



**Republic v Land Registrar Busia & 2 others; Nyabola (Exparte Applicant) (Environment and Land
Judicial Review Case E003 of 2023) [2024] KEELC 1319 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023**

BN OLAO, J

MARCH 12, 2024

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR BUSIA 1ST RESPONDENT

ANN GAUDENCIA MUNGAI 2ND RESPONDENT

SUSAN MUNGAI 3RD RESPONDENT

AND

FELIX OPADA NYABOLA EXPARTE APPLICANT

JUDGMENT

1. Felix Opada Nyabola (the Applicant herein) moved this Court vide his Notice of Motion dated 14th March 2023 in which he sought the following orders:
 1. An order of *certiorari* to call into this Court and quash the decision by the County Land Registrar Busia which unlawfully purportedly and/or is intended to demolish the *Ex-parte* Applicant's house.
 2. An order of prohibition to issue against the County Land Registrar Busia stopping him from demolishing the *Ex-parte* Applicant's house.
 3. That an order of *Mandamus* do issue against the County Land Registrar Busia compelling him to restore the *Ex-parte* Applicant's house.
 4. That costs of this application be borne by the Respondents.



2. The application is supported by the *Ex-parte* Applicant's affidavit and based on the grounds set out therein.
3. The gravamen of the application is that the Land Registrar Busia (the 1st Respondent herein) illegally demolished the *Ex-parte* Applicant's house on the land parcel No Bunyala/bulemia/4674 (the suit land) which action can be cured by an order of *Mandamus*. That the said action was ultravires as the *Ex-parte* Applicant is the registered proprietor of the said land and only a Court could sanction such an act.
4. That ANne Gaudencia MungaI and Susan Mungai (the 2nd and 3rd Respondents respectively) are the registered proprietors of the land parcel No Bunyala/bulemia/5119 which neighbours the suit land yet in 2021, the 1st Respondent visited the suit land in his absence and ordered for the demolition of his house where he has been living for over 35 years. Further, that the 2nd and 3rd Respondents have fenced the suit land and have built a house thereon making it difficult to access his home.
5. That the *Ex-parte* Applicant visited the 1st Respondent's office and was given 30 days to appeal the 1st Respondent's decision as contained in his report.
6. The 1st Respondent's illegal action can be cured by the orders of *Mandamus* and Prohibition since the boundary was ignored and the 2nd and 3rd Respondents have no right to the suit land hence this application.
7. The following documents have been filed by the *Ex-parte* Applicant in support of his application:
 1. Copy of his identity card No. 1727586.
 2. Copy of Title Deed No Bunyala/bulemia/4674.
 3. Copy of Mutation Form for the land parcel No Bunyala/bulemia/465.
 4. Certificate of Official Search for the land parcel No Bunyala/bulemia/5119.
 5. Copy of Mutation Form for the land parcel No Bunyala/bulemia/1327.
 6. Report by the Land Registrar Busia dated 22nd January 2021 on the boundary dispute in respect to the land parcels No Bunyala/bulemia/4674 and Bunyala/bulemia/5119.
 7. Report by the County Surveyor Busia dated 24th February 2021 on re-establishment of the boundary of the land parcels No Bunyala/bulemia/4674 and 5119.
 8. In opposing the application, the 1st Respondent vide a replying affidavit dated 24th March 2023 signed by Winfred Nyaberi deposed, inter alia, that the 3rd Respondent had made an application under Sections 18 and 19 of the [Land Registration Act](#) for the determination of the boundary between her land parcel No Bunyala/bulemia/5119 and the land parcel No Bunyala/bulemia/4674 belonging to the *Ex-parte* Applicant. That he summoned all the parties, visited the land and gave both parties an opportunity to be heard. He then concluded that since there were no proper boundary marks on the ground, maps be used to determine the boundary between the two parcels.
 9. On 18th February 2021 he visited the land, surveyed it and marked the boundaries as per the recommendations of the County Surveyor. From the exercise, he determined that the *Ex-parte* Applicant had built his house partially inside the 3rd Respondent's land. He prepared a report in which he ordered the parties to respect the boundaries as shown to them. He denied having demolished the *Ex-parte* Applicant's house and urged the Court to regard that allegation as



misplaced and this suit as an abuse of the process of this Court which should be dismissed with costs.

