



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW CAUSE NO.3 OF 2017**

**IN THE MATTER OF: AN APPLICATION BY NELSON KIMEMIA GACHERU FOR ORDERS OF MANADAMUS**

**AND**

**IN THE MATTER OF: THE LAND ACT & THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF: THE REGISTERED LAND ACT (CAP 300 REPEALED)**

**AND**

**IN THE MATTER OF SECTION 1A & 1B OF THE CIVIL PROCEDURE ACT. CAP 21 & ARTICLE 159(2) OF THE CONSTITUTION**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**LAND REGISTRY, KIAMBU.....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS.....2<sup>ND</sup> RESPONDENT**

**DANIEL MBUGUA KARIUKI.....3<sup>RD</sup> RESPONDENT**

**MARY WANJIKU KAHUGU.....4<sup>TH</sup> RESPONDENT**

**(EX PARTE NELSON KIMEMIA GACHERU)**

**JUDGMENT**

By an *Amended Notice of Motion* application dated **16<sup>th</sup> February 2017** by the Exparte Applicant sought for the following orders:-

- a) An order of Mandamus to compel the Land Registrar, Kiambu to issue the Applicant with an official search and certified copy of Green Card in respect of parcel of land known as Kiambaa/Ruaka/3123.***
- b) An order of Mandamus to compel the Land Registrar, Kiambu to receive such evidence and ascertain and fix the boundaries between the parcels of land known as Kiambaa/Ruaka/3123, Kiambaa/Ruaka/5425 & Kiambaa/Ruaka/5426.***
- c) That the costs of this Application be provided for.***

The Application is premised on the grounds that on **22<sup>nd</sup> August 2016**, the Applicant applied for an official search from the 1<sup>st</sup> Respondent in respect of **LR.Kiambaa/Ruaka/3123**. However, the 1<sup>st</sup> Respondent has failed to issue him with an official search in respect of the said parcel of land. That further, the Applicant applied for a boundary dispute on **4<sup>th</sup> February 2016**, and on **10<sup>th</sup> June 2016**, the 1<sup>st</sup> Respondent issued

him with a letter of intention to visit the disputed plots on **21<sup>st</sup> July 2016**, to determine the boundaries. On **14<sup>th</sup> June 2016** the applicant paid the 1<sup>st</sup> Respondent the requisite survey fees of Kshs.18,000/= but the 1<sup>st</sup> Respondent never went to ascertain the proper position of the boundary and refused to carry out its statutory duty. Further that though the Applicant has complained to the 2<sup>nd</sup> respondent, the 2<sup>nd</sup> Respondent has failed or ignored to offer the Applicant any assistance on the matter and as such the Respondents have failed, refused and/or ignored to carry out their mandate under the law.

Further in his statement, the Exparte Applicant reiterated the contents of the Supporting Affidavit and further averred that the reliefs are sought on the grounds that; the applicant is the registered owner of **LR.Kiambaa/Ruaka/3123**, and reiterated the contents of the Supporting Affidavit.

In his Verifying Affidavit, the applicant averred that the 3<sup>rd</sup> Respondent is the registered owner of **LR.Kiambaa/Ruaka/3123**, as evidenced by the official search and the 4<sup>th</sup> Respondent is the registered proprietor of the property known as **Kiambaa/Ruaka/5426** as evidenced by the official search.

The suit is contested and the 3<sup>rd</sup> & 4<sup>th</sup> Respondents filed grounds of objection dated **7<sup>th</sup> February 2018**, and stated that the application is incompetent and fatally defective. They further averred that the application does not disclose any cause of action against the 3<sup>rd</sup> & 4<sup>th</sup> Respondents and therefore it is frivolous and an abuse of the court process as it seeks to enforce a land boundary dispute through Judicial Review Orders and the prayers sought by the Applicant cannot be enforced against the 3<sup>rd</sup> & 4<sup>th</sup> Respondents.

