



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 225 OF 2015

REPUBLIC.....APPLICANT

=VERSUS=

THE LAND REGISTRAR, KAJIADO NORTH DISTRICT...1 ST RESPONDENT

THE LAND REGISTRAR, KAJIADO COUNTY.....2 ND RESPONDENT

=AND=

TURGUDHA COMMUNICATIONS LIMITED.....1ST INTERESTED PARTY

THE ATTORNEY GENERAL.....2ND INTERESTED PARTY

THE GREEN GARDEN SCHOOL LIMITED.....EX-PARTE APPLICANT

JUDGMENT

Background

1. On 17/3/2015, the *ex-parte* applicant, The Green Garden School Limited, was granted leave to bring a motion seeking judicial review of the 1st respondent’s decisions made on 15/12/2014 and 13/3/2015. The tenor and import of the impugned decisions was the resurvey of Land Parcel Number Kajiado/Olekasasi/631, registered in the name of the *ex-parte* applicant to provide an access road to Land Parcel Number Kajiado/Olekasasi/928 registered in the name of the interested party, Turgudha Communications Limited. Consequently, the *ex-parte* applicant brought a notice of motion dated 23/3/2015 seeking the following verbatim orders:

- 1) *That an order of certiorari does issue to remove into this honourable court and quash the decision of the 1st respondent made on 15th December 2014 and 13th March 2015 purporting to create an access route through the applicant’s parcel, Kajiado/Olekasasi/631, to the interested party Kajiado/Olekasasi/928.*
- 2) *That an order of prohibition does issue to prohibit the respondents, their agents, employees and servants by whatever name called from entering upon and interfering with, and or altering the boundaries of the property known as Kajiado/Olekasasi/631.*
- 3) *That an order of prohibition does issue to prohibit the 1st and 2nd respondents, their agents, employees and servants by whatever name called from interfering with index map and any other documents delineating the boundaries of the property known as Kajiado/Olekasasi/631.*
- 4) *That an order of prohibition does issue to prohibit the 1st and 2nd respondents, their agents, employees and servants by whatever name called from confirming and or enforcing the 1st respondent’s impugned decision rendered by the 1st respondent on 13th March 2015.*
- 5) *That the costs of this application be provided for.*
- 6) *That the honourable court be pleased to grant any other or further relief deemed apt in the circumstances of this case.*

2. The motion is supported by a verifying affidavit sworn on 16/3/2015 by Mugo Njenga Keiyoro and statement of facts dated 16/3/2015. The case of the *ex-parte* applicant is that it is the registered proprietor of Land Parcel Number Kajiado/Olekasasi/631, situated in Masaa

Lodge Area, Ongata Rongai, Kajiado County (hereinafter referred to as **Parcel Number 631**). The interested party is the registered proprietor of an adjoining parcel of land, Kajiado/Olekasasi/928 (hereinafter referred to as **Parcel Number 928**). The two parcels were surveyed at different times as subdivisions out of a bigger parcel of land, Kajiado/Olekasai/593, which belonged to Ishmael Kokayia Ole Pasha (hereinafter referred to as **Parcel Number 593**). The *ex-parte* applicant contends that during sub-division of Parcel Number 593 by Mr Pasha, provision for access to Parcel Number 928 was not made and as a result, Parcel Number 928, currently owned by the interested party, is landlocked. Consequently, the interested party complained to the respondents, prompting the 1st respondent to issue postdated boundary dispute summonses to the affected parties to attend a boundary dispute resolution meeting on 15/12/2014. On the appointed day, the *ex-parte* applicant appeared at the site with his agent at 8.30 am as required. His agent stayed there upto 12.30 pm after which the agent left. Soon after the *ex-parte* applicant's agent left the site, the respondents arrived at the site and re-demarcated Parcel Number 631 to provide a road of access to Parcel Number 928. Aggrieved, the *ex-parte* applicant wrote to the respondents and in response, the respondents convened a fresh meeting and issued summonses for 13/3/2015. On the appointed day the *ex-parte* applicant attended but the 1st respondent proceeded to render a decision without conducting any hearing or giving the *ex-parte* applicant a chance to present its case.

Applicant's Case

3. The *ex-parte* applicant faults the decisions rendered on both occasions on various grounds. First, the *ex-parte* applicant contends that the decisions of the respondents were arbitrary in that they did not give the *ex-parte* applicant an opportunity to be heard and therefore violated the rules of natural justice. Second, the *ex-parte* applicant contends that the impugned decisions as rendered by the 1st respondent were not communicated to the *ex-parte* applicant. Third, the *ex-parte* applicant contends that the summonses requiring it to attend were issued under Section 21(2) of the repealed Registered Land Act, a law which did not exist.

