



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC JR CASE NO. 1 OF 2018

CHARLES N. EMBODOLIO.....APPLICANT

VERSUS

REPUBLIC OF KENYA.....RESPONDENT

AND

ELIAS MATASIO ALIAS

JOHNSON WABOMBA

PATRICK MATONI.....INTERESTED PARTIES

JUDGEMENT

The application is dated 8th June, 2018 seeking the following orders;

1. That the honourable court be pleased to remove to this court, the decision of the Senior Chief Lumakanda location made on the 25th September, 2018 concerning the boundary between land parcels numbers KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809 and that the said decision be quashed by issuing an order of certiorari.
2. That the Senior Chief Lumakanda location be prohibited from interfering with the boundary features between land parcel number KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809, as he has no jurisdiction to fix the boundaries.
3. That there issues an order of mandamus compelling the County Land Registrar Kakamega County to fix the boundary between land parcel nu. KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809.
4. That costs of the application be granted.

Application based on the grounds that, the Senior Chief Lumakanda purported to fix the boundary between land parcels Nos KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809. That the Senior Chief has no jurisdiction to fix the boundary. That it the Land Registrar Kakamega County has jurisdiction to fix the boundary between land parcels no. KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809.

The 2nd interested party submitted that, he is the son of Linus Alukumu Matoni and a grandson of Charles Ayugu Matoni and duly appointed by family members to pursue and/or represent them in this suit. That Charles Ayuku Matoni (Deceased) is the registered owner of that whole parcel of land Known as KAKAMEGA/LUMAKANDA/1647 measuring 5.50HA. He avers that on or before his grandfather's death on 24th October 1996 he had never sold, sub-divided, leased, any part of his land to Charles Ndayala Embodolio, the Applicant herein nor at all. That however on or about the 6th June 2017 he discovered that the applicant had encroached on their late grandfather's estate. That upon discovery he went to report and or to seek assistance from the Lugari Sub-County Deputy County Commissioner's office on 8th June 2017 which office did a letter summoning all of them to attend their office on 13th June 2017 through the Lumakanda Chief's office. That on the 13th June 2017, while attending DCC's Lugari Sub-County office, the applicant upon being asked if he had encroached on their late grandfather's estate, he admitted. That however, the Deputy County Commissioner directed that the area chief do visit the site in company of a land surveyor to confirm the boundary between his late grandfathers estate i.e. that whole parcel of land known as KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809 belonging to applicant. That on the 19th September 2017, in the company of senior chief of Lumakanda Location, four village elders, his family members, neighbours and the applicant, his children and others went to site in company of a land surveyor by the name of Otwoma at about 10:00a.m. That on reaching the site, the surveyor declined to confirm the boundary and explained that it was the preserve of the District Land Registrar to conduct such an exercise. The chief then

called off the exercise and they parted ways. That however, His family members decided to seek the Kakamega Lands Registrar's intervention on the 26th September 2017. That the Kakamega District Lands Registrar, issued summons for boundary dispute dated 17th October 2017 same fixing boundary determination visit on 17th August 2017. That on the 14th September 2017, the Kakamega District Lands Registrar did not attend as scheduled. Parties waited at the site to no avail. No communication was given at all. That on or about 13th March 2018, the applicant came to their home at about 4 p.m and called them to meet him at the boundary dispute site the following morning at about 9.am. He said that he had wanted to have a discussion with them as neighbours and see how to solve the boundary dispute, they complied. That on 14th March 2018, they met the applicant at the site who was accompanied by his son Nixon Nagide. That applicant then asked his son to go fetch a jembe and he told them that he wanted to surrender back the portion of land he had encroached. That he started showing the son where to dig holes as he planted sisal to mark the boundary. Actually he was reinstating the boundary to where it had earlier been.

That he then told them that he had returned the boundary to where it had been earlier and that he was sorry for having encroached. He further told them to begin utilizing the portion immediately. That thereafter, it is when they got surprised to learn that he had gone ahead to file this application. That the measurement / area entered in the lands register pursuant to that whole parcel of land known as KAKAMEGA/LUMAKANDA/1647 is sacrosanct and can only be reduced, reviewed and or amended by the Lands Registrar or this Honourable Court. That land parcel No. KAKAMEGA/LUMAKANDA/1647 is private property and protected as such. That, the applicant's suit amounts to alienating part of the estate of their grandfather Charles Ayugu Matoni through un-orthodox means. That the whole parcel of land known as KAKAMEGA/LUMAKANDA/1647 is a deceased's person's estate same subject to succession procedure which process, the applicant is evading. None of them have acquired letters of administration in this matter.

