



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO . 671 OF 2017**

**(formerly NAIROBI ELC No. 739 OF 2016 (JR) )**

**IN THE MATTER OF: AN APPLICATION BY ARNOLD WAKILI CHINA WAFULA FOR  
JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF: THE LAND REGISTRATION ACT NO. 3 OF 2012**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**SENIOR LAND REGISTRATION OFFICER**

**KAJIADO NORTH LAND REGISTRY.....1ST RESPONDENT**

**DIRECTOR SURVEYOR, KAJIADO COUNTY.....2ND RESPONDENT**

**FRED MUCHAIZI LUBANGA &**

**RACHEL NECHESA LUBANGA.....1ST INTERESTED PARTY**

**BERNICE ODOLI OBUYA.....2ND INTERESTED PARTY**

**EX PARTE.....ARNOLD WABILI CHINA WAFULA**

**JUDGEMENT**

The application before Court is a Notice of Motion dated 21st July, 2016 and filed on 25th July, 2016 brought pursuant to Order 53 of the Civil Procedure Rules, Sections 101 of the Land Registration Act and all the other enabling provisions of the law and powers of the Court.

The application is supported by the accompanying statements and further grounds which in summary are that the 1st and 2nd Respondents in the process of determining the boundary dispute between the Applicant on one part and the interested parties on the other failed to act fairly and did not observe the rules of natural justice. The conclusions arrived at by both Respondents were based on proceedings that were inherently biased and discriminatory against the Applicant and materially flawed. The 1st Respondent's written report of the proceedings during the exercise is not a true reflection of what

transpired. The 1st Respondent in determining the boundary dispute took into account extraneous issues and misinterpreted the law to the detriment of the Applicant. The Respondents failed to use the Mutation forms and Registry Index Map to determine the boundary dispute despite the fact that the properties in issue were as a result of a common subdivision. The 1st Respondent erred in totally ignoring the Registry Index Map which is indicative on the shape and size of the land and further by stating without any basis that using it would render that the Applicant's land will encroach on the 2nd interested party's parcel number NGONG/NGONG/30917. The decisions arrived at by the Respondents in the boundary dispute resolution are tainted with illegality, irrationality and procedural impropriety as the Applicant stands to lose 7.1% of his property.

The application is supported by the affidavit of ARNOLD WABILI CHINA WAFULA the Applicant herein where he deposes that he is the proprietor of land parcel number NGONG/NGONG/30916. Further that his property is a resultant subdivision from land parcel number NGONG/NGONG/30874; so are the two interested parties whose land parcels number are NGONG/NGONG/30915 and NGONG/NGONG/30917 respectively that are adjacent to his. He avers that on 26th December, 2014, the 1st interested party wrote to him raising issues about their common boundary and accused him of uprooting the survey beacons. He claims through his Advocates he proposed to have a survey carried out to establish the real boundary but the 1st interested party did not respond to them. He avers that the 2nd interested party had also encroached on his land, with his fence squarely in it and having raised the issue with him to no avail, he opted to have the dispute settled by the Land Registrar Ngong. He states that through his advocates, they wrote to the Land Registrar Ngong and even paid for the charges towards the exercise. He reiterates that the exercise commenced after three months when the Land Registrar issued summons and despite going for the meeting on 3rd September, 2015 at 10.00 am, the Respondents and Interested parties failed to show up. Further, when the date was set for 30th September, 2015 the 1st Respondent failed to attend claiming he had received a letter from the interested parties. After registering his complaints, the meeting was set for 15th October, 2015, when he was made to pay a further Kshs.14000 by the 1st Respondent to cater for transport. He confirms that on 15th October, 2015 when the exercise to establish the boundaries of the Applicant's parcel of land took place, the following persons were present: Arnold Wabili China Wafula, John Muniyifwa, Fred Muchaizi Lubanga & Rachel N. Lubanga, Ms Liz Mbugua, Loise Kihohia and J M Mwinzi. He further states that the proceedings as presented are not a true reflection of what transpired and the measurements indicated in both reports are incorrect. He emphasizes that no measurements were taken on the sides of his property and any boundaries of plot no. 30917 which belongs to the 2nd interested party, yet the report indicates to the contrary. He further avers that the 1st Respondent ordered for the removal of the euphorbia shrub marking the lower boundary between his property, plots 30916 and 30915 thus reducing the size of his land. He insists the encroachment by the two interested parties on his land was sanctioned by the 1st Respondent and this failed to take into account his verbal decision to have the 1st interested party move his boundary further into his property by one foot. Further that the findings of the 2nd Respondent that the measurements on the ground tally with those in the mutation highly contradict the 1st Respondent's observation that the measurements do not conform but that the Registry Index Map is no authority on boundary disputes. He affirms that the 1st Respondent also omitted to make any orders on payment of costs incurred and acted beyond his powers and contrary to the law and the rules of natural justice with the said decision being biased against him.

