



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC JUDICIAL REVIEW APPLICATION NO. 1 OF 2016**

**IN THE MATTER OF LAND REGISTRATION ACT**

**AND**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER OF PROHIBITION AND CERTIORARI**

**REPUBLIC OF KENYA ..... APPLICANT**

**-VERSUS-**

**CHARLES GICHANGO WANJOHI ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR NYERI ..... 2<sup>ND</sup> RESPONDENT**

**LAWRENCE MATHENGE KIMINDA ..... 3<sup>RD</sup> RESPONDENT**

**FRANCIS KOINE KIHUTA ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**ANDREW KARIUKI MUTAHI ..... *EX PARTE* APPLICANT**

**RULING**

**Introduction**

1. Pursuant to leave granted on **16<sup>th</sup> February, 2016** to institute judicial review proceedings, the *ex parte* applicant, Andrew Kariuki Mutahi, brought the notice of motion dated **1<sup>st</sup> April, 2016** seeking an order of prohibition to prohibit the Land Registrar Nyeri from visiting or otherwise interfering with the *ex parte* applicant's possession of land parcels number Githi/ Muthambi/988/989/1683 and 1682; an order of *certiorari* to remove to this court for purposes of being quashed any action, award, decision, or any direction by the Land Registrar regarding the boundary status of Githi/ Muthambi/988/989/1683 and 1682.

2. The application is premised on the grounds that the 2<sup>nd</sup> respondent has issued a notice to visit the aforementioned parcels of land; that the dispute over the suit property was resolved in 2003; that none of

the parties to the dispute filed an appeal to the decision made concerning the dispute, despite having been notified about their right of appeal.

3.It is contended that the 1<sup>st</sup> respondent's attempt to get the decision concerning the boundary dispute repealed was dismissed by the chief Land Registrar. The 1<sup>st</sup> respondent is blamed for having revived the dispute despite the fact that it was finally resolved.

4.The applicant is apprehensive that the respondent may move and implement any directions, proposals, award and or decision of the Registrar to his prejudice.

5.It is further contended that the actions of the respondents will be beyond their mandate, illegal and irregular.

6.The application is opposed on grounds that the application is meant to frustrate the 2<sup>nd</sup> respondent from discharging his statutory duties; that there is no decision on which the order of certiorari can hinge and that no prejudice will be suffered by the applicant if the Registrar proceeds to discharge his statutory duties.

7.In opposing the application, the 1<sup>st</sup> respondent, Charles Gichango Wanjohi, has deposed that the Land Registrar in determining boundary disputes acts in a quasi-judicial capacity; that an order of prohibition should not issue against the Land Registrar unless he is acting beyond his powers.

8.Terming the application pre-emptive, premature, misconceived and an abuse of the court process, he deposes that the Land Registrar has not filed any award that is capable of being quashed.

9.Vide his further affidavit sworn on **26<sup>th</sup> July, 2016** the applicant introduces the determination of the 2<sup>nd</sup> respondent which he contends was in contravention of existing court orders (order of stay granted on 16<sup>th</sup> February, 2016)

10.When the matter came up for hearing counsel for the *ex parte* applicant, **Mr. Nderi**, told the court that the 2<sup>nd</sup> respondent (Land Registrar) exceeded his mandate and proceeded to determine the boundary dispute when an order of stay was in place. He submitted that the 1<sup>st</sup> respondent's right of appeal had been exhausted and his plan to the Land Registrar ignored.

11.In view of the foregoing, he urged the court to allow the application as prayed.

12.Counsel for the 1<sup>st</sup> respondent, **Mr. Wachira**, relied on the replying affidavit of the 1<sup>st</sup> respondent. He told the court that the matters in dispute are pending in various courts and that the Land Registrar was within his right to determine the dispute.

