



**Nzaka & 2 others v District Land Registrar Kilifi & another; Katumbi
(Interested Party) (Environment and Land Judicial Review Case
E006 of 2024) [2025] KEELC 992 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 992 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E006 OF 2024
EK MAKORI, J
FEBRUARY 26, 2025**

BETWEEN

THOMAS MSEMBWE NZAKA 1ST APPLICANT

JOHN MUNGA NZAKA 2ND APPLICANT

JANET KUVUNA NZAKA 3RD APPLICANT

AND

THE DISTRICT LAND REGISTRAR KILIFI 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

AND

NGAO NDUNE KATUMBI INTERESTED PARTY

RULING

1. The applicants filed a notice of motion application dated 29th May 2024 supported with an affidavit of the even date against the respondents seeking the following orders:
 - a. An order certiorari to remove into this court to be quashed the decision of the Land Registrar Kilifi contained in the Report dated 11th April 2024 relating to boundary dispute in respect of the parcels of land known as Mgumopatsa/Mazeras/1199 and Mgumopatsa/Mazeras/768.
 - b) an order of mandamus be granted compelling the Land Registrar Kilifi to conduct a proper survey on the parcels of land known as Mgumopatsa/Mazeras/1199 and Mgumopatsa/Mazeras/768
 - c) Costs of this application be provided for.



2. The respondents demurred to the application through a preliminary objection dated 6th July 2024 and grounds of opposition of an even date.
3. The preliminary objection raised the following legal points:
 - i. These proceedings have been filed in bad faith. They are meant to defeat the legal requirement that an appeal from the Land Registrar's decision involving a boundary dispute be filed within 30 days after the decision is rendered.
 - ii. This application contravenes the express provisions of Regulation 40(6) of the Land Registration Regulations.
 - iii. This court only has appellate jurisdiction over boundary disputes.
4. The grounds opposition in turn raised the following issues:
 - a. Although this suit has been christened judicial review, it is unclear whether it is indeed one or a miscellaneous application since the title itself betrays it.
 - b. This suit has been filed as a typical Judicial Review application instead of an appeal against the decision of the Land Registrar in a boundary dispute, as provided in Regulation 40(6) of the Land Registration Regulations, 2017.
 - c. This application has been filed in disguise as a typical Judicial Review application to evade the requirement that an appeal against the decision of the Land Registrar in determining boundary dispute has to be filed within 30 days of the decision in question.
 - d. The land Registrar complied with Regulation 40(4) of the Land Registration Regulations in determining the boundary dispute, as she relied on the survey office's recommendation.
 - e. The Land Registrar complied fully with Regulation 40 of the Land Registration Regulations, 2017, which deals with the procedure for determining boundary disputes.
 - f. Under the said Regulations, this court has only appellate jurisdiction in boundary disputes, which the applicants herein have chosen to ignore and/or intentionally evaded, that position since their appeal would have been time barred.
 - g. from the Title attached to the supporting affidavit it is evident that four registered owners in undivided shares are all required to sue in any proceedings involving the said title deed contrary to the application herein where only three of the four registered owners have sued and further that the authority to plead also attached to the verifying affidavit and the supporting affidavit does not aid the situation due to the following;
 - h. The authority to plead does not make Bartholomew Kindawa Nzaka a party to the proceedings.
 - i. The verifying affidavit is defective since the authority to plead has only been attached and not serialized and sealed as the law requires.
 - j. That the documents attached to the supporting affidavit have no evidentiary value as they are also not serialized and sealed by the seal of the Commissioner for Oaths, hence the application is as good as unsupported.



- k. That since the documents attached to the verifying affidavit and the Supporting affidavit have not been serialized and sealed by the seal of the Commissioner for Oaths, the same are for striking out for not complying with Rule 9 of the Oaths and Statutory Declarations Rules.
- l. This entire suit is hopeless and should be struck out with costs to the respondents.
5. The court directed parties to file written submissions addressing the preliminary objection and the main application.
6. From the materials and submissions placed before me, the issues that fall for this court's determination are: whether the preliminary objection raised is merited, whether the application offends the provisions of Regulation 40 (6) of the Land Registration (General) Regulations, 2017, Whether the application before the court is a judicial review application and whether the unmarked and unattested annexures should be expunged from the court record.
7. On whether the preliminary objection is merited, parties have rightly submitted that the starting point is the test set in the leading decision in this realm *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case is significant as it established the criteria for determining the validity of a preliminary objection, providing a clear framework for such legal challenges, thus at page 700:
- “... A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as a Preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court ...”
8. Mr. Ojwang, for the respondents, contends that, like a lone star navigating the vast expanse of the night sky, jurisdiction serves as the guiding beacon illuminating the path of legal proceedings. The court's role in this process is crucial, ensuring that the legal journey is navigated with precision and fairness.
9. He asserts that the grounds raised in the preliminary objection challenge the jurisdiction of this court, which is crucial as it determines the court's authority to hear and decide on this case. If successful, this will lead to the dismissal of this suit, as the court would not have the power to adjudicate on the matter.
10. I have no difficulty finding that this is the correct position regarding preliminary objections. I will add that the purpose of a preliminary objection is to remove from the system suits that are nonstarters, hence saving judicial time to deal with more merited matters.
11. Whether the application offends the provisions of Regulation 40 (6) of the Land Registration (General) Regulations, 2017. Mr Ojwang submits that the Land Registrar, in strict adherence to the provisions mentioned above, decided on the boundary dispute on 11th April 2024 as stipulated under Regulation 40 (5) and advised the parties, if aggrieved by the determination, to appeal to the High Court (read the ELC) within 30 days from the said date in accordance with Regulation 40 (6).
12. He avers that contrary to Regulation 40 (6) provisions, which require parties aggrieved by the Registrar's decision to appeal against it to the ELC, the applicants filed an application seeking judicial review orders.
13. Mr. Ojwang believes this was a deliberate, choreographed legal subterfuge on the part of the applicants to evade the provisions of the adjectival law that requires aggrieved parties to approach this court by way of an appeal. It is a deliberate maneuver by the applicants as the appeal would have been time-barred since the Land Registrar determined the boundary dispute on 11th April 2024, and this suit was filed more than 30 days later.