The 1st Interested Party opposed the application and filed a replying affidavit sworn by FRED MUCHAIZI LUBANGA where he deposed that the application as filed is misconceived, a non starter and an abuse of the process of court. He confirms there were exchanges of correspondence as deposed but insists the depositions are pure lies. He states that he was personally present when measurements were taken and there has never been a change of boundary since he purchased his plot. He avers that there are no inconsistencies in the report and he pointed out boundaries which were pre existing and it is the Applicant who had illegally and maliciously uprooted the beacons. Further, he claims the Applicant had not shown any variance on the boundary and even if there were any, there was no difference as the dimensions in the mutation and RIM are approximations. He affirms that there is no evidence that the 1st Respondent admitted that his land encroached on the Applicant's land. He confirms he was present during the entire process and state that the proceedings annexed truly presents what transpired. He affirms that there was no bias in the determination of the dispute by the respondents.

The Applicant, 1st and 2nd Interested parties filed their respective written submissions which I have considered.

On 24th July, 2017, Ms. Wanyonyi highlighted the Applicant's submission but Mr. Onsare who held brief for Mr. Kivuva for the 1st Interested party opted to rely on their written submissions.

Ms. Wanyonyi submitted that the Applicant had demonstrated that the 1st Respondent misapprehended himself in reaching the decision on boundary dispute. Further that there were procedural impropriety. She stated that on 12th April, 2016 the Applicant applied for leave under Order 53 of the Civil Procedure Rules which Application was heard on 5th July, 2016 and leave granted. Further the Court ordered the substantive application for Judicial Review to be filed within 21days from 25th July, 2016 and the same was filed within time. She reiterates that application for leave was filed within six (6) months on 12th April, 2016 and submission by the 1st interested party that the application for leave was filed out of time does not hold water.

### **Analysis and Determination**

I have considered the application, the affidavit in support and opposition to the application, the annexures thereon, the submissions and authorities relied upon and the following are issues for determination:

- Whether the Applicant obtained leave in time before filing this judicial review proceedings.
- Whether the proceedings undertaken by the 1st Respondent to determine the boundary dispute between the Applicant, 1st and 2nd Interested parties was biased and amounted to an injustice against the Applicant.

On the question of leave, the 1st and 2nd interested parties aver that the Applicant failed to seek leave to institute the Judicial Review Application herein. I note that the Applicant applied for leave on 12th April, 2016 in accordance with Order 53 of the Civil Procedure Rules, which application was heard on 5th July, 2016 and leave granted. I note as per annexure 'AWC 9 a' that the boundary dispute proceedings were held on 15th October, 2015. I note the Court had ordered the substantive application for Judicial Review be filed within 21days from 25th July, 2016 and I note that the instant application was filed on 25th July, 2016. It is my finding that the Applicant sought leave within 6 months of the Land Registrar's decision and the claim by the interested parties that he did not obtain leave on time is hence false and misleading.

On the second issue as to whether the boundary dispute proceedings undertaken by the 1st Respondent to determine the said dispute was biased, and amounted to an injustice against the Applicant. It is the Applicant's contention that the 1st Respondent relied on extraneous issues to determine the boundary dispute between him and the 1st and 2nd Interested parties, and misinterpreted the law to his detriment. He states that the 1st Respondent failed to use the Mutation forms and Registry Index Map as reference to determine the boundary dispute despite the fact that the properties in issue were as a result of a common subdivision. He further states that the 1st Respondent erred in totally ignoring the Registry Index Map which is indicative on the shape and size of the land. The applicant insists no measurements were done to determine the boundary dispute and the 1st Respondent's report is false and misleading. I note that the 1st Respondent however did not file any replying affidavit to controvert the claim by the Applicant on how he handled the said boundary dispute.

