



**Republic v County Surveyor of Machakos & another; Mbindyo (Exparte Applicant);  
Kithome & 2 others (Interested Parties) (Environment and Land Miscellaneous  
Application 7 of 2023) [2024] KEELC 1427 (KLR) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1427 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 7 OF 2023**

**CA OCHIENG, J**

**MARCH 13, 2024**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY  
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION  
AND MANDAMUS BY GREGORY MUENDO MBINDYO**

**AND**

**IN THE MATTER OF DECISION OF THE MACHAKOS COUNTY  
SURVEYOR CONTAINED IN THE REPORT DATED 16TH NOVEMBER 2020**

**AND**

**IN THE MATTER OF LAND REGISTRATION NO. MWALA/MYANYANI/501**

**AND**

**IN THE MATTER OF ARTICLES 25(C), 47 AND 50 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT CAP 300 (LAWS OF KENYA)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SURVEYOR OF MACHAKOS ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY LAND REGISTRAR, MACHAKOS ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**GREGORY MUENDO MBINDYO ..... EXPARTE APPLICANT**



**AND**

**MAGDALENE MALISAU KITHOME ..... INTERESTED PARTY**

**PAUL WAMBUA KITHOME ..... INTERESTED PARTY**

**ALEXANDER MUTUNGA KITEMA ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the *Ex-parte* Applicant's Chamber Summons Application dated the 8<sup>th</sup> May, 2023, where he seeks the following Orders:-
  1. Spent.
  2. That this Honourable Court be pleased to grant leave to the Applicant to apply for orders of Certiorari directed to the Respondents to quash the decision/report of the County Surveyor, Machakos dated 16<sup>th</sup> November, 2020.
  3. That this Honourable Court be pleased to grant leave to the Applicant to apply for orders of prohibition to prohibit the Respondents from implementing the decision/report of the County Surveyor, Machakos dated 16<sup>th</sup> November, 2020.
  4. That this Honourable Court be pleased to grant leave to the Applicant to apply for an order of mandamus, compelling the Respondents to do the boundary rectification and verification in the presence of the Ex parte Applicant's appointed Surveyor.
  5. That such leave, if granted operate as stay of implementation of the decision/report of the County Surveyor dated 16<sup>th</sup> November, 2020.
  6. That the cost of this Application be borne by the Respondents.
2. The Application is premised on the grounds on the face of it and supported with the Statement and Verifying Affidavit of Gregory Muendo Mbindyo where he deposes that land parcel number Mwala/myanyani/501 hereinafter referred to as the '*suit land*', belonged to his father, the late Mbindyo Mutua Ndava. Further, that he has obtained a Limited Grant over the said Estate. He claims that he had been summoned to attend a boundary verification exercise which took place on 13<sup>th</sup> October, 2020 but he was not satisfied with the decision of the Surveyor since he hived off a big chunk of his father's land. He contends that the Surveyor had no authority to conduct the exercise since the two parcels of land belonged to deceased persons' Estate, neither of which is administered hence the Interested Parties had no capacity to call the Surveyor as his father's Estate was not represented. He avers that the Surveyor had purported to establish a road that never existed and only the deceased could authorize to give away his portion of land/passage. He states that he had sought the indulgence of the Respondents' who had ignored his concerns and denied him a copy of the report, prompting him to seek legal address. He reiterates that the Respondents' had acted illegally and *ultra-vires* in dealing with the un-administered estate of the deceased and infringing on his constitutional rights to a fair hearing.
3. The Respondents opposed the instant Application by filing a Notice of Preliminary Objection dated the 6<sup>th</sup> June, 2023, where they contend that the said Application dated the 8<sup>th</sup> May, 2023 offends the mandatory provisions of Order 53 Rule 2 of the Civil Procedure Rules, 2010 as this court is divested of jurisdiction to hear the proceedings since time has lapsed. Further, that the Application is devoid of merit, incompetent and that the orders sought, ought not be granted.



4. The Interested Parties in opposition to the instant Application filed a Replying Affidavit where they deposed that the report entailed transparency from the County Survey offices with full knowledge of all relevant government offices. They explained that the Ex-parte Applicant was present during the survey process, the requisite survey tools were used and it was established that a road existed between the two parcels of land, of which the Ex-parte Applicant had encroached on. They stated that the Ex-parte Applicant had not mentioned about being denied a copy of the report in his demand letter and that the subject road was recovered as per the map of Myanyani. They explained that the Ex-parte Applicant rushed to the Machakos Environment and Land Court and filed Case No. 60 of 2021. They reiterated that the Application is a witch-hunt as the Surveyor has a right to go to any land.
5. The Ex-parte Applicant filed an objection dated the 21<sup>st</sup> June, 2023 in response to the Notice of Preliminary Objection where he contends that he is not the registered owner of the suit land and had to apply for Letters of Administration over the deceased Estate. He argues that the mandatory provisions of Sections 9(2) and (3) of the *Law Reform Act* and Order 53 Rule 2 of the *Civil Procedure Rules* have since evolved through case law and courts have held that prayers to quash an illegality cannot be time barred since an illegality, irregularity or nullity must be cured.
6. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