Respondents' Case

4. The respondents opposed the motion through a replying affidavit sworn on 18/12/2018 by Mr Rufus Karina Kalama. Their case is that the law allows the Land Registrar to resolve boundary disputes whenever a party files a complaint. In December 2013, the 1st respondent received a complaint dated 9/12/2013 from the interested party. The interested party complained that the proprietor of Parcel Number 631 had erected a perimeter wall blocking access to Parcel Number 928. He convened a site meeting for 13/3/2015 to resolve the boundary dispute. The *ex-parte* applicant was represented at the meeting by its director, Mr Mugo Keiyoro and its advocate, Mr Kihara Njuguna. Also present were the Complainant, the Area Assistant Chief, Two Surveyors and Administrative Officers.

5. Mr Kalama added that he obtained from the Survey Office a copy of the Mutation relating to Parcel Number 593 out of which Parcel Number 631 was parcelled. The said Mutation was registered on 21/5/2001. He further deposed that the Mutation showed an access road leading to the present site of Parcel Number 928. He added that the original proprietor of Parcel Number 593, Mr Pasha, attended and confirmed that during the mutation of Parcel Number 593, he made provision for the road of access at the time of parceling out Parcel Number 631. He added that Mr Pasha further confirmed that during the subsequent sub-division during which Parcel Number 928 was parcelled out, the Surveyor did not take into account the earlier mutation registered on 21/5/2001 at the time of parceling out Parcel Number 631 and that was the genesis of the confusion.

6. Mr Kalama added that on 9/4/2015, the County Surveyor wrote to the Ngong District Land Registrar and directed the 1st respondent to "revisit" the boundary dispute and this was done. He further deposed that the Surveyor's report had determined the ground status, acreage, and the fact that Parcel Number 928 was landlocked.

Submissions

7. The motion was canvassed through written and oral submissions. Mr Peter Kihara Njuguna, counsel for the *ex-parte* applicant, filed written submissions dated 19/1/2017. He framed the following two issues which, in his view, fell for determination: (i) whether the 1st respondent's decision of demarcating a road in the *ex-parte* applicant's land without hearing the *ex-parte* applicant violates Articles 47 and 50 of the Constitution; and (ii) whether the respondents had power to claim part of the *ex-parte* applicant's land and to demarcate a road thereon.

8. Counsel for the *ex-parte* applicant cited the provisions of Article 47 of the Constitution and the holding in **Baker v Canada (Minister of Citizenship & Immigration & S.C.R 8176** in which the importance of procedural fairness was emphasized. Counsel argued that the respondents should have accorded the *ex-parte* applicant an opportunity to be heard and to make representations. He added that the respondents should have given the *ex-parte* applicant a statement of reasons for the decision they took. Counsel argued that the right to a fair hearing is a non-derogable constitutional guarantee enshrined in Article 50(1) of the Constitution and that the respondents were duty-bound to adhere to the Constitutional guarantee of the right to fair administrative action and the right to be heard under Articles 47 and 50 of the Constitution.

9. Counsel submitted that the *ex-parte* applicant's right to the suit property was protected under Article 40 of the Constitution and Section 25(1) of the Land Registration Act. He added that if the respondents wished to compulsorily acquire part of the *ex-parte* applicant's land, they were duty-bound to satisfy the criteria set out in Section 107(1) of the Land Act. He argued that in the absence of a request from the government, the respondents had no power to compulsorily acquire the *ex-parte* applicant's land. Counsel urged the court to grant the prayers sought in the notice of motion.

10. The respondents through written and oral submissions by Mr Motari Matunda, Senior Litigation Counsel, submitted that the action and decision of the 1st respondent was within the law and followed a complaint by the interested party that it was land-locked. He added that the 1st respondent issued summonses to all the affected parties and the *ex-parte* applicant attended the meeting where the decision was taken.

11. Mr Motari further submitted that the respondents fully complied with the requirements of Section 79 of the Land Registration Act. He argued that upon resurvey, it was established that on the ground, the land claimed by the *ex-parte* applicant was 2.093 hectares while title held by the *ex-parte* applicant indicates that the *ex-parte* applicant is entitled to 2.02 hectares, hence the *ex-parte* applicant was holding 0.73

hectares in excess of what it was entitled to. He urged the court to dismiss the application.

12. Mr Abdirazak, counsel for the interested party associated himself with the respondents' submissions. He submitted that the interested party and the *ex-parte* applicant are neighbours. He added that the road serving Nazarene University is a private property and contended that the applicant requires a helicopter to access its property because the road which existed is now blocked.