14. In a rejoinder, Mr. Gitahi, learned counsel for the applicants, contends that the applicant has been embroiled in a prolonged boundary dispute involving parcels of land known as Mgumopatsa/Mazeras/1199 and Mgumopatsa/Mazeras/768, owned respectively by the applicant and the interested party. Initially, the applicant sought the intervention of the 1st respondent to resolve this boundary dispute by ordering a survey. However, the process has been marred by significant procedural lapses and delays.
15. Mr. Gitahi avows that despite the explicit request for a survey to resolve the boundary dispute, the 1st respondent proceeded with a survey without involving the applicants. The survey report, which was completed on 7th March 2024, was conducted without the applicants' participation or knowledge. This lack of involvement is crucial as the report was used as the basis for the 1st respondent's subsequent decision, documented in the Boundary Dispute Report dated 11th April 2024.
16. Mr. Gitahi states that the sequence of events raises substantial concerns. The 1st respondent allegedly conducted a site visit on 24th February 2023, yet the survey report was only prepared over a year later. This considerable delay between the site visit and the survey report, coupled with the failure to involve the applicants in the process, undermines the fairness and transparency of the decision-making procedure. The applicants were not afforded the opportunity to participate in or even be informed about the survey, which directly affected the outcome of the boundary dispute resolution.
17. Mr Gitahi proceeds to state that the 1st respondent's report dated 11th April 2024, which relied on the survey report of 7th March 2024, did not adequately address the applicants' complaint. Instead, it focused on findings related to a different issue, unknown to the applicants. This oversight and procedural lapse effectively dismissed the applicants' concerns and maintained the status quo of the boundaries, potentially leading to irreparable damage and loss for the applicants.
18. Given these circumstances, the appropriateness of judicial review over an appeal becomes evident. Judicial review is designed to ensure that decisions made by public bodies are lawful, fair, and conducted in accordance with established procedures.
19. In this instance, Mr. Gitahi opines that the focus is not on challenging the merits of the 1st respondent's decision but on whether the process complies with legal and procedural standards. The failure to involve the applicants, the significant delay in processing, and the disregard for the applicants' complaint all point to procedural deficiencies that judicial review is well-suited to address.
20. I agree with Mr. Gitahi in his submissions that the purpose of judicial review should be consonant and consistent with the principles outlined in *Republic v Commission of Customs Services Ex parte Imperial Bank Ltd* [2015] eKLR, the court held that:

“The grounds upon which the court grants judicial review orders are now fairly well settled though the known grounds have been recognized not to be exhaustive. The purpose of judicial review proceedings as opposed to the normal Civil proceedings is to ensure that the individual is given fair treatment by the authority to which he has been subjected rather than the merits of the decision in question. It is therefore concerned not with private rights or the merits of the decision being challenged but with the decision-making process and its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”
21. A look at the annexures in support of the applicants' application indicates that there has been a boundary feud concerning plots No. 1199 and 768. The applicants commenced the process of resolving the same. Parties were invited to the ground when the surveyor went to conduct the same.



For plot No. 1199, the representatives were Munga Nzaka and Tom Nzaka, and for Plot No. 768, the representatives were Said Ngao and Hamisi Ndune.

22. In his report (impugned in these proceedings), the Land Registrar indicates that all the parties attended the boundary dispute resolution mechanism held at the location of the two plots. A finding was made clearly faulting the applicants and dismissing their grievances. In the report dated 11th April 2024, the Land Registrar advised any aggrieved party to appeal to the ELC after 30 days pursuant to Regulation 40 of the Land Registration (General) Regulations 2017.
23. As submitted by Mr. Ojwang and correctly so, Regulation 40 of the Land Registration (General) Regulations of 2017, which deals with the manner to process a boundary dispute and the mechanism of appeal after the Land Registrar has decided on a boundary dispute provides:

“ 40.

