



**Republic v County Surveyor of Machakos & another; Mwakavi (Exparte);
Maingi (Interested Party) (Environment and Land Court Judicial Review
Application 8 of 2022) [2023] KEELC 15675 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15675 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND COURT JUDICIAL REVIEW APPLICATION 8 OF 2022

CA OCHIENG, J

FEBRUARY 23, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS BY JAPHETH MUKINYI MWAKAVI**

AND

**IN THE MATTER OF THE DECISION OF THE MACHAKOS
COUNTY SURVEYOR CONTAINED IN THE REPORT DATED THE
24TH JANUARY, 2022**

AND

**IN THE MATTER OF THE LAND REGISTRATION NO. MAVOKO
TOWN BLOCK 3/ 43224**

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

**IN THE MATTER OF THE LAND REGISTRATION ACT CAP 300 OF
THE LAWS OF KENYA**

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SURVEYOR OF MACHAKOS 1ST RESPONDENT

COUNTY LAND REGISTRAR, MACHAKOS 2ND RESPONDENT



AND

JAPHETH MUKINYI MWAKAVI EXPARTE

AND

JACKSON MAINGI INTERESTED PARTY

RULING

1. What is before court for determination is the *ex parte* applicant's chamber summons application dated the June 21, 2022 where he seeks the following orders:
 1. Spent
 2. That this honourable court be pleased to grant leave to the applicant to apply for orders of *certiorari* directed to the respondents to quash the decision/report of the County Surveyor, Machakos dated January 24, 2022.
 3. That this honourable court be pleased to grant leave to the applicant to apply for orders of prohibition to prohibit the respondents from implementing the decision/report of the County Surveyor Machakos dated January 24, 2022.
 4. That this honourable court be pleased to grant leave to the applicant to apply for an order of mandamus compelling the respondents to do the boundary rectification and verification as per the original map.
 5. That such leave, if granted do operate as stay of implementation of the decision/ report of the County Surveyor dated January 24, 2022.
 6. That the costs of this application be borne by the respondent.
2. The application is supported by the statement of facts as well as the affidavit of Japheth Mukinyi Mwakavi. The *ex parte* applicant contends that he is the registered proprietor of land known as Mavoko Town Block 3/43224 hereinafter referred to as the 'suit land', which was a resultant subdivision of Mavoko Town Block 3/3135. He claims on or about January, 2022, he got summons from the County Surveyor through the area chief requiring him to attend the boundary verification exercise to be conducted on the January 24, 2022. He confirms that the surveying process was to be conducted on parcel numbers Mavoko Town Block 3/3121, 3135, 7485, 3133 and 3120 which most of them were not existing at the time of survey. He avers that he was not satisfied with the decision of the surveyor since it meant that a chunk of his land was to be taken away. He has an issue with the map the surveyor used as it did not tally with the original map that had been used in the first demarcation process. Further, he found it irregular for the surveyor to conduct an exercise on parcels of land that had since been subdivided, whose mutation are out yet this was not taken into consideration. He reiterates that he has raised his concerns to the 1st respondent to revisit the issue but his concerns were ignored and the surveyor declined to supply him with relevant documents. Further, he only got the documents from his adversary. He insists that the entire process was irregular and failed to meet the tenets of natural justice such as impartiality, fairness and equality before the law.
3. The interested party opposed the application by filing a replying affidavit sworn by Jackson Maingi where he deposes that he is the registered proprietor of land parcel number Mavoko Town Block 3/3120. He explains that sometime in the year 2021, he visited his land with a private surveyor



Mr Fidelis Mutuku Munywoki of Astute Survey Solutions Limited with a view to determining the boundaries of his property and placing beacons thereon. Further, the surveyor surveyed the property and placed beacons therein. He explains that the private surveyor established that the road which served as a boundary to his property and the neighbouring properties was supposed to be 20 metres and not a 9 metres road as a result of which he was advised that he had to lose almost 2 acres of his property to make way for the said 20 metres road, which he agreed. He claims when beacons were placed, it was also noted that the posts of the fence of a neighbouring property being title number Mavoko Town Block 3/3135 had encroached on his property. Further, that the registered owner of the said property is David Nzioka Kitili (deceased) but the *ex parte* applicant herein purchased the said property, resides thereon and is personally known to him. He states that he informed the *ex parte* applicant of the encroachment and requested him to move his fence. he explains that the *ex parte* applicant including his broker advised him to contact the County Surveyor to identify the boundaries. Further, that he contacted the County Surveyor who issued letters dated the September 7, 2021 to several owners of various parcels of land neighbouring his property indicating that a survey exercise would be conducted on October 8, 2021. Further, all owners of the neighbouring parcels of land were contacted through the village elder and chief, after which the survey exercise was undertaken on October 8, 2021 which was finalized on December 14, 2021. He avers that they were all issued with the County Surveyor's report. Further, he commenced fencing his land as per the County Surveyor's directions and put a string across his property following the beacons placed by the County Surveyor on March 3, 2022. He reiterates that on May 29, 2022, the *ex parte* applicant requested him to forward the County Surveyor's reports which he did. He insists that the *ex parte* applicant subjected himself to the process of the survey and did not raise any issue regarding the subdivision of his land. Further, that there was no procedural irregularity as they were all notified of the survey exercise.

