the rules of natural justice since the parties who were affected were heard before the decision was made. That the right forum for the ex parte applicant to ventilate any grievance arising out of the decision of the 3rd Respondent is to invoke section 86(1) of the Land Registration Act, 2012, that Judicial Review being discretionary in nature the remedies sought herein are not the most efficacious in the circumstances. That the remedy of certiorari cannot ensue in the circumstances since the impugned decision was legal, rational and without any procedural impropriety.

That the remedy of Prohibition cannot ensue in the circumstances since its sole objective would be to hinder the performance of a duty imposed by statute.

That the remedy of mandamus cannot ensue in the circumstances since its sole objective would be to arrogate the 2nd Respondent a duty by law vested upon the Respondents hence an illegality.

That the ex parte applicant has failed to demonstrate any illegality or procedural impropriety in relation to the said decision. That it is in the interest of justice that the remedies sought be denied.

Response by the 5th Respondent

The 5th Respondent filed her Replying Affidavit sworn on 14th March, 2025 in reply to Judicial Review application. She averred that there is already an active suit in WIMAN MELC NO.E048 OF 2024 involving the same parties and the same subject matter. That the facts and issues in the current matter are directly and substantially in issue in Winam MC ELC NO.E048 OF 2024 between the same parties or between parties whom they or any of them claim, litigating under the same title in a court of competent jurisdiction.

That the report and determination by the Land Registrar that is the subject herein was undertaken in accordance with the law.

That the objections being raised by the ex parte applicant are not only baseless and not supported by any evidence or the law, but the same do not merit orders of judicial review sought. That the application is misplaced and ought to be dismissed.

The 5th Respondent also filed a Preliminary Objection which vide directions taken on 17th March, 2025 was treated as part of the 5th Respondent's response to the judicial review. The Preliminary Objection raised vide Notice of Preliminary Objection dated 14th March, 2025 was based on the grounds that;

- (a) The suit is an affront to the provisions of section 6 of the Civil Procedure Act in that there is already an active suit in WIMAN MELC NO.E048 OF 2024 involving the same parties and the same subject matter.
- (b) Under the principles of sub-judice, parties are barred from litigating a dispute that is subject of an ongoing litigation in a parallel court;

and sought that the suit be struck out.

Submissions

Vide directions taken on 17th March, 2025, the Judicial Review was heard by way of written submissions.

Submissions for the Ex parte Applicant

Written submissions dated 17th May, 2025 were filed by Ohayo & Company advocate on behalf of the ex parte applicant. Counsel submitted that the impugned report was done without public participation, notification or issuance of a boundary dispute process as outlined in section 19 of the Land Registration Act and Regulations 40 of the Land Registration (General) Regulations, 2017. That the lack of procedural safeguards renders the decision

void ab initio as held in Republic -vs- Land Registrar, Kajjado North District & 3 Others [2018] KEEL 1305 (KLR).

Counsel submitted that the 3rd Respondent acted outside the scope of his lawful authority (ultra vires) by amending the Registry Index Map to confirm to the situation on the ground without following the mandatory process under sections 18 and 19 of the Land Registration Act.

That the Registrar who wrote the report failed to visit the ground and willfully ignored an earlier report by the Land Surveyor and that the Land Registrar's report is extremely erroneous as it fails to attribute the exact extent in which the ex parte applicant's wall encroaches on the 5th Respondent's land.

Counsel submitted further that the decision to alter legal boundaries based on physical features (like a wall and sisal plants) was patently irrational and a classic case of administrative overreach where the public officer exercised discretion arbitrarily, ignored statutory limits and failed to consider legal parameters.

That the ex parte applicant was not granted an opportunity to be heard. That this contravenes the procedural fairness requirements under article 47 and the Fair Administrative Actions Act. That the

recommendations as proposed by the 3rd Respondent shall be tantamount to arbitrary deprivation of land without following the due process contrary to article 40 of the Constitution.

As to whether the matter is subjudice, Counsel submitted that the application referred to by the 5th Respondent related to difference parcel of land NO.KISUMU/KONYA/9222 and sought orders of stay of the decision of the 3rd Respondent while the present matter concerned Judicial Review in respect of Land parcel No.KISUMU/KONYA/6638, 837 and 9645.

That the doctrine of subjudice is not applicable.

Counsel submitted that the ex parte applicant was entitled to the relief sought and urged the court to allow the judicial review.

Submissions for the 1st, 2nd, 3rd and 4th Respondents

Written submissions dated 20th May, 2025 were filed by Felix Kajo Senior Litigation Counsel on behalf of the Attorney General. Counsel submitted that section 18 and 19 of the Land Registration Act gives the Land Registrar powers to determine any dispute relating to boundaries in the first place before coming to court.

That the boundary in dispute being a general boundary, the Land Registrar was guided by the sisal plantation which demarcated the 5th Respondent's boundary.