10. The following documents are annexed to the replying affidavit:
 1. Copy of the application by the 2nd and 3rd Respondents for the determination of the boundary between the land parcels No Bunyala/bulemia/4674 and 5119.
 2. Summons to the parties.
 3. Boundary dispute report by the 1st Respondent dated 22nd January 2021.
 4. Surveyor's report dated 24th February 2021.
11. The 2nd and 3rd Respondents filed a Notice of Preliminary Objection citing the ground that the application has been filed outside the statutory period for the grant of an order of *certiorari*.
12. The application has been canvassed by way of written submissions.
13. The submissions were filed by Mr Ouma instructed by the firm of B. M. Ouma Advocate for the Applicant, Mr Juma Collins Senior State Counsel Instructed By The Attorney General for the 1st Respondent and MR Jumba instructed by the firm of Balongo & Company Advocates for the 2nd and 3rd Respondents.
14. I have considered the application and the responses by the Respondents. I have also considered the submissions by counsel.
15. I need to first determine the 2nd and 3rd Respondents' Preliminary Objection because it touches on the jurisdiction of this Court. It reads:

“The 2nd and 3rd Respondents herein shall raise a Preliminary Objection on point of law that the impugned administrative action by the Land Registrar against the *Ex-parte* Applicant was made on 24th February 2021 well outside statutory period for an order of *certiorari*.”

In his submissions dated 9th October 2023, counsel for the 2nd and 3rd Respondents has submitted on the above in paragraphs 1 and 2 as follows:

“On 27th February 2021, the County Land Registrar made a ruling and which the Ex-parte Applicant is challenging through this review. Under Order 53 Rule 1 and 2 of the *Civil Procedure Rules*, it is clear that leave to file an application for judicial review must be filed within 6 months from the date of the judgment or decree.”

A reading of the Preliminary Objection together with the submissions by the 2nd and 3rd Respondents makes it clear that what they are raising is the objection that decision by the Land Registrar sought to be quashed having been made on 27th February 2021, then the filing of this Notice of Motion on 20th March 2023 has been made after the 6 months statutory period set out in the law. The 2nd and 3rd Respondents no doubt have in mind the provisions of Order 53 Rule 2 of the Civil Procedure Rules which reads:

“Leave shall not be granted to apply for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of it's being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to



appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

The marginal notes to Order 53 Rule 2 of the [Civil Procedure Rules](#) specifically states:

“Time for applying for *certiorari* in certain cases.”

Section 9(3) of the [Law Reform Act](#) similarly provides that:

“In the case of an application for an order of *certiorari* to remove any judgment, order, decree, conviction or other proceeding for the purpose of it’s being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where the judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”

Section 9(2) of the [Law Reform Act](#) on the other hand provides that:

“Subject to the provisions of subsection (3), rules made under sub-section (1) may prescribe the application for an order of *Mandamus*, prohibition or *certiorari* shall in specified proceedings be made within six months or such shorter period as may be prescribed after the act or omission for which the application for leave relates.”

Section 9(1) of the same [Act](#) provides for the power to make rules which govern the Court while considering application for order of *certiorari*, *Mandamus* and prohibition.