- (1) An interested person may apply to the Registrar for the ascertaining of a missing boundary or a boundary in dispute under section 18(3) of the Act in Form LRA 23 set out in the Sixth Schedule.
- (2) The Registrar shall issue a notice in Form LRA 24 set out in the Sixth Schedule to all persons appearing in the register that may be affected or such other persons as the Registrar may deem necessary for resolution of the dispute if a person has complied with paragraph (1).
- (3) The Registrar shall notify the office responsible for survey of land of the intended hearing of a boundary dispute and require their attendance if a person has complied with paragraph (1).
- (4) In determining a boundary dispute lodged in accordance with paragraph (1), the Registrar shall be guided by the recommendation of the office responsible for survey of land.
- (5) The Registrar shall, after giving all persons appearing for the hearing in accordance with the notifications sent under paragraphs (1) and (2) an opportunity to be heard, make a determination of the dispute and inform the parties accordingly.
- (6) Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within thirty days of the date of notification, appeal the decision to the Court.
- (7) Upon expiry of thirty days, the Registrar shall-
 - (a) Cause to be defined by survey the precise position of the boundaries in question;
 - (b) File a plan approved by the authority responsible for survey of land containing the necessary particulars; and



- (c) Make a note in the register that the boundaries have been fixed, and thereupon the plan shall be deemed to define accurately the boundaries of the parcel.
- (8) A dispute for determination of a boundary and or parcel shall, unless in the case of special circumstances, be completed within a period not exceeding six months from the date of filing the application.
24. As submitted by Mr. Ojwang - rightly so, the Court of Appeal in Speaker of the National Assembly v James Njenga Karume [1992] eKLR cited in the case of Kiroket Ole Punyua v Umash Ole Mwanik & 2 others [2021] eKLR held as follows:
- “Where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
25. in line with the above decision and Regulation 40 (6) of the Land Registration (General) Regulation, the applicants herein ought to have approached this court by way of an appeal against the Land Registrar’s decision dated 11th April 2024 within 30 days and not by dint of an application seeking judicial review orders as the applicants have done.
26. This position was confirmed in the case of Ali & 2 others v Wang’ombe 2024] KEELC 4420 (KLR) where the court held:
- “Regulation 40(6) of the Land Registration (General) Regulations 2017 confirms that the only jurisdiction that the court has in boundary disputes is appellate and not original. It provides as follows.
- “Any party aggrieved by the decision of the Registrar made under paragraph (5) may, within 30 days of the date of notification, appeal the decision to the court”.
- Since this suit is not an appeal against the decision of the Land Registrar, then the court has no jurisdiction.”
27. See also Okondo & 10 others v Kiok & 2 others; Saidimo (Interested Party) [2024] KEELC 5901 (KLR). In that case, the court also denied having original jurisdiction in boundary disputes and stated as follows:
- “My understanding of Section 18(2) and regulation 40 (6) of the Land Registration Act and the 2017 Regulations is that the only jurisdiction that this court has in boundary disputes over registered land, is appellate and not original.
- Finally, I direct that the decision of the Land Registrar contained in the report dated 11/9/2023 be implemented in full unless reversed on appeal.”
28. The grievances by the applicants here are that they were never accorded a hearing when the boundary dispute was being heard and resolved, on the contrary, it is clear from the surveyor’s report and the findings by the Land Registrar that the representatives of the applicants attended the exercise. It is the applicant who originated the proceedings before the Land Registrar. The other grievances that the report was made a year later and that their side of the story was not considered – are all matters of appeal and do not fall within the ambit of judicial review.



29. Without delving into the merits of the other points raised in the preliminary objection and the merits of the judicial review application, I believe this court's jurisdiction has wrongly been invoked. The mechanisms laid down by parliament after resolution of a boundary dispute are as set in Regulation 40 (6) of the Land Registration (General) Regulation - to lodge an appeal

30. That is not to say that one cannot file judicial review proceedings in cases of this nature. Section 9 of the *Fair Administrative Action Act* provides the remedy that is to invoke exception of the doctrine of exhaustion, thus:

“Procedure for judicial review

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.”

31. This was buttressed in the case of *Mwanzia v Rhodes* (Constitutional Petition E115 of 2022) [2023] KEHC 2688 (KLR), where the court elaborated on the exceptions that would necessitate the intervention of the Court as follows:

“As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court’s jurisdiction must be construed restrictively.”



32. The applicants have not brought themselves to bear with the exception to the exhaustion doctrine. The law provides for an appeal. The preliminary objection is hereby upheld to the extent that the judicial review application (sic proceedings herein) are hereby struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 26TH DAY OF FEBRUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Gitahi, for the Applicants

Ms. Ekiru for the Respondents

Happy: Court Assistant

In the Absence of:

Ms. Kayatta for the Interested Party

