



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Republic v District Land Registrar, Thika Lands Office Ex Parte Bushline Properties Company Limited; Moses Kamoro & Francis Karanja (Interested Parties) (Judicial Review 7 of 2018) [2019] KEELC 84 (KLR) (29 November 2019) (Judgment)

Republic v District Land Registrar, Thika Lands Office Ex Parte Bushline Properties Company Limited; Moses Kamoro & Francis Karanja (Interested Parties) [2019] eKLR

Neutral citation: [2019] KEELC 84 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
JUDICIAL REVIEW 7 OF 2018
LN GACHERU, J
NOVEMBER 29, 2019
IN THE MATTER OF: APPLICATION BY BUSHLINE PROPERTY
COMPANY LIMITED FOR JUDICIAL REVIEW (MANDAMUS)
AND
IN THE MATTER OF: DETERMINATION AND /
OR DEMARCATION OF BOUNDARY LOCATION
AND
IN THE MATTER OF: FAILURE TO VISIT GROUND LOCATION
AND
IN THE MATTER OF: L.R RUIRU/RUIRU EAST BLOCK 2/19084
AND
IN THE MATTER OF: SECTIONS 18,19 AND 20 OF
THE LAND REGISTRATION ACT , NO. 3 OF 2012
AND
IN THE MATTER OF: ARTICLES 40(1) AND (3)
AND 47 OF THE CONSTITUTION OF KENYA 2010

BETWEEN



REPUBLIC APPLICANT

AND

DISTRICT LAND REGISTRAR, THIKA LANDS OFFICE RESPONDENT

AND

BUSHLINE PROPERTIES COMPANY LIMITED EXPARTE APPLICANT

AND

MOSES KAMORO INTERESTED PARTY

FRANCIS KARANJA INTERESTED PARTY

JUDGMENT

1. By an Application dated 29th October 2018 the Exparte Applicant herein filed these proceedings seeking for orders that;
 1. An order of mandamus to compel the Respondent to visit land parcel Number Ruiru/Ruiru East Block 2/19084 and thereby to determine and fix the boundary in respect of the property
 2. An order compelling the Respondent to render a determination in view of the report of the District Surveyor dated 17th September 2018 and 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 b the boundaries of the said parcel.
 3. The Respondents be ordered to pay the Exparte Applicant the costs of this Application.
2. The application is premised on the grounds that the Ex parte Applicant who is the registered owner of the suit property vide a letter dated 25th May 2018, informed the area Chief of Theta Ward, of a boundary dispute involving land parcels number Ruiru/Ruiru East Block 2/19804, 19805 belonging to the 1st Interested Party and 19806 belonging to the 2nd interested party. The Chief then wrote a letter to the Land Registrar who in turn wrote a letter to the District Surveyor, requesting the surveyor to visit the scene and confirm the status. That though the Surveyor was scheduled to visit the ground on the 30th August 2018, he failed to do so but would later visit on the 6th of September 2018 he then wrote a report.
3. That the report established that parcel 2/19806, is encroaching on both parcels number 2/19805 and 2/19804, that the tank in 2/19806 is wholly in parcel 2/19804 and the suit property is losing some portion of its land to 2/19803. That based on the report, the Exparte Applicant wrote to the Respondent asking him to render a determination. However the Respondent has neglected to render the report.
4. In his Affidavit sworn on the 1st of October 2018, Isaac Kamau Ndua the Managing Director of the Ex parte Applicant reiterated the grounds in support of the Application and averred that they bought the suit property from one Moses Mwangi Ngechu on 5th April 2018. However after they had acquired the property, they learnt that the measurements on the ground and what is in the title was not in tandem. That 2/19805 and 2/19806, had encroached on its land and though the 2nd Interested Party allowed the boundaries to be rectified, the 1st Interested Party was not in agreement. The Court was therefore



urged to give an opinion regarding the Exparte Applicant's move to have the boundaries rectified by the Respondent.

5. The Application is opposed and the 1st interested party swore a Replying Affidavit and averred that on 12th September 2018 he entered into a sale agreement with one Moses Mwangi Ngechu, and before signing of the agreement the vendor showed him boundaries of the parcel of land which he was to purchase. That the demarcation was that his portion of land being L.R 2/19806, was bordered by a stone wall fence bordering his land and that of the vendor being 2/19804, a stone wall foundation bordering his land and that of the 2nd Interested Party, Kai Apple live fence which bordered his land and 2/19807. That he then built a permanent house on his portion and other structures and on 3rd February 2016, he was issued with a title deed by the Vendor.
6. He averred that he was unaware that there was a reduction in acreage and only learnt of the same when the Exparte Applicant called him and notified him of the same. That the Exparte Applicant unlawfully entered into his parcel of land and he reported the issue to the police. That he has never been served with any letters by the Land Registrar or Surveyor regarding the matter. However from clause 5.2 of the agreement between the Exparte Applicant and his Vendor, it is clear that the Exparte Applicant purchased the land with knowledge of the boundaries that existed and as such no boundaries have ever been shifted. That from the report, it is clear that all the occupants are occupying different acreages and hence fraud and collusion was carried out by the Vendor, with officers of the survey office.
7. It was his contention that the Exparte Applicant claimed a larger portion, and the matter was beyond the Land Registrar and the dispute cannot be determined in a Judicial Review without calling the vendor as the Surveyor has recommended survey of many other parcels of land. Further that the Land Registrar cannot determine the proprietary interest and as such there is need for the rectification of all the documents. He further averred that the inclusions made in the report cannot be made without court scrutinizing all the facts and therefore he urged the Court to disallow the Application.
8. The 1st Interested Party also filed grounds of opposition and averred that the dispute in question is a land claim and not a boundary dispute to be determined by the Land Registrar, as the Exparte Applicant is claiming a portion of the land. That the dispute entails reduction of the size of one parcel of land and that no evidence has been shown that boundaries have been shifted. Further that since the dispute is bordered on fraud, the same cannot be addressed in a Judicial Review as the report is not conclusive as it does not resolve the issues between parties and the Application is therefore an abuse of the Court process.
9. The Ex parte Applicant filed a further affidavit and averred that the 1st Interested Party has encroached on other peoples' land and what was delineated as public land. That he has failed to produce a map showing the survey beacons and measurements of what he bought and the one he was shown by the vendor before buying the plot. Further that the 1st Interested Party having executed the Transfer Forms was aware of the acreage he was purchasing and cannot allege that he was not aware of the reduction of the acreage as he oversaw the Mutation. He further averred that the Interested Party was aware of the ongoing by the surveyor as he was notified and that there are no existing boundaries on the properties.
10. It was his contention that the Land Registrar is obligated by law to deal with boundaries guided by the reports by the District Land Surveyor. That nothing stops the interested party from pursuing a civil claim and denied claiming land belonging to the 1st Interested Party and that this is a clear case where the Land Registrar needs to come on and establish the boundaries and that the Interested Party is proposing to have documents rectified in his favour to validate the fact that he has trespassed on the Exparte Applicant's land and thus a land grabber.



