



**Republic v Attorney General & another; Odhim (Exparte); Mark & another
(Interested Parties) (Environment and Land Judicial Review Miscellaneous
Application E003 of 2022) [2023] KEELC 383 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 383 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

**ENVIRONMENT AND LAND JUDICIAL REVIEW
MISCELLANEOUS APPLICATION E003 OF 2022**

GMA ONGONDO, J

JANUARY 30, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW BY WAY OF JUDICIAL REVIEW**

AND

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS
UNDER SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF
KENYA AND THE LAND REGISTRATION ACT NO 3 OF 2012 LAWS OF
KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

LAND REGISTRAR HOMA BAY COUNTY 2ND RESPONDENT

AND

SAMWEL ORERO ODHIM EXPARTE

AND

NYAKUNDI OMOKE MARK INTERESTED PARTY

MOGAMBI N JANE INTERESTED PARTY



JUDGMENT

1. By a chamber summons application dated May 17, 2022 duly filed in court on May 18, 2022 under, *inter alia*, order 53 rules 1, 2, 3 and 4 of the [Civil Procedure Rules, 2010](#), the *ex parte* applicant, Samuel Orero Odhim (the applicant herein) sought leave of the court to apply for *mandamus* directed at the 2nd respondent to act as stated in paragraph 2 *infra*. On May 19, 2022, leave was granted accordingly.
2. As a result, the applicant through learned counsel, Hussein B Indimuli filed a Notice of motion dated May 25, 2022 on March 26, 2022 (The application herein) seeking the following orders;
 - a. An order of *mandamus* directed on the 2nd respondent, the land registrar Homa-Bay county to make a boundary determination between all that parcel of land known as Karachuonyo/konyango/3422 And Central Karachuonyo/konyango/655/656 in accordance with section 18(2) and section 19(2) of the [Land Registration Act 2012](#).
 - b. That costs of this application act 2012.
3. The application is premised on the statement of facts set out in the applicant's verifying affidavit filed together with the chamber summons application. Further, the application is based on grounds including-
 - a. A survey exercise was carried out to ascertain the boundaries between Central Karachuonyo/konyango/3422 And Central Karachuonyo/konyango/655/656 on the October 5, 2021 and a report issued on October 21, 2021 but the land registrar Rachuonyo East, South and North sub-counties have refused and/or ignored carrying out a determination of the boundaries between the parcels aforesaid in accordance with the mandatory provisions of section 18(2) and section 19(2) of the [Land Registration Act](#).
 - b. No explanation or justification has been given by the 2nd respondent for their continued reluctance to carry out their mandate as provided for by the law and the applicant is now desperate and apprehensive that the 2nd respondent has no intention of carrying out his mandate and/or duty.
4. Moreover, the application is anchored upon the supporting affidavit of nine paragraphs sworn by the applicant on May 25, 2022 and copies of the annexed documents inclusive of title deeds, report and letters marked as "SOO 3 to SOO 5 (b)". The applicant deposed in part that he is the registered owner of LR nos Central Karachuonyo/Konyango/ 655 and 656. That he has been having a boundary dispute with the two interested parties who own LR no Central Karachuonyo/Konyango/3422, a subdivision of LR no Central Karachuonyo/Konyango/658.
5. Further, the applicant deposed that the dispute led to the carrying out of a survey on October 5, 2021 which generated a report dated October 21, 2022. That however, the 2nd respondent who is mandated by law to determine boundaries between the applicant's parcels of land and the interested parties' parcels of land, has failed to carry out his statutory duties. Thus, it provoked this application.
6. The two respondents were duly served with the application as disclosed by affidavits of service sworn on June 16, 2022, July 27, 2022 and October 11, 2022. So, they were made aware of the existence of the application and had the right to appear or decline to do so as held in the case of [Ogada-vs-Mollin \(2009\) KLR 620](#).
7. Notably, the 1st and 2nd respondents failed to reply to the application.



