



IN THE COURT OF APPEAL

AT KISUMU

(CORAM : MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 71 OF 2014

BETWEEN

ABDALLAH SHIKANDA HASSAN 1ST APPELLANT

HADIJA NANZALA SHIKANDA 2ND APPELLANT

HAWA MUKULO SHIKANDA 3RD APPELLANT

ATHUMAN MUTULI SHIKANDA 4TH APPELLANT

SHIKANDA ABDALLA YUSUF 5TH APPELLANT

ABDUL AZIZ KOMBO

TABUCHE SHIKANDA6TH APPELLANT

AISHA ASABO SHIKANDA7TH APPELLANT

AMINA TABUCHE SHIKANDA8TH APPELLANT

MARIAM MUSIKOYO SHIKANDA9TH APPELLANT

KHATIB ALUTSESHE SHIKANDA ...10TH APPELLANT

THROUGH THE REPUBLIC

VERSUS

THE DISTRICT LAND REGISTRAR –

KAKAMEGA1ST RESPONDENT

MWANAMISI M. SHIBWABO 2ND RESPONDENT

MWANAISHA N. SHIBWABO 3RD RESPONDENT

(An appeal from the ruling and orders of the High Court of Kenya at Kakamega, (Chitembwe, J.) dated 24th July, 2014

in

H.C.J.R. NO. 37 OF 2012)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling and order of the High Court at Kakamega, (Chitembwe, J.) given on 24th July 2014 dismissing the appellants' application for an order of certiorari to quash a report dated 20th January 2012 purporting to determine a boundary dispute.
2. On 13th June 2012 the appellants obtained leave from the High Court at Kakamega to apply for an order of certiorari to quash a report dated 20th January 2012 signed by one Nicholas Shiguri on behalf of the District Surveyor, Kakamega, allegedly determining a boundary dispute between the appellants and the 2nd and 3rd respondents over title numbers S. Wanga/Ekero/3403, 2022, 2024 and 2025. The leave was to operate as a stay of the report pending the hearing and determination of the substantive motion for judicial review. On the same day, that is 13th June 2012, the appellants presented the substantive motion for the order of certiorari.
3. The grounds in support of that motion, to which learned counsel for the appellants, Mr. D. Akwala, referred during the hearing of the appeal before us, were contained in a statement filed with the application for leave and a verifying affidavit sworn by the 1st appellant.
4. In summary, the appellants' case was that parcel Title Numbers S. Wanga/Ekero/3403, 2022, 2024 and 2025 share a boundary that is clearly demarcated on the ground; that on 17th January 2012, officials claiming to be from Kakamega District Lands office visited the site allegedly on instructions of the District Land Registrar and purported to determine a boundary dispute; that the 1st appellant was not until that date aware that a boundary dispute had been lodged; that on 20th January 2012, one Nicholas Shiguri of the District Survey Office, Kakamega, authored a report addressed to the Land Registrar, Kakamega, recommending that the 1st appellant should demolish houses allegedly constructed on the road; and that at no time were the appellants summoned by the District Land Registrar to express their views on the alleged boundary dispute and no hearing was ever convened by the District Land Registrar to hear the parties.
5. The appellants also contended that the report dated 20th January 2012, by Nicholas Shiguri of the District Survey Office was a nullity as the statutory mandate to determine a boundary dispute fell on the Land Registrar and could not be delegated.
6. Given those complaints, counsel for the appellants submitted that the learned Judge of the High Court erred when he dismissed the appellants' motion as lacking merit.
7. On behalf of the 2nd and 3rd respondents, the 2nd respondent swore a replying affidavit in which she deposed that the appellants were notified of the survey exercise; that the appellants were represented by the 1st appellant during that exercise; and that Nicholas Shiguri who did the survey exercise was a government officer of the Ministry of Lands, Kakamega.
8. Learned counsel for the 2nd and 3rd respondents, Mr. Gichaba, submitted that the appellants' motion was incompetent and urged us to uphold the decision of the High Court. According to Mr. Gichaba, there was evidence that the 1st appellant was present when the site visit was

undertaken on 17th January 2012 and the appellants cannot therefore feign ignorance of the boundary dispute.