The 4<sup>th</sup> Respondent also filed a Replying Affidavit and averred that the application falls under the ambit of Judicial Review Court and not the Environment & Land court and the entire application is vexatious as there is no cause of action against her and the 3<sup>rd</sup> Respondent. She further averred that the Applicant is a stranger to her and the alleged boundary having been created in **2001**, is time barred by the Limitation of Actions Act. It was her contention that upon subdivision of the entire land in **2001**, she disposed the portion being claimed by the Applicant to a third party who years later in **2014** subdivided it into two portions and sold to the Applicant and the applicant's cause of complaint is against the third party as the portion she was left with, she further subdivided and sold to the 3<sup>rd</sup> Respondent. She further averred that when the 1<sup>st</sup> & 2<sup>nd</sup> Respondents were faced by the Applicant's application for re-survey they summoned all parties and they agreed that the claim was time barred as well as the fact that the Applicant did not establish any direct connections to her and the 3<sup>rd</sup> Respondent. She urged the Court to dismiss the application against her and the 3<sup>rd</sup> Respondent.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents although duly served did not file any papers. The application was canvassed by way of written submissions to which the court has now carefully read and considered.

Having now considered the relevant pleadings, the available evidence and the written submissions, the court finds that the issues for determination are:-

- a) **Whether this Court has jurisdiction to deal with the instant matter.**
- b) **Whether the applicant have proved that he is suitable to be granted the orders sought.**
- c) **Who should bear costs of the suit?**

a) **Whether this Court has jurisdiction to deal with the instant matter**

The Exparte Applicant has sought for Judicial Review Orders. The 4<sup>th</sup> Respondent in her Replying Affidavit averred that the instant application falls under the Judicial Review Court and not Environment & Land Court. It is trite that jurisdiction is everything and without it, the court has no option but to down its tools. See the case of **The owners of the Motor Vessel 'Lilian S'...Vs... Caltex oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

***"..Jurisdiction is everything. 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."***

It is apparent that Judicial Review jurisdiction is the power granted to courts to review the lawfulness of an enactment or decision, action, failure to act in relation to public function. See the case of **Grain Bulk Handlers Ltd..Vs...J. B. Maina & Co. Ltds & 2 Others (2006) eKLR**, where the Court held that:-

***"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is legality of such decisions."***

The Applicant herein has sought for an Order of Mandamus to compel the **Land Registrar, Kiambu** to issue him with official search and certified copy of Green Card in respect of the parcel of land known as **Kiambaa/Ruaka/3123**.

The Applicant alleged that he applied for an official search from the 1<sup>st</sup> Respondent on **22<sup>nd</sup> August 2016**, over the said suit property **Kiambaa/Ruaka/3123**, but the 1<sup>st</sup> Respondent has refused and/or neglected to issue the

Applicant with the said search.

From the description of Judicial Review, then the alleged action of the 1<sup>st</sup> Respondent amounts to failure to act in relation to public action. Therefore the prayers sought fall under the ambit of Judicial Review. The question is whether this Court has jurisdiction to deal with Judicial Review matters.

The creation of Environment & Land Court is provided by **Article 162(2)(b)** of the **Constitution** which provides that:-

**“Parliament shall establish 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 for land”.**

Further **Article 162(3)** of the **Constitution** provides that:-

**“Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”**

Flowing from the above provisions Parliament enacted the **Environment & Land Court Act, No.19 of 2011** which came into effect on **30<sup>th</sup> August 2011**. **Section 13** of the **Environment & Land Court Act** sets out the jurisdiction of the **Environment & Land Court**. One such issue is disputes relating to boundaries.

Further **Section 13(7)** provides that in exercise of its jurisdiction, the **Environment & Land Court** shall have power to make any order and grant relief as it deems fit and just including:-

a) .....

b) **Prerogative orders.**

The orders granted in Judicial Review falls under the prerogative orders. Therefore from the above provisions of law, the court has jurisdiction to deal with Judicial Review matters that relate to land and especially disputes related to boundaries. Consequently, the court finds that it has jurisdiction to deal with the instant matter.

b) **Whether the Applicant is entitled to the orders sought.**

The Applicant has sought for two Mandamus Orders;-to compel the Land Registrar Kiambu to issue the Applicant with an official search and certified copy of green card in respect of **LR.No.Kiambaa/Ruaka/3123** and also to compel the Land Registrar, Kiambu to receive such evidence and ascertain and fix boundaries between parcels of land known as **Kiambaa/Ruaka/3123, 5425 & 5426**.