The 1st Interested party on the other hand states that he was present when measurements were taken and there has never been a change of boundary and that there are no inconsistencies in the report as he pointed out boundaries which were pre existing and it is the Applicant who had illegally and maliciously uprooted the beacons. He insists the Applicant had not shown any variance on the boundary and even if there were any, there was no difference as the dimensions in the mutation and Registry Index Map are approximations. He reiterates that he was present during the entire process with the proceedings being indicative of what transpired as there was no bias in the determination of the dispute. Both the 2nd Respondent and 2nd Interested party also failed to file any response in opposition to the application.

What we need to ask is whether the Applicant was granted due process and hearing in determining the

boundary dispute.

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.'**

I note from these provisions that the Land Registrar is indeed empowered by statute to handle boundary disputes. From the Applicant's claim, it was the duty of the Land Registrar to undertake the process to determine the boundary dispute herein. The Applicant stated that twice the Land Registrar failed to commence the process and when it finally began, it was marred with bias against him. These are serious allegations against a government officer mandated to handle the boundary dispute. From the reading of the legal provisions above, it can be inferred that the Land Registrar owes a duty to all parties to accord them a fair hearing before making a final decision on the dispute at hand.

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's actions in handling the boundary dispute proceedings were rational, reasonable and that he observed the basic rules of natural justice. I note that the proceedings being complained of commenced the time the Applicant sought the intervention of the 1st Respondent to establish his boundary upto the time the meeting was held almost three months down the line. It is the Applicant who sought the 1st Respondent's intervention to establish his boundary vide his advocates letters dated 6th February, 2015, 12th March, 2015 and 23rd April, 2015 respectively. From the receipts annexed to the Applicant's supporting affidavit, it is evident that he was the only one made to pay for charges of the hearing the boundary dispute which involved other parties. Secondly, the 1st Respondent convened the first two meetings where it is only the Applicant who attended the while the rest of the parties' were absent and it is only after the Applicant complained that the 1st Respondent finally set down the meeting on 15th October, 2015. These clearly demonstrates that there was an element of irrationality on the part of the 1st Respondent and from the onset it seems he was not committed to the process which he is expected to determine by Law. From the proceedings dated 15th October, 2015, especially on the last page at the second paragraph the Land Registrar was dismissive of the Applicant's claim and stated as follows: '**It is only after the applicant took measurements and found that the ground boundaries are not conforming with the RIM. It should be noted to the applicant that RIM only gives approximations and it is not an authority on boundary disputes. If the measurements were used, the Applicant would encroach on parcel 30917. The 30917 has well maintained boundaries as under Section 20 of the Land Registration Act. He has also developed his property extensively. The applicant is just beginning to develop. "**

From this statement it is indeed evident that the Land Registrar took into account extraneous issues and failed to accord the Applicant proper hearing. Further the last sentence also denotes an element of bias. Further from the said proceedings, it is not recorded on when the measurements of the disputed boundaries took place and neither when parties were taken through the respective Mutation Form and RIM. However, the reference to the RIM, is only done dismissively at the end of the meeting when the 1st Respondent indicates that it only gives approximations and it is not an authority on boundary disputes.

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.”**

In relying on the excerpt from the boundary dispute proceedings and on the case above, I find that the 1st Respondent was abt biased, relied on extraneous matters and failed to **observe procedural fairness rather and basic rules of natural justice towards the Applicant during the hearing of the boundary dispute**. I find that the Applicant was indeed not accorded a fair hearing.

In the circumstances, I find that the ex parte applicant's Notice of Motion filed on 25th July, 2016 is merited and allow it as prayed. I order that the proceedings of the boundary dispute held on 15th October, 2015 be and is hereby quashed and a fresh process should commence.

**Dated signed and delivered in open court at Kajiado this 7th day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION**

Wafula holding brief for Wanyonyi for applicant

No appearance for respondent and interested parties

Court Assistant Mpoye