9. As to the competence of the report sought to be quashed, counsel argued that it was patently clear that the author of the report, Nicholas Shiguri, was from the office of District Surveyor and the Land Registrar is not required to personally attend.
10. Although the 1st respondent, the District Land Registrar, Kakamega, was served with process in the High Court, he did not participate in the proceedings before that court. The motion was disposed of by written submissions. After considering the matter, the learned Judge delivered the impugned ruling, holding that there is no requirement that the District Land Registrar and surveyor must be present personally whenever a boundary dispute is fixed; that the person who conducted the survey had been mandated by the District Land Registrar; that the 1st appellant was present and participated in the fixing of the boundary; and that if he is not satisfied he is free to engage an independent surveyor and challenge the report. The Judge concluded his decision thus:

“In the end I do find that the application lacks merit. The 1st applicant must have received a notice of determination of the boundary. The person who did the report was mandated by the land registrar and was therefore competent. The Land Registrar acted within his powers as per the law. There is nothing to quash as the report is lawful. The application is hereby dismissed with costs to the respondents.”

11. As already indicated, that decision is the subject of the present appeal.
12. We have considered the appeal and the submissions by learned counsel. There are two issues for us to determine. The first is whether due process was observed in the determination of the boundary dispute, for if the boundary dispute was determined in contravention of the rules of natural justice, an order for certiorari would be available. [See the decision of this Court in **Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge and 9 others [1997] eKLR.**
13. The second issue is whether the report that the appellants sought to quash was indeed the report of the Land Registrar. In other words, could the Registrar’s statutory powers to fix boundaries under the repealed Registered Land Act be delegated?

14. On the first issue, Section 22 of the repealed Registered Land Act, Cap 300 provided that:

“22 (1) If the Registrar in his discretion considers it desirable to indicate on a filed plan, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if any interested person makes application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

(2) The Registrar shall, after giving all persons appearing by the register to be affected an opportunity of being heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and 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.

(3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the Director of Surveys, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section. (Emphasis added).

15. Those provisions made it mandatory for the Registrar to “give notice to the owners and

occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.” There was also a mandatory requirement for the Registrar to give all persons appearing to be affected *“an opportunity of being heard.”*

16. It is common ground that the parcels of land mentioned share a common boundary. The first appellant deposed that he only became aware of the alleged dispute when “officials” claiming to be from District Lands office, Kakamega, visited the site on 17th January 2012. As we have already indicated, the appellants’ application for an order of certiorari before the High Court was served on the Land Registrar. The Land Registrar did not file any response to the application and neither did he participate in the proceedings in the High Court. No notice from the Land Registrar was exhibited to the replying affidavit of the 2nd respondent to support the statement in that affidavit that the appellants *“were notified of the surveying exercise”*. The 1st appellant did not deny he was present when the purported survey was done on 17th January 2012 as indicated in the impugned report dated 20th January 2012. His presence there does not, in our view, attest to notice having been given, for he could well have otherwise been legitimately on his property when he spotted the “officials” of the Lands office. The finding by the Judge that, *“the 1st applicant [the 1st appellant] must have received a notice of determination of the boundary”* is with profound respect not supported by any evidence.
17. Furthermore, there is no evidence whatsoever that before the impugned report was made the parties were accorded an opportunity to be heard by the Registrar as Section 22(2) of the repealed Registered Land Act demanded.
18. In our judgment, the process leading to the impugned report was flawed and in breach of the principles of natural justice entrenched in section 22 of the repealed Registered Land Act. For that reason alone, we are satisfied that the learned Judge erred in declining to grant the order of certiorari.
19. The last issue is whether the Registrar properly delegated his authority to determine the boundary dispute. The power to fix boundaries under Section 22 of the repealed Registered Land Act was conferred on the “Registrar”. Under Section 3 of the same Act Registrar means the Chief Land Registrar or Deputy Chief Land Registrar or a Land Registrar or an assistant Land Registrar authorized to exercise or perform any particular power under S. 7(4) of the same Act. In fixing a boundary, the Land Registrar would therefore be exercising delegated authority. Whereas under section 8(a) of the repealed Act the Land Registrar could require the production of a plan or instrument by another person, the determination of the boundary dispute itself was a matter for the Land Registrar himself as a delegate of the Chief Land Registrar to make. A delegate cannot himself delegate. The land Registrar could not therefore delegate delegated authority. There is neither express or implied authority in the statute for the Land Registrar to have delegated to another person. (See **Administrative law** by Sir William Wade, 10th Edition at page 265).
20. For those reasons, we allow the appeal and set aside the ruling and orders of the High Court given on 24th July 2014 in Kakamega Judicial Review case No. 37 of 2012. We substitute the same with an order allowing, with costs, the appellants’ notice of motion dated 11th June 2012. The appellants shall also have the costs of the appeal.

Dated at Kisumu this 12th day of February, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

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DEPUTY REGISTRAR