16. My reading of the provisions of Section 9(1), (2) and (3) of the [Law Reform Act](#) and Order 53 Rule (2) of the [Civil Procedure Rules](#) is that it is the rules which are made under the Civil Procedure Rules which will govern the time limit for an Applicant to file any application seeking for orders of *certiorari*, *Mandamus* and Prohibition. And in respect to an application for orders of *certiorari*, it is clear from Section 9(3) of the [Law Reform Act](#) and Order 53 Rule 2 of the [Civil Procedure Rules](#) that the time limit is 6 months. No time limit has been prescribed under the rules within which an application for orders of *Mandamus* or prohibition must be filed. In other words the time limit for seeking orders of *Mandamus* or prohibition is therefore not circumscribed by the provisions of Section 9(3) of the [Law Reform Act](#) or Order 53 Rule 2 of the [Civil Procedure Rules](#). In any case, it would be impracticable and not in the interest of justice to limit the time for seeking an order of *Mandamus*, which is a writ issued by the Court to compel the performance of any act by a particular agency, or an order of prohibition, which is a writ that forbids a certain act, to the time limit of 6 months. For instance, when a party approaches the Court seeking an order of prohibition, it means that the action being complained about is continuing. And when an order of *Mandamus* is sought, it means that the body against whom it is sought has refused to perform a public duty imposed upon it by the law. It is obvious now, therefore, why the orders of *Mandamus* and prohibition are not mentioned in Section 9(3) of the [Law Reform Act](#) or Order 53 Rule 2 of the [Civil Procedure Rules](#).
17. I have gone at length to discuss the above two provisions because the Preliminary Objection by the 2nd and 3rd Respondents is hinged specifically on the provisions of Order 53 Rule 2 of the [Civil Procedure Rules](#). However, as is clear from the Notice of Motion, the *Ex-parte* Applicant did not confine his application to the order of *certiorari*. He also seeks for;



- 2) An order of prohibition to issue against the County Land Registrar Busia stopping him from demolishing his house and;
- 3) An order of *Mandamus* to issue against the County Land Registrar Busia compelling him to restore his house.

Therefore, since the Ex-parte Applicant's Notice of Motion seeks the combined remedies of *certiorari*, *Mandamus* and prohibition, it cannot be defeated by the 6 months, time limit set out in Order 53 Rule 6 of the Civil Procedure Rules. The application can only be incompetent in so far as it relates to the remedy of *certiorari*.

18. In the circumstances, the Preliminary Objection by the 2nd and 3rd Respondents is un-meritorious. It is accordingly dismissed.
19. I shall now consider the merits or otherwise of the application.
20. This being a Judicial Review application, this Court must remember that in such an application, the Court is not considering an appeal from the decision of the body which has been sued. Rather, the Court is concerned with the decision making process itself. Not the merits of the decision. This was well captured in the case of *Pastoli -v- Kabale District Local Government Council & Others* 2008 3 EA 300 where the Court said:

“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 or 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 ...

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 is 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.”

Similarly, in the case of *Municipal Council Of Mombasa -v- Republic & Umoja Consultants Ltd* 2002 eKLR, the Court of Appeal stated:

“Judicial review is concerned with the decision -making process, not with the merits of the decision itself; the Court would concern itself with issues such as 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 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 as whether there was or there was not sufficient evidence to support the decision.”



21. It is also now well settled that where the law provides for a remedy to address a particular grievance, the Court must act with restraint and allow the relevant bodies or organs to first deal with the dispute. In the case of *Speaker Of National Assembly -v- Njenga Karume* 2008 I KLR 425, the Court of Appeal said:

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or any Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions.”

It must also be remembered that orders in judicial review applications are discretionary in nature. The Court must therefore weigh one thing against another to see if the remedy sought is the most efficacious in the circumstances of each case – see *Halsbury’s Laws Of England* 4th Edition Vol Ii page 805.

22. Guided by the above principles, among others, it is clear from the replying affidavit of Wilfred Nyaberi the 1st Respondent herein that Anne Guadencia the 3rd Respondent had made an application under Sections 18 and 19 of the *Land Registration Act* seeking the intervention of the 1st Respondent in determining the boundary between the land parcels No Bunyala/bulemia/5119 and Bunyala/bulemia/4674. The 1st Respondent, pursuant to that application summoned the Ex-parte Applicant as well as the 2nd Respondent and after hearing them, he and the County Surveyor fixed the boundary and any aggrieved party was allowed 30 days from 27th February 2021 to file any appeal. By another report dated 24th February 2021, the County Surveyor had recommended that the Ex-parte Applicants house which had encroached onto the land parcel No Bunyala/bulemia/5119 by 6 metres x 7 metres be demolished. The County Surveyor is not a party in these proceedings. It is the Land Registrar who is a party in these proceedings and nowhere in his report which is the subject of this application has he ordered for the demolition of any building. In the last paragraph of his report dated 27th February 2021, he states:

“Registrar’s Verdict

Parties to respect the boundary as shown on the ground by the surveyor.