That the area chief, Land Surveyor, all those who were affected as well as the two neighbours were present during the hearing and determination of the boundary dispute. That because general boundaries are identifiable by using the existing physical features and by interviewing the owners of the adjacent plots, the law requires disputes relating to such boundaries to be handled by the Land Registrar.

Counsel relied on the case of George Kamau Macharia -vs- Exka Limited [2019] KEELC (4596)KLR & Estate of Sonrisa Ltd & Another -vs- Samuel Kamau Macharia & 2 Others [2020] KECA 734 (KLR) to support the submissions.

On whether the survey report showing that the Registry Index Map does not conform to the ground ought to have been relied upon by the Land Registrar, Counsel relied on the provisions of sections 15 and 16 of the Land Registration Act and the case of Republic -vs- Kisumu County Land Registrar & Another, Otieno & 29 Others (ex parte) Judicial Review application E001 and E003 OF 2023

(Consolidated) [2024] KEEL 6577 (KLR) (3 October, 2024)

Judgement, and submitted that in the present matter, the Land Registrar found that the survey report showed that the Registry Index Map of the alleged boundary did not confirm to the ground.

That the ex parte applicant developed his parcel in accordance with the Registry Index Map, on the other hand the 1st, 2nd and 3rd Respondents relied on sisal plantation which was shown to them by the 5th Respondent and claimed are what had been the boundary for a long time.

That the Land Registrar should not have relied on the registry index map as claimed by the ex parte applicant because according to the survey report, it did not conform to the ground. That the ground takes precedence.

On whether the orders of certiorari prohibition and mandamus sought should be granted, Counsel relied on the case of Municipal Council of Mombasa -vs- Republic & Another [2002]eKLR and Lithara -vs- Land Adjudication and Settlement Officer, Tigania central; M. Abiru (Interested Party) (Judicial Review E001 OF 2023) [2024] KEELC (1775)(KLR) (20th March, 2024).

Counsel submitted that regarding the order of certiorari sought, the Land Registrar had jurisdiction under section 18 (2) to determine the boundary dispute. That the Land Registrar did not act with excess jurisdiction and that the ex parte applicant was given a fair hearing. That hence the order cannot issue.

Referring to the case of Kenya National Examination Council -vs- Republic Ex parte Geoffrey Githinji Njoroge & 9 Others (1997) eKLR, Counsel submitted that an order of prohibition cannot issue as there was no evidence that the 3rd Respondent acted against the law and that therefore the 1st and 2nd Respondents cannot be prohibited from implementing the decision of the 3rd Respondent.

Counsel submitted further that the 3rd Respondent performed its duties correctly and therefore the order of mandamus cannot quash the decision.

Counsel urged the court to dismiss the application with costs to the Respondent.

Submissions for the 5th Respondent

On behalf of the 5th Respondent, written submissions dated 26th May, 2025 were filed by the firm of Bruce Odeny & Company Advocates.

The 5th Respondent associated herself with the submissions by the 1st, 2nd, 3rd and 4th Respondents and submitted that other than the present matter, there is already another active suit in WINAM MELC NO.E048 OF 2024 involving the same parties and the same subject matter which offends section 6 of the Civil Procedure Act.

That this court cannot proceed with this matter as the same is sub judice.

That the envisaged decision of the Winam matter is subject to appeal to this court. Counsel urged the court to find that the matter is sub-judice.

As part of the 5th Respondent's response to the application, she filed a Preliminary Objection on the issue of sub judice.

In her submissions, the 5th Respondent referred the court to annexure R0-1 to her Replying Affidavit which is pleadings filed in WINAM MCELC NO E048 OF 2024. The parties in the suit as can be seen from the a copy the plaint, are the ex parte applicant herein as the 2nd Defendant, the 5th Respondent as the 1st Defendant and the 1st to 4th Respondents herein as the 4th Defendant jointly.

The subject matter of the suit is land parcel numbers KISUMU/KONYA/9222, 6638, 6637, 9223 and the suit land herein namely 9645.

In paragraph 14 of the plaint, the Plaintiffs complain that they were aggrieved by the Land Registrar's report dated 20th September, 2024. They averred that the report was marred with irregularities and flaws that they wished to be corrected before implementation.

The Plaintiffs sought for orders inter alia, that the report be declared null and void.

The same report is the subject matter of the Judicial Review herein.

The ex parte applicant having been sued in the matter at Winam ought to have pursued the same as it seeks similar results/outcomes as the Judicial Review herein.

I find that the Judicial Review herein is sub judice as there is an active existing case. The Judicial Review is hereby struck out. No order as to costs.

Orders accordingly.

Judgement dated and signed at Kisumu and delivered virtually this 20th day of November, 2025.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Ohayo for the Ex Parte Applicant.

N/A for the 1st, 2nd, 3rd and 4th Respondents.

Akinyi h/b for Odeny for the 5th Respondent.