



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

JUDICIAL REVIEW APPLICATION NO. 130 OF 2017

**IN THE MATTER OF: An application for Judicial Review Order of Certiorari
to remove into this Court and quash the decision/determination
of the August 2017 or thereabout directing that parties should
adopt boundaries as marked on the ground.**

AND

**IN THE MATTER OF: An application for Judicial Review order of
Mandamus compelling the District Surveyor Kajiado North District to
identify the beacons and fix boundaries of LR. No. NGONG/ NGONG/ 31271 and
31272 in accordance with the Mutation Form registered on 10th December, 2003.**

AND

IN THE MATTER OF : Sections 21 & 22 of the Registered Land Act Cap 300 (Repealed)

AND

IN THE MATTER OF: Sections 18, 19 & 104 of the Land Registration Act

AND

IN THE MATTER OF : Survey Act

AND

IN THE MATTER OF: Sections 8 & 9 of the Law Reform Act

AND

IN THE MATTER OF: Articles 40 and 47 of the Constitution of Kenya

AND

IN THE MATTER OF : Order 53 of the Civil Procedure Rules 2010

AND

REPUBLIC.....APPLICANT

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

DISTRICT SURVEYOR, KAJIADO NORTH DISTRICT....2ND RESPONDENT

SAMUEL NJAU GACHOMO.....INTERESTED PARTY

EX PARTE: JOHN MWANGI MUTURI

JUDGEMENT

The application before Court is a Notice of Motion dated 21st December, 2017 and filed on 10th January, 2018 brought pursuant to Order 53 rule 3(1) of the Civil Procedure Rules, Section 8 & 9 of the Law Reform Act and leave of Court granted on 19th December, 2017. The Ex parte Applicant seeks the following orders:

- 1) CERTIORARI to remove into this court and quash the decision and/ or determination of the Land Registrar, KAJIADO NORTH DISTRICT dated 24th August, 2017 or thereabout directing that parties should adopt boundaries as marked on the ground.
- 2) MANDAMUS compelling the District Surveyor Kajiado North District to identify the beacons and fix boundaries of LR NO. NGONG/ NGONG/ 31271 and NGONG/ NGONG/ 31272 in accordance with the Mutation Form Registered on the 10th day of December, 2003.
- 3) THAT Costs of this application be provided for.

The application is premised on the statutory statement and the verifying affidavit of JOHN MWANGI MUTURI. In the statutory statement, it highlights the grounds upon which the reliefs are sought and confirm that the applicant is the proprietor of land parcel number Ngong/ Ngong/ 31272 while the Interested party is the owner of land parcel number Ngong/ Ngong/ 31271, which properties are adjacent to each other and share a boundary. That Ngong/ Ngong/ 31272 and Ngong/ Ngong/ 31271 were resultant subdivision from Ngong/ Ngong/ 3516. Upon survey of the survey of Ngong/ Ngong/ 3516 as well as its subdivision, a mutation form serial number 171765 was prepared and registered by the Land Registrar on 10th December, 2003. The Interested party has encroached on the applicant's land by approximately 2 metres, constructed a septic tank thereon and has been draining sewerage therein. Upon complaint, the Land Registrar and a team of surveyors undertook a site visit on 18th April, 2017 with the aim of resolving the boundary dispute and prepared a report dated the 17th May, 2017, which confirmed encroachment by the 1st Interested party into the Applicant's property. On 29th August, 2017, the Land Registrar concluded that parties should adopt the boundaries as marked on the ground, contrary to his report. The impugned decision by the Land Registrar is a gross violation of the applicant's legitimate expectation that at all times he would uphold the law as set out in sections 18 & 19 of the Land Registration Act. The decision of the Land Registrar is evidently unreasonable, made without jurisdiction and based on extraneous considerations only known to him. The applicant's constitutionally guaranteed right to property and to fair administrative process and action have been and continues to be violated by the Interested party in concert with the Land Registrar. Further, the District Surveyor has the statutory duty to ascertain the boundaries as stipulated in the Survey Act.

The application is supported by the affidavit of JOHN MWANGI MUTURI who avers that they had been living in harmony until the Interested Party encroached on his land with two metres. He claims they had mutually agreed with the Interested Party to fix the boundary, by inviting Geomatics who had initially done the subdivision to fix the missing beacon, which were later removed by the Interested Party's spouse. He confirms that after complaining to the Land Registrar, a site meeting was convened on 18th April, 2017 where measurements were undertaken of the walls as built against the existing dactum and thereafter a report dated the 17th May, 2017 was prepared to that effect. He reiterates that the Land Registrar made a decision contrary to his report and he continues to suffer great prejudice including discomfort as the Interested Party has encroached on his land.

