



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**MISC. APPLICATION NO. 24 OF 2011 (JUDICIAL REVIEW)**

**IN THE MATTER OF APPLICATION BY NORA BOCHABERI**

**ORUOCHI FOR JUDICIAL REVIEW (MANDAMUS)**

**AND**

**IN THE MATTER OF DETERMINATION AND/OR**

**DEMARCATION OF BOUNDARY LOCATION**

**AND**

**IN THE MATTER OF ASCERTAINMENT OF THE**

**GROUND LOCATION OF ROAD OF ACCESS**

**AND**

**IN THE MATTER OF FAILURE TO VISIT GROUND**

**LOCATION AND COMPLY WITH STATUTORY DUTY**

**AND**

**IN THE MATTER OF LR NO. CENTRAL KITUTU/DARAJA MBILI/769**

**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, 2010**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE COUNTY LAND REGISTRAR, KISII COUNTY.....1<sup>ST</sup> RESPONDENT**

THE COUNTY SURVEYOR, KISII COUNTY.....2<sup>ND</sup> RESPONDENT

THE COUNTY PHYSICAL PLANNER, KISII COUNTY....3<sup>RD</sup> RESPONDENT

AND

EX PARTE

NORA BOCHABERI ORUOCHI

RULING

1. The ex parte applicant in this matter had by Notice of Motion (JR) dated 17<sup>th</sup> December 2014 sought orders of mandamus to compel the respondents to visit land parcel number **Central Kitutu/Daraja Mbili/769** and thereby to determine and fix the boundary in respect of the property and to further determine the actual position of the road of access in accordance with the relevant registry index map (RIM). On 25<sup>th</sup> November 2015 the court referred the matter to the land registrar to deal with as it involved the delineation and fixing of parcel boundaries which the land registrar had mandate to undertake under the provisions of Sections 18 and 19 of the Land Registration Act, 2012.

2. The land registrar duly carried out the exercise and filed a report in court. The parties made their comments on the report filed by the land registrar and the court vide a ruling delivered on 28<sup>th</sup> April 2017 accepted the land registrar's report and directed the same to be implemented. In the said ruling I rendered myself thus:-

**“7. I have considered the pleadings and the report by the land registrar and the observations and comments by the parties. The report by the land registrar affirms that the disputed portion of the road of access which runs through the applicant's plot does not exist on the current Registry Index Map (RIM) and that if it is permitted to exist it would markedly reduce the size of the applicant's plot. Indeed the land registrar's report acknowledges the access road has encroached onto the applicant's plot. There is no suggestion that any of the interested parties plots is landlocked and/or is not served by an access road. While having the access road at the disputed site may be convenient to the interested parties that cannot confer a right to the prejudice of the applicant.**

**8. In the premises, I find the applicant was entitled to initiate the judicial review proceedings to compel the respondents to have the boundaries of parcel 769 established and fixed and now that the respondents have in response to the court's order inspected and delineated the parcel boundaries of the suit land and verified the physical location of the roads of access, I direct that the land registrar's report be implemented. I find no basis to order for the amendment of the Registry Index Map (RIM) as there is no doubt that the interested parties want an access road to be created where there is none. The fact that there may have been encroachment over the applicant's land for a period of time cannot create a right. The applicant's right over land parcel Central Kitutu/Daraja Mbili/769 are absolute and indefeasible in terms of Sections 24, 25 and 26 of the Land Registration Act, 2012 and the applicant is as it were entitled to exclusive use and possession of the same in its entirety. The portion being used as an access is an encroachment onto the applicant's land parcel and the applicant is entitled to reclaim the same.**

**9. In the premises, it is my holding and finding that the applicant's application for judicial review was merited. The report by the land registrar is hereby adopted and ordered to be implemented. Each party will bear their own costs of the application.”**

3. It is that ruling that has provoked the interested parties application dated 2<sup>nd</sup> May 2017 which is the subject of this ruling. The application seeks orders staying the implementation of the land registrar's report; setting aside and/or varying the orders made by the court on 28<sup>th</sup> April 2017 and further to confirm the road of access serving land parcels **2074, 4491, 4492** and **2557** and stop creation of the road of access between land parcels **769** and **2070**. The application is premised on the grounds set out on the face of the application and the affidavit sworn in support of the application by Ben Mosota Onyaru the 1<sup>st</sup> interested party. The interested parties application to a large extent delved into the historical background leading to the creation of the parties various parcels of land. Simply put, the interested parties were contending that the land registrar in coming up with the report failed to take into account the actual status of the parcels of land on the ground.

4. The ex parte applicant filed a statement of grounds of opposition and inter alia contended that:

**(i) The application is misconceived, incompetent and legally untenable.**

**(ii) The court lacks the jurisdiction to entertain the application as it became functus officio upon delivery of the ruling on 28<sup>th</sup> April 2017.**

**(iii) That the application contravenes order 53 of the Civil Procedure Rules, 2010 as read together with Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya.**

**(iv) That the application has no merit and constitutes an abuse of the due process of the court.**

5. The parties argued the application by way of written submissions. The applicants in their submissions basically reiterated the facts as set out in the grounds and the affidavit in support of the application. In essence the applicants argue that on the basis of the evidence showing

how the land parcels came into existence, the status quo as depicted by the current positioning and usage of the land parcels and road of access on the ground should be sustained notwithstanding what the records held by the lands office may show.