4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant chamber summons application including the statement of facts, respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the applicant is entitled to leave to institute judicial review proceedings of *mandamus*, *certiorari* and prohibition and if the said leave should operate as a stay of implementation of the County Surveyor's decision dated the January 24, 2022.
6. Both the applicant and the interested party admit that there were proceedings conducted by the County Surveyor in respect to the boundaries dispute herein which they participated in. The *ex parte* applicant claims he was not accorded a proper hearing and only got the report of the proceedings through his adversary and not from the County Surveyor. Further, that the County Surveyor used a different map to determine the boundaries instead of the original map.
7. Order 53 rule 1 of the *Civil Procedure Rules* stipulates that parties seeking leave to institute judicial review have to apply for same from court. The said provisions state thus:
 - (1) No application for an order of *mandamus*, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.
 - (2) An application for such leave as aforesaid shall be made *ex parte* to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.
 - (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution.
 - (4) The grant of leave under this rule to apply for an order of prohibition or an order of



certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.”

8. The court in the case of *Kingdom Kenya 01 Limited v the District Land Registrar, Narok & Fifteen (15) others* [2018] eKLR described judicial review as follows:

Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. See the *Commissioner of Lands v Hotel Kunste* [1997] eKLR. The purpose of JR is to ensure that the individual is given fair treatment by the Authority to which he has been subjected. JR as a remedy is available, in appropriate cases, even where there are alternative legal or equitable remedies. See David Mugo t/a *Manyatta Auctioneers v Republic* – civil appeal No 265 of 1997 (UR). JR being a discretionary remedy, it demands that whoever seeks to avail itself/himself/herself of this remedy has to act with candour or virtue and temperance. See *Zakayo Michubu Kibwange v Lydia Kagina Japheth and 2 others* [2014] eKLR. JR as a remedy may also be invoked where the issues in controversy as between the parties are contested. See *Zakayo Michubu Kibwange case* (Supra). The remedy of judicial review is only available where an issue of a public law nature is involved. Further, that a person seeking *mandamus* must show that he has a legal right to the performance of a legal duty by a party against whom the mandamus order is sought or alternatively, that he has a substantially personal interest and that the duty must not be permissive but imperative and must be of a public nature rather than of a private nature.”

9. Judicial review is not concerned about the merits of the decisions but the process, which was adhered to in arriving at the said decision. It challenges the administrative action of a person in position of authority. I note the *ex parte* applicant seeks to challenge the process of the boundary dispute proceedings which were conducted by the 1st respondent on October 8, 2021 and concluded on December 14, 2021. He was not satisfied with the decision of the Surveyor since it meant that a chunk of his land was to be taken away. Further, the map used by the Surveyor did not tally with the original map that had been used in the first demarcation process. He insists that it was irregular for the Surveyor to undertake an exercise on parcels of land that had since been subdivided. The interested party opposed the application for leave insisting that the *ex parte* applicant ought to have lodged an appeal instead of filing the instant application. Further, that he has already implemented the decision of the surveyor and that the *ex parte* applicant participated in the boundary dispute proceedings.
10. However, at this juncture, as a court I will not analyze the merits or demerits of the Surveyor’s decision dated the January 24, 2022, but note that the *ex parte* applicant has raised certain pertinent issues. In associating myself with the decision of Justice Aburili where she held in the case of *Director of Public Prosecutions & 2 others v Pius Ngugi Mbugua & another exparte Muktar Saman Olow* (2017) eKLR, that a fundamental principle in judicial review cases is that the concern of courts has nothing to do with the merits of the decision but the process in arriving at that decision; and in relying on the facts as presented including the legal provisions I have cited above, I find that the *ex parte* applicant is entitled to leave. Since this matter is touching on proceedings which also involved other parcels of land whose owners are not party to these proceedings, and I note the application was filed almost six (6) months after the County Surveyor’s decisions, I will decline to grant an order that the leave operates as a stay of implementation of the decision/report of the County Surveyor dated the January 24, 2022.



11. In the foregoing, I will proceed to make the following final orders: The *ex parte* applicant be and is hereby granted leave of twenty one (21) days to file and serve a substantive motion, applying for orders of *certiorari*, *mandamus* and prohibition in respect to the decision of the Surveyor dated the January 24, 2022. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF FEBRUARY, 2023.

CHRISTINE OCHIENG

JUDGE

