



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MAKUENI

ELC MISC. APPL. NO. 51 OF 2017

DOMINIC M. MATHEKA APPLICANT

=VERSUS=

THE LAND REGISTRAR MAKUENI COUNTY..... RESPONDENT

TITUS MUSYOKA MULUNGYE..... 1ST INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL2ND INTERESTED PARTY

JUDGEMENT

1. By his Notice of Motion application dated 04th March, 2016 and filed in court on 07th March, 2016, the Ex parte Applicant prays for orders:-

i. THAT an order of Certioraran (sic) to remove into the ENVIRONMENT & LAND LAW COURT and quash the decision of the Land Registrar Makueni County dated 18/08/2015 which order fixed/determined the boundary between Land Parcel Nos.MBITINI/ITETA/608 & MBITHIN/ITETA 609.

ii. THAT an order of mandamus do issue to compel the Land Registrar Makueni County to determine and fix the boundary in accordance with the law – giving all parties an opportunity to be heard in accordance with Section 19 of the Land Registration Act and the Constitution 2012 after a fair hearing.

iii. THAT cost of this application be provided for.

The Application is expressed to be brought under Sections 8 and 9 of the Law Reform Act chapter 26 of the Laws of Kenya, Sections 2 and 19 of the Land Registration Act, Sections (sic) 47 and 50(1) of the Constitution of Kenya 2010, Order 53 Rules 1, 2, 3 and 4 of the Civil Procedure Rules and all other enabling provisions of the law. It is accompanied by the verifying affidavit sworn by the Ex-parte Applicant at Makindu on 18th January, 2016 and filed in court on 18th February, 2016 together with the statutory statement dated 18th January, 2016.

2. From the affidavit of service sworn at Nairobi on 16th March, 2016 by Ethan Kamau who is a process server, the 1st Interested Party and the 1st Respondent were served on the 11th and 14th March, 2016 respectively. There is no evidence of service upon the Attorney General who is listed as an Interested Party in this application.

3. The 1st Interested Party, Titus Musyoka Mulungye, has opposed the application vide his replying affidavit sworn at Makindu on 25th January, 2019 and filed in court on 27th February, 2019.

4. Directions to dispose off the application by way of written submissions were issued on the 27th February, 2019. The matter was fixed for mention on 09th May, 2019 to enable both parties file and exchange their submissions. The matter was fixed for further mention on 18/06/19 to enable the Interested Parties file and serve their submissions. Of importance to note is that both the Ex-parte Applicant and the 1st Interested Party filed their submissions on the same day. The 2nd Interested Party's submissions appear to have been prompted by the service that was effected upon him on 08th August, 2019 as can be seen from the affidavit of service sworn at Makindu on 26th February, 2019 and filed in court on 27th February, 2019. The 2nd Respondent however did not file a memorandum of appearance.

5. I have read the submissions filed by the Ex-parte Applicant and the 1st Interested Party. What comes out clearly is that the Ex-Parte Applicant's Counsel in his submissions attacks the merit of the decision made on the 18th August, 2015 by the Land Registrar. The Counsel

submitted in passing that the actions of the Registrar amount to passing a judgment against the Ex-parte Applicant without giving him an opportunity to be heard.

6. In his submissions, the Counsel for the 1st Interested Party has submitted that the Ex-parte Applicant has merely averred that the Respondent was biased against him and had a pre-determined mind without demonstrating that the Respondent was biased. The Counsel went on to submit that all the parties were heard as required by the law and it was up to the Ex-parte Applicant to prove otherwise. The Counsel cited the case of *Municipal Council of Mombasa vs. R & another [2002] eKLR*. He however did not avail the said authority in court.

7. In judicial review proceedings, the court is concerned with the process rather than merits of decision sought to be quashed. As earlier on pointed out in my judgement, the Ex-parte Applicant has dwelt on the merits of the decision arrived at by the Respondent on 18th August, 2015. This would have been appropriate in civil rather than in the judicial review proceedings. In the case of *Ransa Company Ltd vs. Manca Francesco & 2 others [2015] eKLR* the Court of Appeal expressed itself thus:-

“As we all appreciate, a court sitting on judicial review exercises a sui generis jurisdiction which is very restrictive indeed, in the sense that it principally challenges the process, and other technical issues like excessive jurisdiction, rather than merits of the case. It is also restrictive in the nature of the remedies or reliefs available to the parties”.

Guided by the above authority, my finding is that the Ex-parte Applicant has not demonstrated that the Respondent acted with illegality, irrationality and impropriety of procedure in arriving at his decision on the 18th August, 2015. The application is therefore devoid of merits and I proceed to dismiss it with costs to the 1st Interested Party.

Signed, Dated and Delivered at Makueni this 3rd day of October, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Kasyoka for the Ex-parte Applicant

Ms. Ongong'a holding brief for Mr. Onyancha for the 2nd Interested Party

Mr. C. Nzioka – Court Assistant

MBOGO C. G., JUDGE,

03/10/2019.