The Applicant has alleged that he applied for the said official search but the 1<sup>st</sup> Respondent has failed to issue him with the same. Further that though the Applicant filed a boundary dispute with the 1<sup>st</sup> Respondent and 1<sup>st</sup> Respondent wrote a letter on 10<sup>th</sup> June 2016 alleging that he would visit the disputed land on **21<sup>st</sup> July 2016** to determine the boundaries, he failed to do so and has thus failed in his statutory duty.

The Applicant has sought for orders of Mandamus which orders are issued to compel the performance of a public duty which is imposed on a person or body of persons of 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. See the case of **R...Vs...Kenya National Examination Council Ex-parte, Geoffrey Gathenji & Others, Civil Appeal No.266 of 1996**, where the Court held that:-

**“The Order of Mandamus is of a 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 thereon specified which appertains to his or their office and is in the nature of public duty.... The order must command no more than the party against whom the application is legally bound to perform”.**

Though the 1<sup>st</sup> & 2<sup>nd</sup> Respondents did not file their responses to the instant application, it was the duty of the Applicant to prove his case on the required standard.

The Applicant alleged that he applied to the Land Registrar for issuance of a certificate of official search and a certified copy of the green card for his land parcel no.**Kiambaa/Ruaka/3123**, but the Land Registrar failed to provide the same to him. There is no doubt that the Applicant has a title deed for **Kiambaa/Ruaka/3123**, and therefore prima facie, he is the absolute and indefeasible owner of the said suit property. Apart from several receipts for payment to Kiambu Lands office several monies, there is no evidence of application for provision of the Certificate of official search or certified copy of the Green Card. The receipts attached to the application do not show they were receipts for payment for what purposes. This Court cannot hold with certainty that indeed the Applicant did apply for the certificate of official search and green card from **the Land Registrar Kiambu** and the said application was rejected.

Further it is indeed true that on **10<sup>th</sup> June 2016**, the District Land Registrar wrote to the Applicant and other parties informing them to appear before him on **21<sup>st</sup> July 2016** accompanied by their witnesses over the disputed boundaries of **Kiambaa/Ruaka/3123, 5425 & 5426**. There was no evidence that the Applicant did appear before the said Land Registrar on the given date and the said Land Registrar failed to listen to him.

Having considered the available evidence, the Court finds that the Exparte Applicant came to court too early before exhausting all the avenues provided by Section 19 of the Land Registration Act. The Land Registrar has the power to issue the official search and a copy of the Green Card to any citizen of Kenya who applies for such documents. Further, the Land Registrar has an obligation under **Section 19** of the **Land Registration Act** to ascertain and fix boundaries upon an application by any interested person. The Exparte Applicant has not shown that he did apply to the Land Registrar to provide the said documents or for him to ascertain the boundaries and he failed to do so.

For the above reasons, the Court finds that the Exparte Applicant's **Amended Notice of Motion** dated **16<sup>th</sup> February 2017** is not merited. Consequently, the Court dismisses the said Notice of Motion application entirely with costs to the 3<sup>rd</sup> & 4<sup>th</sup> Respondents.

***c) Who should bear costs of the suit"***

Costs are ordinarily awarded at the discretion of the court but they do follow the event. The Exparte Applicant is not successful in his application. However, he enjoined the 3<sup>rd</sup> & 4<sup>th</sup> Respondents to this suit. The 3<sup>rd</sup> & 4<sup>th</sup> Respondents are entitled to costs of this application. The Exparte Applicant should bear costs of the suit in respect of 3<sup>rd</sup> & 4<sup>th</sup> Respondents.

It is so ordered.

***Dated, Signed and Delivered at Thika this 12<sup>th</sup> day of September 2019.***

**L. GACHERU**

**JUDGE**

**12/9/2019**

In the presence of

Mr. Mungai. for the Exparte Applicant

No appearance for 1<sup>st</sup> Respondent

No appearance for 2<sup>nd</sup> Respondent

No appearance for 3<sup>rd</sup> Respondent

No appearance for 4<sup>th</sup> Respondent

Lucy - Court Assistant

**L. GACHERU**

**JUDGE**

**12/9/2019**