That right of appeal to the High Court of Kenya granted within 30 days from the date hereof 27th February 2021.

Wilfred N. Nyaberl

Land Registrar

Busia County.”

It is difficult to see how in his report the 1st Respondent can be said to have “unlawfully purportedly and or is intended to demolish the Ex-parte Applicant’s house” as alleged in the Notice of Motion. In any event, there is no evidence to show that pursuant to that report, any house was demolished which needs to be restored. Nothing would have been easier for the Ex-parte Applicant to avail photograph of the house before, and the debris, after the demolition. And if there was any demolition of the Ex-parte Applicant’s house, the most efficacious remedy would be achieved by filing a suit for damages against the Land Registrar and any other parties for trespass and damage to property. The remedy of prohibition will not serve any purpose where the house, as alleged by the Ex-parte Applicant, has already been demolished.



23. In the case of *Kenya National Examination Council -v- Republic Ex-parte Geoffrey Gathenji Njoroge C.a.* Civil Appeal No. 266 of 1996, the Court said the following with regard to the remedies of *Mandamus* and prohibition:

“The order of *Mandamus* is of a most extensive remedial nature and is in form of a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It’s purpose is to remedy the defects of justice and accordingly it will issue to the end that justice may be done in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legal bound to perform. Where a general duty is imposed, a *Mandamus* cannot require it to be done at once. Where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *Mandamus* cannot command the duty in question to be carried out in a specific way.

The Court went on to add that:

“An order of *Mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform these same but if the complaint is that the duty has been wrongfully performed according to the law, then *Mandamus* is the wrong remedy to apply for because, like an order of prohibition, an order of *Mandamus* cannot quash what has already been done.”

It is clear, therefore, that even if the 1st Respondent had demolished the *Ex-parte* Applicant’s house as alleged, the remedies of *Mandamus* and/or prohibition would not have been available to the Applicant.

24. Further, from the report of the 1st Respondent dated 27th February 2021, the parties herein were allowed 30 days to appeal the 1st Respondent’s decision. The record shows that the 1st Respondent heard the parties before arriving at the decision which he made that the parties abide by the boundary as set. Indeed I have not heard the *Ex-parte* Applicant alleged that he was not allowed to present his case. Therefore, the rules of Natural Justice with regard to hearing of the parties were adhered to. It was therefore the duty of the *Ex-parte* Applicant, if he was aggrieved by the Land Registrar’s decision, to invoke the provisions of Section 86(1) of the *Land Registration Act* and seek redress. That provision reads that:

86(1) “If any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on the Registrar by this Act, the Registrar or any aggrieved person shall state a case for the opinion of the Court, and thereupon the Court shall give its opinion, which shall be binding upon the parties.”

There is therefore a procedure set out in Section 86(1) of the *Land Registration Act* which, as was held in the case of *Speaker Of The National Assembly -v- Njenga Karume* (supra), the *Ex-parte* Applicant was required to pursue rather than circumventing that route and rushing to this Court seeking judicial review remedies. Taking into account the fact that remedies in Judicial Review application are at the discretion of the Court, I am not persuaded that this is a proper case in which to invoke that discretion in the *Ex-parte* Applicant’s favour.



25. Finally, although there is no time limit in seeking for order of *Mandamus* or prohibition in Judicial Review applications, the [Constitution](#) of Kenya 2010, which the Applicant has himself invoked, requires that disputes be determined expeditiously. Any delay in approaching the Court must therefore be explained. The decision which the Ex-parte Applicant is challenging by this application was rendered on 27th February 2021. This application was filed some 2 years later on 20th March 2023. There has been no explanation proffered, reasonable or otherwise, as to why it took the *Ex-parte* Applicant that long to file this application.
26. Taking all that into account, I am constrained to dismiss the *Ex-parte* Applicant's application dated 14th March 2023.
27. The upshot of all the above is that the Notice of Motion dated 14th March 2023 is devoid of merit. It is dismissed with costs to the Respondents.

BOAZ N. OLAO

JUDGE

12th March 2024

Judgment dated, signed and delivered by way of electronic mail on this 12th day of March 2024 with notice to parties

Right of Appeal.

BOAZ N. OLAO

JUDGE

12th MARCH 2024