The Interested Party SAMUEL NJAU GACHOMO opposed the application and filed a replying affidavit where he confirmed being the proprietor of land parcel number NGONG/ NGONG/ 31271 which he purchased from Mr. Mburu, who pointed out the boundaries that included trees, cedar posts and barbed wire. He states that his property according to the mutation form is a subdivision of NGONG/ NGONG/ 3516 and measured 32.00 M X 23.50 M. He avers that he constructed a home on his land and put up the boundary on 31.50 M instead of the stipulated 32.00M. He explains that in 2008, he built a perimeter wall on one side of the boundary and removed the cedar posts to give room to the stonewall while the side they share a boundary with the applicant, remained as it was demarcated with cedar posts. He denies encroaching on the applicant's land but claims it is the applicant who trespassed on his land and cut down twenty five trees valued at Kshs. 250, 000/= and he reported the matter to the Ngong Police station vide OB No. 43/25/5/2017. He contends that the applicant has not come to court with clean hands and the decision by the Land Registrar on 18th April, 2017 for all parties to adopt the boundaries is just and fair as it was reached after all parties were heard. He reiterates that the instant application is an abuse of the Court process and should be dismissed with costs.

Both the Applicant and the Interested Party filed submissions that I have considered.

Analysis and determination

Upon perusal of the instant judicial review application, including the supporting and replying affidavits, as well as the submissions relied upon; the following are issues for determination:

- Whether the Court has jurisdiction to handle the dispute herein.

- Whether the proceedings undertaken by the 1st and 2nd Respondent to determine the boundary dispute between the Applicant and the Interested Party was biased, discriminatory and materially flawed amounting to an injustice against the Applicant.
- Whether the ex parte applicant has demonstrated sufficient interest to be granted the orders sought.
- Who shall bear the costs of the application herein.

As to whether this Court has jurisdiction to hear and determine the dispute herein, it was the Interested Party's contention that the Environment and Land Court does not have jurisdiction to handle the dispute herein. He relied on section 13 (7) of the Environment and Land Court Act and submitted that remedies for judicial review are conveniently avoided from it. Section 13 (1) of the Environment and Land Court Act confers jurisdiction to the Environment and Land Court (ELC) and stipulates as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13 (2) (c) & (d) further stipulates that ' in exercise of its jurisdiction under Article 162 (2) (b) of the Constitution, the Court shall have power to hear and determine disputes - (c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

Section 13 (4) of the Act further provides that:' in addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of this court.'

Further section 13 (7) (b) of the ELC Act states as follows: **' In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including (b) prerogative order.'**

From the legal provisions, I have cited above, which confer jurisdiction to the Environment and Land Court, I note that judicial review fall within the ambit of prerogative orders, which are included therein. I hence find that this court indeed has jurisdiction to determine the dispute herein.

On the issue as to whether the boundary dispute proceedings undertaken by the 1st Respondent to determine the boundary dispute was biased, discriminatory and materially flawed amounting to an injustice against the Applicant. It is the Applicant's contention that the impugned decision by the Land Registrar is a gross violation of his legitimate expectation that at all times he would uphold the law as set out in sections 18 & 19 of the Land Registration Act. He insists the Land Registrar's decision is evidently unreasonable, made without jurisdiction and based on extraneous considerations only known to him. He contends that the Land Registrar's decision violated his constitutionally guaranteed right to property and to fair administrative process and action. Further, the District Surveyor has the statutory duty to ascertain the boundaries as stipulated in the Survey Act. The Applicant relied on the case of **HC Misc. Application No. 524 of 2017 R vs The Chief Licensing Officer and Anor Ex parte Tom Mboya** to support his arguments.

The Interested party insists the decision by the Land Registrar on 18th April, 2017 for all parties to adopt the boundaries is just and fair as it was reached after all parties were heard. He disputed the jurisdiction of the court to handle the matter herein and contended that the Applicant failed to adhere to the Appeal mechanism that was available to him. He relied on the case of **Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Limited (1989) KLR; Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others (2017) eKLR; and Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** to oppose the judicial review proceedings herein.

The key question we need to ponder is whether the Land Registrar was reasonably and procedurally fair in making a determination of the boundary dispute therein.

