



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, M'I NOTI & MURGOR, JJA.)

CIVIL APPEAL NO. 218 OF 2011

BETWEEN

EZEKIEL KAMAU WAINAINA.....APPELLANT

AND

THE LAND REGISTRAR, THIKA DISTRICT.....1ST RESPONDENT

RAHAB WANJIRU WAINAINA.....2ND RESPONDENT

ISAIAH MAINA WAINAINA.....3RD RESPONDENT

JEREMIAH KAHORA P. KARANU.....4TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi of Mbogholi Msagha, J.) dated 26th May 2011 in

Judicial Review ELC No. 7 of 2010)

JUDGMENT OF THE COURT

This appeal arises from a ruling wherein the High Court declined to issue an order of mandamus to compel the District Land Registrar, Thika (*the Registrar*) to fix the boundary between land parcel Nos. Loc. 16/Gatura/1301, and Loc. 16/Gatura/1383 (*the land parcels*).

By a Notice of Motion dated 11th February 2010, the appellant, ***Ezekiel Kamau Wainaina*** (*Ezekiel*) sought an order of mandamus under ***section 21 and 22*** of the repealed Registered Land Act, (the Act) to compel the Registrar to carry out a survey, indicate, determine, mark and fix the ground position of the boundary between the two land parcels. The application was made on the grounds that Ezekiel is the registered owner of land parcel No. Loc. 16/Gatura/1301 measuring 0.26 hectares which parcel adjoins land parcel No. Loc. 16/Gatura/1383 and land parcel Nos. Loc. 16/Gatura/1298 belonging to the 2nd and 3rd respondents respectively.

It is apparent that there was a longstanding dispute with respect to the precise position of the common boundary between the land parcels that had resulted from a survey carried out sometime in 2004 by

Ezekiel's surveyor, one Michael Kinuthia. The resultant survey report established that the common boundaries between the land parcels were not properly marked, and as a consequence his land was smaller on the ground, and did not correspond with the area of 0.26 hectares indicated on the Title Deed and the Registry Index Map. On 25th November 2009, Ezekiel applied to the Registrar for the determination and the establishment of the correct position of the respective boundaries under **section 21** and **22** of the Act.

After hearing the parties and in a ruling delivered 28th August 2009, the Registrar dismissed Ezekiel's complaint on the premise that it fell outside the registrar's jurisdiction. Ezekiel appealed to the Chief Land Registrar against that decision, and by a letter of 28th October 2009, the Chief Land Registrar dismissed Ezekiel's appeal for the same reason.

Ezekiel's next stop was the High Court where he maintained that the Registrar was under a statutory obligation to determine and establish the correct boundary between the land parcels, and that the refusal to perform his duties had occasioned him irreparable damage; that, an order of mandamus to compel the District Land Registrar to comply with the statutory duties would serve the ends of justice.

In an affidavit in reply sworn on 5th March 2010, **Rahab Wanjiru Wainaina**, the 2nd respondent deponed that, she was the registered owner of No. Loc. 16/Gatura/1383 and Elijah Wainaina Karanu, the 3rd respondent was the registered proprietor of No. Loc. 16/Gatura/1298; that the land parcels occupied by herself and the 3rd respondent were not part of the land claimed by Ezekiel; that he should not rely on the surveyor's mistake in the subdivision of the original land parcel to demand more land than he was entitled, which was 4 acres. The replying affidavits of the 3rd and 4th respondents reiterated the position taken by the 2nd respondent.

Pamela Muthoni Mutegi, the Registrar, swore an affidavit in reply on 4th February 2011, where she deponed that a report concerning the disputed boundaries was received by the Registrar in November 2008; that on 17th April 2009 the Registrar visited the site, where a hearing was conducted which culminated in the ruling of 29th August 2009; that the ruling determined that no boundary dispute existed between the parties and that Ezekiel's complaint was essentially a land claim. It was further deponed that a land claim arose when one party claimed a larger portion or extension of land into another parcel, which is a matter that goes beyond the Registrar's jurisdiction; that the Registrar had carried out the obligatory duties specified by the Act and had submitted a ruling to Ezekiel. She concluded that if Ezekiel was dissatisfied with the ruling, his only recourse was to file a civil suit in court to be awarded the extra land that he was claiming.

Upon considering the pleadings and hearing the parties' submissions, the learned judge declined to issue an order of mandamus to compel the Registrar to fix the boundary between the land parcels for reasons that the dispute concerned a claim for land and was therefore not a boundary dispute. The learned judge was of the view that having rendered his decision on the issue on 28th August 2009, the Registrar had performed his statutory duty under the Act and as such, there was nothing left for him to do.

Aggrieved by the decision of the High Court, Ezekiel filed an appeal to this Court on the grounds that, the learned judge erred in failing to find that the Registrar had failed to perform his statutory duty to establish the boundaries; in finding that there was no boundary dispute between himself and the respondents; in holding that the report issued by the Registrar amounted to a performance of the statutory duties set out by the Act; by failing to hold that the Registrar failed to comply with the court orders of 14th May 2010; and in concluding that the dispute concerned a claim for land and not a boundary dispute.

Mr. C. Njoroge, Ezekiel's learned counsel submitted that the genesis of the dispute was an application for determination of the boundary made to the Registrar under **section 21 (2)** of the Act, on the basis that there was a dispute or uncertainty over the boundaries between the land parcels. It was submitted, that although the Registrar conceded that the registry map indicated that Ezekiel's land comprised of a larger acreage, as compared to the ground, the Registrar had refused to perform his duties to indicate the

boundaries on the ground, and had instead dismissed his application. Counsel further argued that the finding by the High Court that the dispute concerned a land claim was incorrect, as a land claim was incapable of arising unless the boundaries were determined.