11. The Application was canvassed by way of written submissions which the Court has now carefully read and considered. The Court has also carefully considered the evidence placed before it and the pleadings and the relevant provisions of law and finds that the issues for determination are as follows;
 1. Whether the dispute in question is a boundary dispute capable of being dealt with by the Land Registrar.
 2. Whether the Ex parte Applicant is entitled to the orders sought.

Whether the dispute in question is a boundary dispute capable of being dealt with by the Land Registrar

12. It is clear from the prayers sought in the Notice of Motion that what the Ex parte Applicant is seeking from the land Registrar is for the said land Registrar to visit the suit land and determine the boundaries that the District surveyor has already made a report on. While the interested party is of the opinion that the issue at hand involves the acquiring of a portion of his parcel of land, this Court will concur with the Ex parte Applicant that this does not seem to be the case. It is this Court's finding that the case anchored on interference of the boundaries by the parties either by the Vendor or the Interested Party. Therefore, the Court is not in a position to make a finding on the same in these proceedings.
13. However what is clear is that there is an issue on how the boundaries were demarcated and the report by the Surveyor indicate as much. Who then has the authority and mandate to fix the same? The Court finds that Section 18(2) of the *Land Registration Act* places that mandate on the shoulders of the Land Registrar. The said provisions of the law provides;
 - ”(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:
14. Further, Section 19 of the *Land registration Act* also give the land registrar the duty to fix boundaries to registered land. It provides as follows:
 - “(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.

14. Further, in the case of *George Kamau Macharia ...Vs... Dexka Limited* [2019] eKLR, the Court held that

“From the above provisions of the law, it is manifestly clear that the above section gives the mandate to the Land Registrar to resolve boundary disputes of land with general boundaries. Registry Index Map (RIM) only indicates approximate boundaries and the approximate situation on the ground. Even if this Court was to hear and determine this matter, it will still require the input of the Land Registrar. The framers of section 18(2) of the *Land Registration Act* placed this matter before the Land Registrar who has the technical advice and resources of the District Surveyor to determine and ascertain the boundaries. It is trite law that where the law has given a legal obligation to a department of Government, it is important for the Court to let that department proceed to meet its legal obligations. In this case the office of the Land Registrar is mandated to deal with the general boundary dispute first before the same is escalated to the Court.”

Whether the Ex parte Applicant is entitled to the orders sought.

15. The Exparte Applicant has sought for an Order of Mandamus to compel the Land Registrar to visit the land and fix the boundaries. It is evident that an Order of Mandamus is given directing a party to do some duties to which he is supposed to. See the case of *Kenya National Examinations Council ... Vs... Republic Ex parte Geoffrey Gathenji Njoroge* Civil Appeal No. 266 of 1996, to which the court stated 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 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 or 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. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way... These principles mean that an order of mandamus compel 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. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...”

16. The Court has already established above that the Land Registrar is the one with the mandate to resolve the boundary dispute and fix the dispute as required by Section 18 and 19 of the *Land Registration*



Act. The Court has also seen the report produced by the Ex parte Applicant prepared by the District Surveyor which has not been controverted. Further, the Court has also seen the letter by the Ex parte Applicant to the Land Registrar requiring him to fix the boundaries. His evidence that the Land registrar failed to do so has not been controverted.

17. For the above reasons, the Court has an obligation to compel the Land Registrar to perform his duty as provided in law by issuing the Order of Mandamus. Further it is clear that the issue of ownership cannot be determined in these proceedings and as such whether or not the report is the correct position is for another forum.
18. Consequently, the Court finds that the Land Registrar has legal duty to determine the boundary dispute as presented and fix the same. Therefore the court finds that the Notice of Motion dated 29th October 2018 is merited and the same is allowed entirely with costs.
19. The upshot of the foregoing is that the Ex parte Applicant has proved his case on the required standard of balance of probabilities and thus the Notice of Motion dated 29th October 2018 is allowed entirely with costs to the Exparte Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF NOVEMBER 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

Mr. Ondaga holding brief for M/S Many for Exparte Applicant

No appearance for Respondent

M/S Wangui holding brief for Mr. Mwariri for 1st Interested Party

No appearance for 2nd Interested Party

Lucy - Court Assistant.

Court – Judgment read in open court in the presence of the above advocates.