6. Under Sections 18, 19 and 20 of the Land Registration Act No. 3 of 2012 it is the land registrar who is given the mandate to establish and fix land parcel boundaries of land registered under the Act or the previous Registered Land Act, Cap 300 Laws of Kenya (now repealed). The evidence on record shows that before the ex parte applicant brought the instant judicial review application seeking orders of mandamus to compel the respondents to visit the affected parcels of land and to delineate their boundaries and the road of access, he had requested the land registrar to invoke his powers and mandate under Section 18 and 19 of the Land Registration Act, 2012 but the land registrar failed to carry out his duty.

7. The application before this court for judicial review was merely seeking that the public officers vested with the duty of demarcating, establishing and fixing the parcel boundaries and verifying the position of the road of access be compelled to carry out their duty. Section 18(2) of the Land Registration Act, 2012 clearly divests the court of jurisdiction to hear and determine disputes relating to boundaries of registered land. The court being alive to its limitation in regard to matters relating to boundary disputes on 25<sup>th</sup> November 2015 with the concurrence of the parties made an order referring the matter to the land registrar in the following terms:-

**“This clearly is a dispute touching on the delineation of boundaries. Under Section 18 of the Land Registration Act No. 3 of 2012 it is the mandate of the land registrar to establish and fix boundaries. The court has absolutely no role. In the circumstances of this matter I order and direct that:**

**(i) The Land Registrar, Kisii and County Surveyor, Kisii do inspect and establish and fix the boundaries of land parcel Central Kitutu/Daraja Mibli/769 and also make note of any access road servicing the plot and/or any neighbouring plots. The affected parties will have liberty to have their independent surveyors on site during the exercise.**

**(ii) .....**

**(iii) .....**

**(iv) .....**

8. The ex parte applicant in his submissions argued that upon the land registrar executing the order of reference of the matter to him and filing a report in court which the court by its ruling of 28<sup>th</sup> April 2017 adopted and ordered the implementation of the same, this matter was concluded and the court had become *functus officio* and the aggrieved party could only appeal the ruling. The ex parte applicant submits that the court lacks the jurisdiction to entertain the application by the interested parties and relies on the case of **HC Misc. Civil Application NO. 2 of 2016 (Kisii), Republic –vs- DCIO, Kisii & 5 Others** where Okwany, J. in similar circumstances held that the court lacked the jurisdiction to set aside orders made pursuant to a judicial review application. The ex parte applicant also places reliance in the case of **Supreme Court of Kenya Petition No. 5 of 2013 Raila Odinga –vs- IEBC & 3 Others** where the court considered the aspect of a court becoming *functus officio*.

9. This court like the High Court in handling judicial review applications brought under the provisions of order 53 Rules 1 and 2 of the Civil Procedure Rules and Sections 8 and 9 of the Law Reform Act Cap 26 exercises a special jurisdiction in conformity with the aforesaid provisions of the law.

10. Under section 8(5) of the Law Reform Act, a party aggrieved by an order of the court while exercising that special jurisdiction may only appeal against such order to the Court of Appeal. Section 8(5) provides thus:-

**“Any person aggrieved by an order made in the exercise of civil jurisdiction of the High Court (read ELC) under this section may appeal therefrom to the Court of Appeal.”**

In the case of **Biren Amritlal Shah & Another –vs- The Republic [2013] eKLR** the Court of Appeal stated thus:-

**“It is therefore quite clear that appeals in respect of orders made under judicial review lie with the Court of Appeal. Therefore in answering the question whether the High Court had jurisdiction to entertain a review application, we agree with the learned judge of the High Court that in exercising its special jurisdiction under the Law Reform Act, the High Court had no jurisdiction to review its previous order.”**

11. The position therefore is that once a court exercising its original jurisdiction in a judicial review application makes its decision and/or order the court becomes *functus officio* and cannot entertain any further application in the matter except perhaps one to correct a glaring error on the face of the record. The Supreme Court in the **Odinga** case (supra) while discussing the application of *functus officio* cited with approval a passage by Daniel Malan Pretorius, in **“The Origins of the Functus Officio Doctrine with Specific Reference to its Application in Administrative Law.” [2005] 122 SALJ 832**, where the concept was explicated thus:-

**“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise use those powers only once in relation to the same matters. The (principle) is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision maker.”**

The Supreme Court Judges also referred to the case of **Jersey Evening Post Limited -vs- A. Thani [2002] JLR 542** at pg 550 where the court stated:-

**“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”**

12. In the instant matter, the court determined that the ex parte applicant had a valid complaint against the respondents and that explains why the court made the order of reference to the land registrar to carry out his duties in accordance with the statute. Essentially, therefore the ex parte applicant’s order of Mandamus was granted. The court after making the order of reference merely retained a supervisory role to ensure the order was complied with. Once the land registrar filed his report, and the court after giving the parties an opportunity to make comments on the same, was satisfied the land registrar complied with the order of reference the court made the ruling of 28<sup>th</sup> April 2017 which fully disposed of the judicial review application. Henceforth, the court became *functus* and any party dissatisfied with the order emanating from the ruling could only have proceeded by way of appeal to the Court of Appeal as provided under Section 8(5) of the Law Reform Act, Cap 26 Laws of Kenya.

13. In consequence therefore, I uphold the ex parte applicant’s submission that this court lacked the jurisdiction to entertain the interested parties Notice of Motion dated 2<sup>nd</sup> May 2017. The same is ordered dismissed with costs to the ex parte applicant.

14. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 22<sup>ND</sup> DAY of JUNE, 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Nyambati for Oguttu for the ex parte applicant

N/A for the 1<sup>st</sup> respondent

Ms. Nyaega for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

Mr. Okenye for the interested parties

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**