Section 18 (2) and (3) of the **Land Registration Act** provides as follows: **' (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.'**

These provisions mandate the Land Registrar to handle boundary disputes. From the Applicant's arguments, the Land Registrar relied on extraneous factors to arrive at his decision dated the 17th May, 2017 and that is the fulcrum of the application for judicial review herein.

Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

Lord Diplock in the case of **Council for Civil Service Unions vs. Minister for Civil Service [1985] A.C. 374, at 401D** clearly set the standards of judicial review when he stated that:-

"Judicial review has I think developed to a stage today when...one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'...By 'illegality' as a ground for judicial review I mean that the

decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it...By 'irrationality' I mean what can now be succinctly referred to as "Wednesbury unreasonableness"...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it...I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.'

In line with these set standards, it is hence pertinent to decipher whether the 1st Respondent relied on extraneous factors to determine the boundary dispute herein. According to the Mutation Form, the two parcels of land mentioned above, were resultant subdivisions from one parcel of land and each had distinct measurements/ boundaries. I note the Land Registrar indeed convened a meeting to resolve the dispute on 18th April, 2017 as indicated in his report. From the Land Registrar's report, he observed as follows: **' On the disputed boundary, the measurements show that all the parcels are less than indicated on the ground. All parties agree on the boundaries as shown on the ground and is marked by trees and are visible and big enough. The trees have been there for approximately 10 years. The parties had said they had no dispute with all the other neighbours. He concluded that ' the parties should adopt the boundaries as marked on the ground. A mark on the road side which had the most beacons dispute was erected to conform to the boundary on the inside of the walls.'**

The District Surveyor also prepared a report which indicated the measurements of the two parcels of land. In his findings he stated as follows: **' In the measurement of B – C is less by 2. 00 m which is as a result of shift in distance of D – E.'** On perusal of the sketch attached to the District Surveyor's report, I note B – C is the Applicant's land while D – E is land parcel number NGONG/ NGONG/ 31270 which was a next to the parcels belonging to the ex parte applicant and interested party respectively.

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

From land registrar's findings, which I have cited above, it is evident that he failed to consider the findings in the District Surveyor's report who had confirmed that indeed the Applicant's parcel of land was less by 2 metres but instead directed the parties to maintain the boundaries as they were.

In the case of **HC Misc Application No. 524 of 2017 R Vs The Chief Licensing Officer and Anor Ex Parte Tom Mboya Onyango** favourably quoted Warsame J (as he then was) in Re: Kisumu Muslims Association HC Misc Application No. 280 of 2003 where he held as follows:

' Where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters.. where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behavior might be constituted by (i) an outright refusal to consider the relevant matters. (ii) misdirection on a point of law. (iii) taking into account some wholly irrelevant or extraneous consideration. (iv) wholly omitting to take into account a relevant consideration. "

Further section 47 of the Constitution provides that: **'(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration'.

In relying on the above cited judicial authorities including the legal provisions quoted above, I find that even if the Land Registrar who was a state officer mandated to determine the boundary dispute, acted within the law to convene the hearing of the said dispute; in making his findings, he failed to observe the Constitutional principles of reasonability and procedural fairness by failing to consider the report of the District Surveyor who was an expert herein, mandated to assist him in measuring the disputed boundaries in question. I note he proceeded to make his findings by directing parties to maintain boundaries as they were and directed any aggrieved party to lodge an appeal in the High Court. Insofar as judicial review is concerned about the process, I opine that failure by the Land Registrar to consider all the materials presented before it, before arriving at a finding, amounts to 'unreasonableness' and is centrally to the rules of natural justice.

In the circumstances, I find that the ex parte applicant's Notice of Motion dated the 21st December, 2017 and filed on 10th January, 2018 is merited and allow it as prayed. I proceed to make the following orders:

i. The decision/ determination of the Land Registrar, KAJIADO NORTH DISTRICT dated 24th August, 2017 or thereabout directing that parties should adopt boundaries as marked on the ground be and is hereby quashed.

ii. The District Land Registrar Kajiado North District be and is hereby directed to consider the report of the District Surveyor dated the 17th May, 2017 and submit a fresh report to Court, in respect of the boundary dispute herein, within the next 60 days from the date.

iii. The costs are awarded to the Applicant.

Dated signed and delivered in open court at Ngong this 16th day of October, 2018

CHRISTINE OCHIENG

JUDGE