It was further submitted that, in failing to determine the boundary on the ground, the Registrar had not complied with the law, and in so doing had failed to perform his duties under **section 21 (2)** of the Act; that furthermore, by a court order dated 14th May 2010, the Registrar was ordered to carry out the exercise on 10th May 2010 and to serve a report on Ezekiel, but the order was not complied with, and no further report was ever submitted.

Mr. Kariuki, learned counsel for the 2nd to 4th respondents relied on his written submissions and the judgment of the High Court in opposing the appeal. He submitted that Ezekiel had admitted at the site visit called by the Registrar that he had participated in the subdivision following *Succession Cause No. 122 of 1992*, and that after survey and the boundaries were agreed, Ezekiel had planted a wattle tree; that when he later discovered that the R.I.M showed that his parcel on the ground was of a lesser acreage, he ought to have applied to have the land resurveyed instead of alleging that there was a boundary dispute; that it was for this reason that the Registrar concluded that this was a land claim.

In reply, Mr. C. Njoroge stated that there was no dispute as to the entitlement of each of the beneficiaries. The appellant was to receive 4 acres following succession, and was not claiming any more than his entitlement, so that the question of a land claim did not arise.

We have considered the pleadings and the submissions of the parties and the law, and are of the view that the issue that fall for consideration is whether the learned judge rightly declined to grant the order of mandamus on the basis that the ruling issued on 29th August 2009 was sufficient to discharge the statutory duties set out under **section 21** of the repealed Registered Land Act.

Before addressing the issue, we bear in mind the caution regarding this Court's mandate in matters of this nature. In the case of *Maina vs Mugiria (1983) KLR 79* it was held, *inter alia*, that:-

“The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

We are also not oblivious to the fact that judicial review orders are discretionary in nature. In this case the issue is whether the learned judge erred by holding that the Registrar had carried out his statutory duties under the Act and therefore rightly exercised his discretion and declined to issue the order of mandamus against the Registrar.

In this regard the court stated;

“In the instant case, the respondent performed the statutory duty conferred by law. There is nothing that remained for the court to compel the respondent to perform. The District Land registrar was emphatic that, as no evidence was adduced to show that the boundary had been shifted this dispute should not be treated as boundary dispute, it is a land claim which is beyond the jurisdiction of his office.”

In essence, Ezekiel's complaint is that the Registrar abdicated his responsibilities, in failing to discharge the statutory duties as set out in **section 21** of the Act.

The relevant sections provides,

“(1) Except where, under section 22, it is noted in the register that the boundaries of a parcel

have been fixed, the registry map and any filed plan shall be deemed to indicate the approximate boundaries and the boundaries situation only of the parcel.

(2) Where any uncertainty or dispute arises as to the position of any boundary, the Registrar, on the application of any interested party, shall, on such evidence as the Registrar considers relevant, determine and indicate the position of the uncertain or disputed boundary.

(3) ...

(4) No court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section.

(5) ...” (Emphasis ours)

In other words, these provisions make it clear that where the position of any boundary is uncertain, it was the statutory duty of the Registrar to determine and indicate the position of the uncertain or disputed boundary. More particularly, **section 21(4)** further provides that until such determination by the Registrar, a court has no jurisdiction to hear and determine a boundary dispute concerning registered land. See *Wamutu vs Kiarie [1982] KLR 480.*

After visiting the site with a District Surveyor on 17th April 2009, the Registrar, in a ruling dated 29th August 2009, stated thus;

“It is true that the measurements scaled from the R.I.M and on the ground in relation to the complainant’s land parcel No. Loc. 16/1301 does not agree. The acreage computed from the R.I.M tallied with the registered acreage of 0.26 ha, while that computed from the ground measurement was smaller. It would appear that the boundary was not marked on the ground as per the measurements scaled on the mutation form that was used in the amendment of the R.I.M.” (Emphasis ours).

What we understand the Registrar to have been saying was that the issue the parties had placed before him was not an issue of determining the boundary between the two parcels of land within the meaning of section 21 of the repealed Act. It was a dispute entailing substantial reduction, on the ground, of the size of one parcel, and corresponding increment of the size of another. In his professional view, that was a claim for a chunk of land, which was beyond his jurisdiction, and not merely a boundary dispute.

In *Kenya National Examinations Council vs Republic ex parte Geoffrey Gathenji Njoroge [1997] eKLR*, this Court considered the circumstances under which an order of mandamus will issue and stated:

“An order of mandamus will compel the performance of a public duty which is imposed on a person or body of person by a statute and where that person or body of person has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.”

The Court further quoted with approval the following statement from

Halsbury’s Laws of England, 4th Ed. Vol. 1 page 111:

“The order must command no more than the party against whom the application is made is legally 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 order of mandamus will therefore not issue to compel a person to act *ultra vires* or to discharge duties

other than those vested in him by law.

In the result, we are satisfied that the Registrar properly determined that the dispute in issue in this appeal was not a boundary dispute and that the remedy for the appellant's complaint lay elsewhere than under **section 21** of the repealed Act. In those circumstances, to issue an order of mandamus would have had the effect of compelling him to purport to discharge duties beyond his statutory duties. This appeal therefore has no merit and is dismissed with costs to the respondents. ***It is so ordered.***

Dated and delivered at Nairobi this 15th day of December, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR