



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISC APPLICATION NO. 35 OF 2018

(Formerly Machakos Misc. Application No. 134 of 2014)

IN THE MATTER OF: AN APPLICATION BY SIMON SALAON PERTET JOINTLY WITH ELIZABETH PERTET FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER ORDERS OF MANDAMUS AND PROHIBITION

BETWEEN

1. SIMON SALAON PERTET

2. ELIZABETH PERTET.....APPLICANTS

AND

1. PETERSON NDUNGU MARIRA

2. SAMUEL NDUNGU IRUNGU

3. HON. GIDEON S. KONCHELLA.....INTERESTED PARTIES

VERSUS

THE COUNTY LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGEMENT

The application before Court is a Notice of Motion dated 27th October, 2014 and filed on 28th October, 2014 brought pursuant to section 8 of the Law Reform Act and Orders 53 Rule 1 (1), (2), (3) and (4) of the Civil Procedure Rules and Section 1A of the Civil Procedure Act. The Ex parte Applicants seek the following orders:

1) THAT this Honourable Court be pleased to issue an order of mandamus directed to the County Land Registrar Kajiado through the office of the Honourable Attorney General Republic of Kenya compelling them to demarcate and put boundary marks on land reference number KAJIADO/ KAPUTIEI NORTH/ 2234 that belongs to SIMON SALOAN PERTET jointly with ELIZABETH PERTET, Land reference number KAJIADO/ KAPUTIEI NORTH/ 2233 that belongs to PETERSON NDUNGU MARIRA and SAMUEL NDUNGU IRUNGU jointly and land reference number KAJIADO/ KAPUTIEI NORTH/ 2232 that belongs to HON. GIDEON S. KONCHELLAH

2) THAT this Honourable Court be pleased to order that the above order be supervised by the Police County Commander, Kajiado County for purposes of enforcement.

3) THAT costs of this Application be provided for.

The application is based on the statement and supporting affidavits of SIMON SALAON PETERT, SAMUEL NDUNGU IRUNGU and HON. GIDEON S. KONCHELLA. They aver that on 19th July, 2011 the Applicants herein notified the 1st and 2nd Respondents vide a complaint letter that a boundary dispute involving the location of Title Number KAJIADO/KAPUTIEI-NORTH/2234 needed their intervention in the matter in order to establish the correct boundaries of the land in issue. They claim they are proprietors of LR. NO. KAJIADO/KAPUTIEI-NORTH/2234. They explain that the original parent title was KAJIADO/NORTH KAPUTIEI/1107 which was subdivided into 6 (six) portions i.e. LR. NO. 2232 measuring 8.09 Ha, LR NO. 2233 measuring 4.05 Ha, LR. NO. 2234 measuring 8.09 Ha,

LR. NO. 2235 measuring 25.64, LR. NO. 2236 measuring 25.64 Ha and LR. NO. 2237 measuring 25.64 Ha respectively. They contend that vide a Sale Agreement dated 19th November, 1993 they purchased the subject land being LR. NO. KAJIADO/KAPUTIEI-NORTH/2234 measuring 8.09 Ha. The applicants purchased the said land for value from REV. JOSEPH LASEI KISANGA. Further that the official search done in 2011 and the RIM MAP tally with mutations of 1993. They explain that in 1996 Land Reference Number KAJIADO/KAPUTIEI-NORTH/2235 was subdivided into two portions i.e LR. NO. KAJIADO/KAPUTIEI-NORTH/4546 measuring 17.55 Ha and LR. NO. KAJIADO/KAPUTIEI-NORTH/4547 measuring 8.09 Ha. totaling 25.64 Ha. as originally indicated since 1993. However, in 1999 Land Reference No. KAJIADO/KAPUTIEI-NORTH/4546 whose parent title is LR. NO. KAJIADO/KAPUTIEI-NORTH 2235 was on paper falsified and expanded to read 28.07 Ha. an increase of 10.52 Ha. This was an annexation of LR. NO. KAJIADO/KAPUTIEI-NORTH 2234 measuring 8.09. They contend that it is necessary for the Kajiado County Land Registrar to undertake a resurvey and confirm the true measurement of LR. NO. KAJIADO/KAPUTIEI-NORTH/2234. They further explain that both PETERSON NDUNGU MARIRA and SAMUEL NDUNGU IRUNGU are registered proprietors of Land Reference No. KAJIADO/KAPUTIEI/NORTH-2233 within Kajiado County having been registered as such on 16th September, 1993. Further, that the said Peterson Ndungu Marira and Samuel Ndungu Marira are now highly apprehensive that their subject land may have been encroached upon, hived away, subdivided, sold, charged or interfered with in a manner inconsistent with their right of ownership as envisaged under Section 25 and 26 of the Land Registration Act, 2012. They reiterate that the neighbours occupy and own Land Reference Number KAJIADO/KAPUTIEI-NORTH/2235 and may have encroached upon the proposed interested party's land as there are no demarcation marks and more specifically beacons to show the boundaries. Further, that HON. GIDEON S. KONCHELLA is the absolute owner of Land Reference Number KAJIADO/KAPUTIEI-NORTH/2232 measuring 20 acres which he has subdivided into KAJIADO/KAPUTIEI-NORTH/34278, 34279, 34280, 34281, 34282, 34283, 34284, 34285, 34286, 34241, 34242, 34243, 34244, 34245, 34246, 34247, 34248, 34244, 34300, 34301, 34302, 34303, 34304, 34305, 34306, 34307, 34308 and 34309 respectively. Further, that on 24th May 2012 a stranger encroached on the said Hon. Gideon S. Konchella's land by starting to fence as well as construct thereon and he is apprehensive that his land may have been sold, changed or interfered with in a manner inconsistent with his right of ownership.

The application is supported by a statement and affidavits sworn by SIMON SALAON PERTET, SAMUEL NDUNGU IRUNGU AND HON. GIDEON S. KONCHELLA respectively where they reiterate their claim above.

The Respondents though duly served failed to enter an appearance nor file a response to the instant application. I hence find that the Applicants and Interested Parties' averments uncontroverted.

The Applicants and Interested Parties filed their respective submissions, which I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 27th October, 2014 including the supporting affidavit as well as the annexures thereon, statement and submissions, the only issue for consideration is whether the Applicants are entitled to the orders sought in the Motion dated 27th October, 2014.

The Applicants were seeking orders of mandamus to compel the District Land Registrar Kajiado to demarcate the boundaries of the aforementioned parcels of land. They claimed that despite seeking the intervention of the District Land Registrar to demarcate their boundaries, he has failed to do so. From the annexures, it is evident that the applicants lawyers messrs Maina Mukoma & Company Advocates vide their letter dated the 19th July, 2011 sought the intervention of the District Land Registrar, Kajiado to establish the correct boundaries and location of Kajiado/ Kaputiei North/ 2234. It is not in dispute that Applicants and Interested parties are the absolute proprietors of the property being Land Reference Number KAJIADO/KAPUTIEI-NORTH/2234 measuring 8.09 Ha having purchased it from one REV. JOSEPH LASEI KISANGA vide a sale agreement dated 19th November 1993. It is also not disputed that the official search with regard to the Reference Number KAJIADO/KAPUTIEI-NORTH/2234 done in 2011 and the RIM Map tally with mutations of 1993. I note in 1996 Land Reference Number KAJIADO/KAPUTIEI-NORTH/2235 was subdivided into two portions i.e LR NO. KAJIADO/KAPUTIEI-NORTH/4546 measuring 17.55 Ha and LR. NO. KAJIADO/KAPUTIEI-NORTH/4547 measuring 8.09 Ha totaling 25.64 Ha. The Applicants contend that in 1999 Land Reference no. KAJIADO/KAPUTIEI-NORTH/4546 whose parent title is LR NO. KAJIADO/KAPUTIEI-NORTH/2235 was later falsified.

It is evident that both PETERSON NDUNGU MARIRA AND SAMUEL NDUNGU IRUNGU are registered proprietors of Land Reference No. KAJIADO/KAPUTIEI-NORTH/2233 having been registered as such on 16th September, 1993 to date. While HON. GIDEON S. KONCHELLA is the absolute owner of Land Reference Number KAJIADO/KAPUTIEI-NORTH/2232 measuring 20 acres, which has been subdivided into KAJIADO/KAPUTIEI-NORTH/34278, 34279, 34280, 34281, 34282, 34283, 34284, 34285, 34286, 34241, 34242, 34244, 34245, 34246, 34247, 34248, 34300, 34301, 34302, 34303, 34304, 34305, 35306, 34307, 34308 and 34309 respectively. Further, that the Applicants are the proprietors of land parcel number KAJIADO/ KAPUTIEI NORTH/ 2234

The Applicants and the Interested Parties are apprehensive that their subject land may have been encroached upon, hived away, subdivided, sold, charged or interfered with in a manner inconsistent with their right of ownership as envisaged under section 25 and 26 of the Land Registration Act, 2012. The applicants sought for intervention from the 1st Respondent on 19th July, 2011 in respect of the boundary dispute involving the location of Title Number KAJIADO/KAPUTIEI-NORTH/2234 but no action has been taken to date.