Analysis & Determination

13. I have considered the motion together with the statement of facts and the supporting affidavit, the responses to the motion, and the parties' respective submissions. I have similarly considered the constitutional and legal frameworks relevant to the key issue in this motion. The broad issue falling for determination in this motion is whether the Land Registrar's decision to resurvey the dimensions of the *ex-parte* applicant's land and to create a road of access for the interested party in the manner he did, contravened the requirements of Articles 47 and 50 of the Constitution and Section 79 of the Land Registration Act.

14. It is clear from paragraph 15 of Mr Rufus Kalama's replying affidavit that the exercise giving rise to the impugned decisions was undertaken to determine a boundary dispute relating to what was contended to be an error in the survey plans pursuant to which the titles of the *ex-parte* applicant and the interested party were registered. My interpretation of our land registration law is that a survey plan pursuant to which a title is issued is part and parcel of the parcel register. Rectification of any survey plan relating to a registered parcel of land is a rectification of the parcel register and is subject to the mandatory requirements of Section 79 of the Land Registration Act which provides as follows:

1) The Registrar may rectify the register or any instrument presented for registration in the following cases—

a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

b) in any case and at any time with the consent of all affected parties;

c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel.

2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

3) Upon proof of the change of the name or address of any proprietor, the Registrar shall, on the written application of the proprietor, make an entry in the register to record the change.

4) The Commission may by regulations prescribe the guidelines that the Registrar shall follow before rectifying or directing rectification under subsection(2) and without prejudice to the generality of the foregoing, the regulations may provide for—

a) the process of investigation including notification of affected parties;

b) hearing of the matters raised; and

c) the criteria to be followed in coming up with the decision

15. The procedure followed by the respondents in undertaking the exercise leading to the impugned decisions is contained in Mr Kalama's affidavit and in the *ex-parte* applicant's exhibits. First, on 10/1/2014, the Kajado North Land Registry received a complaint from the interested party dated 9/12/2013. On 15/1/2014, the interested party paid a fee of Kshs 6000 to enable the Land Registrar to act on the complaint. On 27/12/2014, the 1st respondent issued boundary dispute summonses addressed to four affected parties, among them, the *ex-parte* applicant herein. The summonses read as follows:

MINISTRY OF LAND AND SETTLEMENT

DISTRICT LAND OFFICE, P O BOX 78, NGONG HILLS

REGISTERED LAND ACT: (CAP 300)

Ismael Kokaya Pasha-931(1023-39)

Door International Company Ltd-544

Ngucie Investment Ltd-929

Green Garden School Ltd-631

BOUNDARY DISPUTE SUMMONS

TITLE-KDJ/OLEKASASI/928. The proprietor of the piece of land comprised in the above mentioned title Mr/Mrs TURGUDHA COMMUNICATIONS has applied to me under Section 21(2) of the Registered Land Act to determine the disputed boundary between his land and your land which is registered under Title KJD/OLEKASASI/631.

I shall visit the disputed boundary to determine and indicate its position on 15th day of December, 2013 at 10.00 A.M.

Your are therefore hereby summoned to appear before me at the place of the dispute boundary (sic) on the day and time before mentioned and to bring any witnesses you may wish to call to give evidence relevant to the application.

NOW TAKE NOTICE THAT in default of your appearance on the day and time at the place before mentioned, the evidence of the application (sic) and his witness may be heard, considered and the position of the disputed boundary determined in your absences. (sic)

Please note that failure to appear may consist an offence under Section 155(3) of the Registered Land Act punishable by a fine not exceeding Kshs 500.

Dated 27th December 2013

Signed

C.M. Gichuki*125

LAND REGISTRAR

KAJIADO NORTH DISTRICT

Copy to

- 1. MR/Mrs..as above (applicant)**
- 2. District Surveyor, Kajiado North/Central District**
- 3. District Officer – Rongai Division**
- 4. Area Chief**

DAPC

16. It is clear from the reading of the above summonses that they were not clear. Firstly, whereas the summonses were issued on 27/12/2014, they required the affected parties' attendance on 15/12/2014 which was a past date. Secondly, the 1st respondent invoked jurisdiction under Section 21(2) of the Registered Land Act which had already been repealed by the Land Registration Act of 2012. Thirdly, the said summonses did not make any reference to the intended rectification of the survey plan as required under Section 79(1) (c) of the Land Registration Act.