8. In a replying affidavit of eighteen paragraphs sworn on September 8, 2022 and filed herein on September 21, 2022 by the 1st interested party for and on behalf of the 2nd interested party and himself, deposed in part that they are the owners of Central Karachuonyo/Konyango/3422 which originated from Central Karachuonyo/Konyango/3380. That they bought the same from one Philip Jowi Osendo on April 14, 2020.
9. The 1st and 2nd interested parties further deposed that the county surveyor visited the disputed land on October 5 and prepared a report on October 21, 2021. That the report is yet to be filed in Oyugis SPM's Court Environment and Land Case number 47 of 2022 (The magistrate's court civil suit) for adoption and or implementation as the said suit is pending hearing and determination. That therefore, that the application is premature, meant to defeat justice, lacks merit and that the same be dismissed with costs to the respondent.
10. On October 4, 2022, the court ordered and directed, *inter alia*;
 - a. The Notice of motion dated May 25, 2022 be heard by written submission.
 - b. The applicant's counsel to rely on the Notice of Motion on it's entirely as indicated by him.
11. The applicant and the respondents failed to file any submissions.
12. The 1st and 2nd interested parties filed submissions dated October 12, 2022 where they reiterated their averments in the replying affidavit. They termed the application a clear abuse of court process and lacks merit thus, the same be dismissed with costs. That the property in dispute falls within the jurisdiction of the land registrar Rachuonyo based at Kosele hence the 2nd respondent and this court lack jurisdiction over this matter.
13. I have carefully considered the entire application as well as the interested parties' replying affidavit and submissions. In that regard, has the applicant established that he is entitled to the orders sought in the application?
14. An order of *mandamus* sought in the application is a judicial review relief which the court may grant under article 23 (3) (f) of the Constitution of Kenya, 2010.
15. In Black's Dictionary 10th Edition at page 1105, the term 'Mandamus' comes from a Latin word "we command" and it means;

A writ issued by a court to compel performance of a particular act by a lower court or a governmental officer or body, usually to correct a prior action or failure to act.
16. The applicant's lamentation is that the 2nd respondent has refused to carry out the mandate under sections 18 (2) and 19 (2) of the Land Registration Act, 2016 (2012). However, the 1st and 2nd interested parties contend that the report is yet to be presented before the magistrate's court civil suit which is pending hearing and determination as shown in a copy of amended plaint dated August 29, 2022 (N.O.M 1) and copies of other documents annexed to their replying affidavit.
17. Section 11 of the Civil Procedure Act Chapter 21 Laws of Kenya (The CPA) stipulates, *inter alia*, that every suit shall be instituted in the court of the lowest grade competent to try it. Sections 12, 13 and 15 of the CPA govern institution of suits.
18. Sections 5 of the CPA provides for courts to try all suits of civil nature unless expressly or impliedly barred. Also, this court is not unaware of stay of suit as captured under section 6 of the CPA.



19. This court is guided by the exhaustion principle and postponement of judicial consideration of matters to ensure that a party is first of diligent; see the Court of Appeal decision in the case of *Geoffrey Muthiga Kabiru and 2 others vs Samwel Munga Henry and 1756 others* (2015) eKLR.
20. Similarly, I endorse the decision in *Republic vs Jubilee Party and another vs Exparte Wanjiku Mubia and another* (2017) eKLR as regards jurisdiction conferred on a body. That the same should not be interfered with and the body be allowed to handle and determine the issues before it.
21. It is crystal clear that in the magistrate's court civil suit, the defendant is the applicant herein. The suit property therein namely LR no Central Karachuonyo/Konyango/656, is part of the property in dispute in this application.
22. The ends of justice dictate that the magistrate's court proceed to hear and determine the suit as required by the law and in line with Geoffrey Kabiru and Jubilee Party cases (*supra*) alongside sections 1A, 1B, 3, 3A, 5 and 6 of the CPA. It would not be right for the two matters to be heard simultaneously by this court and the magistrate's court; see also *Judicial Commission of Inquiry into Goldenberg Affair and 3 others vs Kilach* (2003) KLR 249 at 265 and 266.
23. So, the applicant is not entitled to order of mandamus and costs as sought in the application at this point in time. The application is unmeritorious.
24. In the ultimate, the application be and is hereby stayed pursuant to section 6 of the CPA.
25. No orders as to costs.

DATED AND DELIVERED AT HOMA BAY THIS 30TH JANUARY 2023.

G M A ONG'ONDO

JUDGE

Present

Mr Achola, learned counsel for the applicant.

Luanga, Court assistant