They hence sought for an Order of mandamus to compel the 1st Respondent to demarcate and put up boundaries Land Reference Number KAJIADO /KAPUTIEI-NORTH /2234, KAJIADO /KAPUTIEI-NORTH /2233 and KAJIADO/ KAPUTIEI-NORTH /2232 respectively, belonging to the Applicants and the Interested Parties as the neighbours' may have taken advantage of lack of boundary marks including beacons to encroach, subdivide, sell and even charge eh subject title to unsuspecting third parties. In their submissions, the Applicants and Interested Parties relied on the various judicial authorities including **REPUBLIC -VS- KENYA NATIONAL EXAMINATION COUNCIL EX PARTE GATHENGI & OTHERS CIVIL APPEAL NO. 234 OF 1996; DISTRICT COMMISSIONER KIAMBU – VS- R AND OTHERS EX PARTE ETHAN NJAU, 1960 EA 109; CHIEF CONSTABLE OF NORTH WALES POLICE –VS- EVANS (1982) ALLER 14; IN THE MATTER OF AN APPLICATON BY ET AL IN JUDICIAL MANUFACTURERS FOR**

Section 18 and 19 of the Land Registration Act provides that: '18 (1) *Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.* (2) *The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.* (3) *Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary: Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, (Cap. 299).* 19. (1) *If the Registrar considers it desirable to indicate on a filed 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, 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.* (3) *Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.'*

These provisions give the Land Registrar as a public officer the legal mandate to determine boundaries before the Court can entertain any boundary dispute.

In the case of Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others [2018] eKLR the Court of Appeal held that: "Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the Commissioner of Lands –versus Hotel Kunste [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a Manyatta Auctioneers –versus Republic – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See Zakayo Michubu Kibwange case (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.'

Further in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal while highlighting the circumstances under which judicial review of mandamus are issued, cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89** and stated thus:

"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 and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

In the current case, the Applicants sought for an order of mandamus against the Land Registrar Kajiado to compel him to demarcate boundaries of their respective parcels of land. The Applicants and the Interested Parties are all registered proprietors of their land. They sought the intervention of the Land Registrar vide a letter dated the 19th July, 2011 but he failed to demarcate the boundaries. The Applicants and the Interested Parties refer to a report by a private Surveyor who discovered that the neighbouring parcel of land had extended its boundaries. Further, the 3rd Interested Party discovered that certain persons had encroached upon his land and started fencing as well as constructing thereon. The applicants and the interested parties contend that they are now exposed to damage and loss and imminent interference with the proprietorship of their respective properties by the respondents' non-action. From a reading of section 18 and 19 of the Land Registration Act, the 1st Respondent owes a public duty as imposed by the Land Registration Act to make a determination on the boundaries herein and by failing to respond to the Applicants' request to demarcate the boundaries, he breached the applicants and interested parties legitimate expectation to fair administrative action as provided for under Article 7 of the constitution of Kenya.

In associating myself with the aforementioned judicial authorities and based on the analysis above, I hold that if this Court were to decline to grant mandamus, the Applicants and the Interested Parties would be left without an effective remedy to determine their boundary dispute. In the circumstances, I find that the Applicants and the Interested Parties are indeed entitled to an order of mandamus as against the Respondents.

The Applicants have sought for costs of the instant proceedings, I find that at this juncture, since the 1st Respondent will proceed to demarcate the boundaries and cannot be blamed for the third parties encroachment on the respective parcels of land, I will direct that each party do bear their own costs.

It is against the foregoing that I find the instant application merited and proceed to make the following order:

i) An order of mandamus be and is hereby issued directing the Land Registrar Kajiado through the office of the Honourable Attorney General Republic of Kenya compelling him to demarcate and put boundary marks on land reference number KAJIADO/ KAPUTIEI NORTH/ 2234 that belongs to SIMON SALOAN PERTET jointly with ELIZABETH PERTET, Land reference number KAJIADO/ KAPUTIEI NORTH/ 2233 that belongs to PETERSON NDUNGU MARIRA and SAMUEL NDUNGU IRUNGU jointly and land reference number KAJIADO/ KAPUTIEI NORTH/ 2232 that belongs to HON. GIDEON S. KONCHELLAH, within 90 days from the date hereof.

ii) The Police County Commander, Kajiado County do supervise the enforcement of the order granted in (i) above.

iii) Each Party do bear their own costs.

Dated, Signed and Delivered in Kajiado this 25th day of July, 2019

CHRISTINE OCHIENG

JUDGE