17. The second set of summonses were issued on 13/2/2015 and required the affected parties' attendance on 13/3/2015. Mr Kalama deposes that the *ex-parte* applicant was in attendance in the meeting of 13/3/2015. He has exhibited a list of the people present but he has not exhibited any signed minutes or proceedings of the hearing which he conducted. The summonses indicated that there was going to be a hearing and a determination. In a dispute of this nature, signed minutes or signed proceedings would indicate the procedure followed by the Land Registrar together with the presentations made by the parties and the decision reached. Given the fact that the *ex-parte* applicant's complaint in this motion was that the 1st respondent denied it a hearing, it was incumbent upon the 1st respondent and the interested party to controvert the *ex-parte* applicant's allegations by demonstrating that the requirements of Articles 47 and 50 of the Constitution, together with the framework in Section 79 of the Land Registration Act, were fully satisfied. Regrettably, the 1st respondent withheld the record of his proceedings and did not exhibit any evidence to demonstrate compliance with Article 47 and 50 of the Constitution and Section 79 of the Land registration Act.

18. Similarly, although Mr Kalama admits that the impugned decisions were made, there is no evidence of any written communication made to the *ex-parte* applicant setting out the reasons for the decisions taken.

19. The exercise leading to the impugned decision was one that affected the *ex-parte* applicant's land parcel register. The applicant was therefore entitled to the full safeguards contained in Section 79 of the Land Registration Act and Articles 47 and 50 of the Constitution.

20. One of the key ingredients of the safeguards contained in Articles 47 and 50 of the Constitution and Section 79(1) (c) of the Land Registration Act is the right to a fair hearing. The Supreme Court of court Canada emphasized the centrality of fair hearing in proceedings relating to rights in the case of **Baker v Canada (Minister of Citizenship and Immigration) 2 S.C.R 8176** in the following words:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made

using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision.”

21. The totality of the foregoing is that the 1st respondent proceeded to exercise jurisdiction under Section 79 of the Land Registration Act without adhering to the constitutional safeguards set out in Articles 47 and 50 of the Constitution and the statutory safeguards spelt out under Section 79 of the Land Registration Act. For that reason, the impugned decisions cannot stand. It is therefore my finding that the Land Registrar’s decision to resurvey the dimensions of the *ex-parte* applicant’s land and to create a road of access for the interested party in the said land in the manner he did contravened the requirements of Articles 47 and 50 of the Constitution and Section 79 of the Land Registration Act. Consequently, prayers 1 and 4 in the notice of motion dated 23/3/2015 will be granted.

22. Prayers 2 and 3 will not be granted because they seek to completely bar the respondents against exercising jurisdiction under Section 79 of the Land Registration Act in relation to the suit property. In my view, it would not be right for the court to completely bar the Land Registrar against exercising his statutory mandate in the face of the common admission that there is a survey problem which requires resolution by the Land Registrar in the manner provided under the law. The concern of the court in the present proceedings is the Land Registrar’s failure to adhere to the Constitution and to the statutory requirements under the Land Registration Act. The Land Registrar shall therefore be at liberty to resolve the dispute afresh by adhering to all the constitutional and statutory requirements.

23. Lastly, before I make my disposal orders, it is important I mention that among the documents exhibited by Mr Kalama was a supposed award by the Kajiado North Land Dispute Tribunal dated 23/2/2012. No adoption order was however exhibited. Similarly, no enforcement proceedings were exhibited. None of the parties’ submissions touched on the award. The respondents and the interested party did not in any way suggest that the impugned decisions constituted an enforcement of the award. Of equal significance, the Land Disputes Tribunals Act under which the Land Disputes Tribunals exercised jurisdiction was repealed by the Environment and Land Court Act of 2011. It is for the above reasons that I have elected to say nothing about the award.

Disposal Orders

24. In light of the above findings, I make the following disposal orders in disposing the *ex-parte* applicant’s notice of motion dated 23/3/2015.

a) An order of certiorari does issue to remove into this honourable court and quash the decisions of the 1st respondent, made on 15th December 2014 and 13th March 2015, purporting to create an access route through the applicant’s parcel of land, Kajiado/Olekasasi/631 to the interested party’s land Kajiado/Olekasasi/928.

b) An order of prohibition does issue to prohibit the 1st and 2nd respondents, their agents, employees, and servants by whatever name called from confirming and/or enforcing the 1st respondent’s impugned decision rendered by the 1st respondent on 13th March 2015.

c) Prayers 2 and 3 of the notice of motion are declined.

25. Because the dispute leading to the impugned decisions arose from earlier surveys and it is not clear at this point who caused the problem, I will not make any award relating to costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28TH DAY OF NOVEMBER 2019.

B M EBOSO

JUDGE

In the presence of:-

Ms Wairimu holding brief for the plaintiff

Munawa for the *ex-parte* applicant

Court Clerk - June Nafula