13.Counsel for the 2<sup>nd</sup> respondent, **Mr. Gisemba**, told the court that the report of the 2<sup>nd</sup> respondent is not prejudicial to any of the parties, since all parties participated in the decision making process. He echoed the sentiments by the 1<sup>st</sup> respondent's counsel that the 2<sup>nd</sup> respondent was merely carrying out his statutory duties.

14.In a rejoinder, counsel for the applicant submitted that participation of parties does not confer jurisdiction where none exists. He took issue with the determination having been made when there were orders of stay in place.

#### **Analysis and determination:**

15.From the pleadings filed in this matter and the submissions in respect thereof, the following facts are either common ground or uncontroverted:

- i) That the dispute preferred before the 2<sup>nd</sup> respondent to determine, had previously been adjudicated upon and a decision in respect thereof made;
- ii) That despite having been notified about their right of appeal none of the parties appealed the decision;
- iii) That the 1<sup>st</sup> respondent applied for review of the decision which application was dismissed.
- iv) That by the time the ex parte-applicant instituted the current proceedings, the 2<sup>nd</sup> respondent had not made any decision capable of forming the ground of issuance of an order of *certiorari*.
- v) That the 2<sup>nd</sup> respondent made his decision before the orders of stay issued on 16th February, 2016 was made (at least going by the report attached to the applicant's further affidavit which shows that the report was made on 9<sup>th</sup> February, 2016.

16. From the facts stated above, I find the issues that arise from the foregoing are:

- a) Whether an order of prohibition can issue to restrain what had already happened by the time the applicant moved to court?
- b) Whether the 2<sup>nd</sup> respondent had jurisdiction to entertain the boundary dispute when the same had been determined?
- c) Whether the applicant has made up a case for being granted the orders sought or any of them.

17. With regard to the first issue, it is trite law that an order of prohibition cannot issue to restrain what has happened. In this regard see the case of **Kenya National Examination Council V. Republic Ex parte Geoffrey Gathenji Njoroje and others**, Civil Appeal No.266 of 1996 where it was held:

**“What does an ORDER OF PROHIBITION do and when will it issue” it is an order from the High court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg. 37 paragraph 128. when those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.”**

18. Having determined that the impugned decision was made before the application herein was filed, I find and hold that the applicant has not made up a case for issuance of an order of prohibition.

19. On whether the 2<sup>nd</sup> respondent had jurisdiction to determine the dispute when the same had already been determined, upon reading the provisions of **Section 86** of the Land Registration Act, 2012, I am of the view that by arbitrating on a dispute that had been subject of arbitration, the 2<sup>nd</sup> respondent exceeded his mandate. I say this because under the said section of the law, the recourse for any party aggrieved by the determination was to apply for review to a court of competent jurisdiction.

20. From the evidence adduced in this case, it is clear that the parties did not file an application for review

against the earlier determination. It is improper for the 1<sup>st</sup> applicant to appeal the previous decision through the back door.

21. On whether the applicant has made up a case, despite the fact that the claim was instituted on the basis of speculation, this court cannot shut its eyes to the fact that the decision which is the subject matter of these proceedings was made without jurisdiction and in violation of the procedure provided in **Section 19** of the Land Registration Act 2012 for resolving boundary disputes. In the case of **Kenya National Examination Council V. Republic Ex parte Geoffrey Gathenji Njoroge and others** (*supra*) the court held as follows regarding an order of *certiorari*;

**“Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

22. Having determined that the decision that is the subject matter of the current proceeding was made without jurisdiction, I find and hold that the applicant has made up a case for issuance of an order of certiorari to remove to this court and quash any action, award, decision or any direction by the Land Registrar regarding the boundary status of Githi/Muthambi/988/989/1683 and 1682.

23. The upshot of the foregoing is that the motion dated 1<sup>st</sup> April, 2016 has merit and is allowed in terms of prayers (c) and (d).

**Dated, signed and delivered in open court at Nyeri this 22<sup>nd</sup> day of February, 2017.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Kebuka Wachira for the 1st defendant

N/A for the applicant

N/A for the 2nd and 3rd respondents

Court assistant - Esther