7. Upon consideration of the instant Chamber Summons Application including the respective Affidavits, Statement, Annexures, Grounds of Opposition, Notice of Preliminary Objection and rivalling submissions, the only issue for determination is whether the Ex-parte Applicant is entitled to leave to commence proceedings of certiorari, mandamus and prohibition and if such leave can operate as Stay of implementation of the decision/report of the County Surveyor dated the 16<sup>th</sup> November, 2020.
8. The Ex-parte Applicant in his submissions argued that the Interested Parties had no capacity to bring a Surveyor to the suit land before taking out Letters of Administration over Plot No. 483 in the name of Kithome Maliani. Further, that the 1<sup>st</sup> Respondent could not alter the acreage of Plot No. 501 belonging to the deceased, whose Estate is un-administered. He submitted that the provisions of Order 53 Rule 2 of the *Civil Procedure Rules* and Sections 9 of the *Law Reform Act* were settled in *Republic vs District Commissioner Keiyo & 2 Others, Ex parte Robert Kipsigirio Loriang* (2018) eKLR wherein the court held that Order 53 Rule 2 does not envisage null proceedings because nullities can be quashed at any time. He insisted that the decision of the 1<sup>st</sup> Respondent herein does not fall under the decisions envisaged under Order 53 Rule 2, being ‘Judgment, Order, Decree, conviction or other proceedings...’ and to support this argument, he relied on the case of *Republic vs Kenya Highways Authority & 2 Others Ex parte Amica Business Solutions Limited* (2016) eKLR.
9. The Interested Parties in their submission reiterated the averments in their Replying Affidavit. They insisted that the instant Application was not merited. To buttress their averments, they relied on the following decisions: *Republic vs National Land Commission: County Government of Nyeri & 8 Others (Interested Parties): Ex Parte Ephraim Muriuki Wilson & 3 Others* (2019) eKLR and *Republic v Cabinet Secretary for lands & 2 Others Ex parte Soitara Ole Saoli; Paulo Morombi Saoli (Interested Party)* [2021] eKLR.
10. The Respondents in their submissions contended that the Preliminary Objection was properly before court. They further submitted that the instant Application was time-barred as per provisions of Section 9(3) of the *Law Reform Act* and Order 53 Rule 2 of the *Civil Procedure Rules*. To buttress their averments, they relied on the following decisions: *Mukhisa Biscuit Manufacturing Co. Ltd v Westend*



*Distributors* (1969) EA 696; Nakuru ELC JR No.23 of 2014 *Kibichi Mogotio & 2 Others v District Land Registrar, Baringo* (2015) eKLR and Eldoret Misc. Application No.38 of 2021, *David Tanui & 3 Others v Deputy County Commissioner (Marakwet East) & 4 Others; Peter Cheruiyot (Interested Party)* (2022) eKLR.

11. On granting of leave to commence Judicial Review proceedings, Order 53 Rule 1 of the *Civil Procedure Rules* provides that:-
- (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.
  - (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
  - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
  - (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”
12. In the current scenario, the Ex-parte Applicant seeks to challenge the report by the County Surveyor dated the 16<sup>th</sup> November, 2020 which culminated in the establishment of a public road between Plot No. 483 and the suit land. He claimed the Surveyor should not have established the road since the suit land belonged to a deceased Estate. Further, that a huge chunk of the deceased land was taken. The court in the case of *Kingdom Kenya 01 Limited versus the District Land Registrar, Narok & Fifteen (15) others* [2018] eKLR described Judicial Review as follows:-

Judicial Review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands –versus – Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See *David Mugo t/a Manyatta Auctioneers –versus Republic* – Civil Appeal No. 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange –versus Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case* (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking mandamus must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.”



13. It is trite that Judicial Review is not concerned about the merits of the decisions but the process the person in authority adhered to. Further, it challenges the administrative action of a person in position of authority. From the averments of the respective parties including documents presented, I note the Ex-parte Applicant actually participated in the process wherein the Surveyor established a road between the two parcels of land. There is no indication that he protested when he was served with summons. The Court takes judicial notice of the fact that in processes involving boundary disputes, they are governed by Section 18 of the Land Registration Act. Further a Surveyor has the legal mandate to undertake measurements in instances, where there is a boundary dispute between two parcels of land and when a party is aggrieved with the process, the law prescribes the period within which an Appeal can be lodged. In this instance, I note the Ex-parte Applicant seeks leave, two and a half years after the decision of the Surveyor, when the road has already been established. Further, he has relied on the provisions of Order 53 of the Civil Procedure Rules to seek leave to commence the process of Judicial Review and has not disputed that he already filed Machakos ELC No. 60 of 2021.
14. In the case of the Republic v National Transport & Safety Authority & 10 others Ex parte James Maina Mugo [2015] eKLR, it was held that:-
- It follows therefore that where the resolution of the dispute before the Court requires the Court to make a determination on disputed issues of fact that is not a suitable case for judicial review. The rationale for this is that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect determine the merits of the dispute the Court would not have jurisdiction in a judicial review proceeding to determine such a dispute and would leave the parties to ventilate the merits of the dispute in the ordinary civil suits.”
15. Based on the facts as presented including associating myself with the decisions cited above, it is my considered view that the issues the Ex -parte Applicant has raised do not fall within the ambit of Judicial Review. Further, I find that the Ex-parte Applicant ought to have filed an Appeal against the decision of the Surveyor dated the 16<sup>th</sup> November, 2020 instead of seeking to institute Judicial Review, way out of time. In the circumstances, I find that the Ex-parte Applicant is hence not entitled to leave as sought.
16. In the foregoing, I find the Chamber Summons Application dated the 8<sup>th</sup> May, 2023 unmerited and will dismiss it, but make no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13<sup>TH</sup> DAY OF MARCH, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of;**

Kuria for Mumo for Respondents

Mwendwa for Ex-parte Applicant

No appearance for Interested Parties

Court Assistant – Simon/Ashley