This court has carefully considered the application and the submissions therein. In *Republic v Kenya Revenue Authority & Another Ex-Parte Tradewise*

Agencies (2013) eKLR, para. 21 G.V. Odunga, J. in quoting from *Pastoli vs.*

Kabale District Local Government Council and Others [2008] 2 EA 300

observed thus:

"In order to succeed in an application for Judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety... Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards... Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision

In *Republic vs Kenya Revenue Authority ex parte Yaya Towers Limited* (2008) eKLR it was held that the remedy of judicial review is concerned with the reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself.

The decision whether or not to grant judicial review orders is an exercise of discretion. As stated in *Halsbury's Laws of England* 4th Edition Vol. II page 805 paragraph 1508, the Court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining and the discretion of the court being a judicial one must be exercised on the evidence of sound legal principles.

In *Republic vs. Judicial Service Commission of Kenya Ex Parte Stephen S. Pareno Nairobi HCMA No. 1025 of 2003* (2004) 1 KLR 203, it was held that judicial review orders are discretionary and not guaranteed hence even if the case falls into one of the categories where judicial review will lie the court is not bound to grant it and what orders the court will make depends upon the circumstances of the case.

Judicial review is a discretionary remedy. They are prerogative remedies. It is in the orders to quash, prohibit or compel. In the Kenya legal system, the said prerogative remedies may be obtained under Order 53 of the Civil Procedure Rules (2010) and the Law Reform Act, Cap 26, Laws of Kenya (Part VI of the Act). It has been noted that judicial review proceedings as envisaged under Order 53 of the Civil Procedure Rules are a special procedure; which are invoked whenever orders of certiorari (quash), mandamus (mandamus) or prohibition are sought in either criminal or civil proceedings - See *Welamondi vs The Chairman, Electrol Commission of Kenya* (2002) 1 KLR,

"..... in exercising powers under Order 53, the court is exercising neither civil or criminal jurisdiction in sense of the word. It is exercising sui generis"

In the case of *Republic v Chairperson Business Premises Rent Tribunal & another Ex-parte Keiyo Housing Cooperative Society Ltd & another* [2014] eKLR it was held that;

"Being discretionary remedies, judicial review orders will only issue based on various considerations by the court and peculiar circumstances of each case. In the book "Judicial Remedies in Public Law" by Clive Olive, it is noted that "there are varieties of

considerations discernible in the case law which are relevant to the exercise of the judicial discretion to refuse a remedy. Some are related to the conduct of the claimant, such as delay or waiver; others are related to the circumstances of the particular case, such as the fact that a remedy would be of no practical effect. Other considerations relate to the particular nature of public law where the court may need to have regard to the wider public interest as well as the interest of the claimant in obtaining an effective remedy.”

In Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No. 307/2003, Omolo JA stated as follows;

“The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way.”

Be that as it may, this application is based on the fact that, the Senior Chief Lumakanda purported to fix the boundary between land parcels Nos KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809. That the Senior Chief has no jurisdiction to fix the boundary. That the Land Registrar Kakamega County has jurisdiction to fix the boundary between land parcels no. KAKAMEGA/LUMAKANDA/1647 and KAKAMEGA/LUMAKANDA/809. I have perused the documents on record and I see no evidence of such decision, photos of the boundary to be quashed is insufficient. The interested party contends that, on 14th March 2018, they met the applicant at the site who was accompanied by his son Nixon Nagide. That applicant then asked his son to go fetch a jembe and he told them that he wanted to surrender back the portion of land he had encroached. That he started showing the son where to dig holes as he planted sisal to mark the boundary. Actually he was reinstating the boundary to where it had earlier been.

This court is of the view that, judicial review applications should not be trivialized and should be confined to purely such matters. Where the ordinary law provides for relief that relief must be pursued. In this case there are provisions the Land Act are clear. This is clearly a boundary dispute and ought to be resolved at the land registry. A judicial review application is meant to deal with clear matters. It is to be applied in clear cases where facts can be ascertained, it is my view that, where there is need for further facts then the applicant ought to revert to a civil claim. This application is misplaced and an abuse of the court's process. I find that the judicial review application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE