



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC MISC. CIVIL APPLICATION NO. 15 OF 2018

IN THE MATTER OF BOUNDARY DISPUTE BETWEEN KAJIADO/ KAPUTIEI CENTRAL/ 594 AND 588 (1071 – 1073)

AND

IN THE MATTER OF THE DECISION OF THE PRINCIPAL LAND REGISTRAR, KAJIADO MADE ON 1ST MARCH 2018

AND

IN THE MATTER OF FAIR ADMINISTRATION ACT, 2015

AND

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

REPUBLIC.....APPLICANT

VERSUS

PRINCIPAL LAND REGISTRAR, KAJIADO.....1ST RESPONDENT

COUNTY SURVEYOR, KAJIADO.....2ND RESPONDENT

DIRECTOR OF SURVEY.....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

AND

TIMOTHY LANLEY.....1ST INTERESTED PARTY

DAVID LANLEY.....2ND INTERESTED PARTY

AND

SAIDIMU OLE MATAYIAN.....1ST APPLICANT

SAMUEL SAIDIMU.....2ND APPLICANT

JUDGMENT

What is before Court for determination is the Notice of Motion dated the 29th May, 2018 brought pursuant to Order 53 (1) of the Civil Procedure Rules, Section 8 and 9 of the Law Reform Act, Cap 26 and all the other enabling provisions of the law.

The Applicant prays for the following orders:

1. An order of certiorari to bring into this court for the purposes of being quashed the 1st Respondent's ruling/ determination dated the 1st March, 2018.
2. An order of prohibition restraining the respondents from implementing the ruling/ determination of the 1st Respondent dated 1st March, 2018.
3. An order of mandamus compelling the respondents to amend the register and Registry Index Map (RIM) in respect of the land parcels no. KAJIADO/ KAPUTIEI – CENTRAL/ 594 and KAJIADO/ KAPUTIEI – CENTRAL/ 588 (1071 – 1073) to be in conformity with the actual acreages occupied before this ruling/ determination dated the 1st March, 2018.
4. Any other appropriate order or discretion as this honourable court may deem just and fit to grant.
5. An order of costs.

The application is supported by the affidavit of the 1st Applicant SAIDIMU OLE MATAYIAN where he deposes that he is the registered proprietor of land parcels numbers KAJIADO/ KAPUTIEI – CENTRAL/ 588 now subdivided into KAJIADO/ KAPUTIEI – CENTRAL/1071, 1072 and 1073. He explains that the Respondents are the sons of PAUL KIPAMET LANTEY – deceased who was proprietor of land parcel number KAJIADO/ KAPUTIEI – CENTRAL/ 594. He states that both land parcels numbers KAJIADO/ KAPUTIEI – CENTRAL/ 594 and KAJIADO/ KAPUTIEI – CENTRAL/ 588 are adjacent to each other and was owned by ERANKAU GROUP RANCH before its subdivision to the members. It is his evidence that the members of the Group Ranch were to get an approximate 220 acres upon subdivision but because of the varying terrain and landscapes, the acreages would vary. He confirms that the registered acreage of his land is 90 hectares (222 acres) but on the ground, it occupies a total of 140 hectares (346 acres). Further, the registered acreage for the Interested Parties' land is 122 hectares (302 acres). He contends that on 26th July, 2011 the widow of PAUL KIPAMET LANTEY – deceased one Doris Lantey filed a claim with the Kajiado Central Land Disputes Tribunal vide case no. TC/ 645/ 06/ 2011 in which she sought the District Land Surveyor to visit the two parcels of land and establish the beacons separating them. He states that the Tribunal directed the District Surveyor to enter the parcel of land, establish the beacons, excise 12 acres from his land and annex it to the interested parties' land. He avers that he filed judicial review proceedings vide Machakos HC Misc. Appl. No. 284 of 2011 now Kajiado ELC Misc 33 of 2017 and the High Court granted leave on 24th February, 2012, which leave was to operate as a stay of the decision of the Tribunal dated the 26th July, 2011. He insists the suit is yet to be determined but notwithstanding the Respondents entered the parcels of land in question, purported to determine the boundaries and beacons separating the said two parcels in blatant violation of the court's orders. He reiterates that the proceedings and subsequent decision was a nullity in law and therefore illegal. Further, that the proceedings including the decision of the respondents were highly biased and one sided as the Principal Land Registrar applied a wrong and biased methodology in reaching the decision. He reaffirms that the Principal Land Registrar further made a decision on the existence of a disputed road separating the two parcels of land without receiving an independent report of the same from the surveyor and as such his findings on the same was unfair.

The application is opposed by the Interested Parties who filed a replying affidavit sworn by the Ist Interested Party TIMOTHY LANTEY who deposes that the instant application does not conform to the mandatory provisions of order 53 of the Civil Procedure Rules where the Republic should be the Applicant in the Leave stage. He avers that the application does not contain a verifying affidavit and that the Applicants were given a period of 30 days within which to challenge the 1st Respondent's Report dated 1st March, 2018 through an appeal but they waived their right to do so. Further, that the intended Judicial Review Application whose leave is being sought to be filed is a mere afterthought meant to defeat the 1st and 2nd Interested Parties' Constitutional Right. He

confirms being the legal administrator to the estate of PAUL KIPAMET LANTEI and that his father's parcel of land measures 140 hectares while the applicant's parcel of land KAJIADO/ KAPUTIEI CENTRAL/ 588 measures approximately 90 hectares (222 acres) and any excess acreage on the ground is disputed. He states that his mother sued the applicant in 2011 at the Kajiado Central Land Disputes Tribunal vide case No. 645/06/2011 seeking for the determination of the boundaries for his father's land and that of the applicant as well as planting of beacons. He further confirms that the said Tribunal awarded the mother twelve (12) acres from the Applicants' land but the applicant filed a suit Machakos High Court Miscellaneous No. 284 of 2011 (Kajiado ELC Misc. No. 33 of 2017) seeking to quash the said Award where the Interested parties' were not party, hence the Order granted therein does not bind them. He insists the said Orders have lapsed since they have not been extended over time. He explains that the site visit to ascertain the boundaries were carried out between 31st January, 2018 and 1st March, 2018 after both the Applicants and the Interested Parties agreed to engage the services of the Respondents to determine the dispute. Further, that the proceedings were properly conducted with the consent of the parties who willfully gave their respective statements and there was no bias. He contends that it is clear from the Land Registrar's Report dated the 1st March, 2018 that after resurvey of the two suit lands, there is an undisputed area measuring 38 (94) acres. Further, that the Applicants were never denied a chance to bring a private surveyor and the 1st Respondent directed any aggrieved party to appeal. He avers that after realizing there was extra acreage on the ground, the 1st Respondent directed both the Applicants and themselves to have a meeting and agree on how to share it equally. He urged the Court to adopt the 1st Respondent's Report dated the 1st March, 2018.

Both Applicants and Interested Parties' filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the instant judicial review application, including the supporting and replying affidavit, Grounds of opposition as well as the submissions relied upon; the following are issues for determination:

- Whether the ex parte applicant has demonstrated sufficient reasons to be granted the orders sought.
- Whether the orders issued on 24th February, 2012 are binding to the parties in this case.
- Who shall bear the costs of the application herein.

On the question as to whether the ex parte applicant has demonstrated sufficient reasons to be granted the orders sought. It is the ex parte applicant's contention that the District Land Registrar Kajiado ruling dated the 1st March, 2018 which directed that the Registry Index Map be amended with the effect of excising a portion of land measuring 46 acres from his parcel number KAJIADO/ KAPUTIEI CENTRAL/ 588 and adding it to the Interested Parties' parcel number KAJIADO/ KAPUTIEI CENTRAL / 594, contravened the order of the Court issued on 24th February, 2012 in the Kajiado ELC MISC 33 of 2017 (formerly Machakos ELC Misc 284 of 2011). It is his contention that the ruling was bias and illegal. From a perusal of the pleadings in the Kajiado ELC MISC 33 of 2017 (formerly Machakos ELC Misc 284 of 2011), it is evident there was a dispute between the Applicant herein and the Interested Parties' mother where she alleged that the Applicant had failed to apportion her husband the twelve acres of land he had purchased. The Applicant was dissatisfied with the ruling of the Kajiado Land Dispute Tribunal that had been adopted by the Kajiado SRM's Court which led to is instituting the abovementioned miscellaneous cause which was dismissed for want of prosecution. In the instant miscellaneous cause, the Land Registrar had proceeded to determine a boundary dispute between the Applicant and the Interested parties, which findings have been rejected by the Applicant.

The Applicants reiterated their claim in the submissions and relied on the following cases to buttress their arguments: **Municipal Council of Mombasa Vs Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001; Republic Ex parte the Minister for Finance & the Commissioner of Insurance as Licensing and Regulating Officers Vs Charles Lutta Kasamani t/a Kasamani & Co. Advocates & Another Civil Appeal (Application) No. NAI. 281 of 2005; and Republic Vs Land Disputes Tribunal Court Central Division & Anor Ex parte Nzioka (20060 1EA 321.** While the Interested Parties relied on the case of **ELC No. 3 of 2015 Azzuri Ltd Vs Pink Properties Limited; Samuel Wangau Vs AG & 2 others (2009) eKLR; and Republic vs Rosemary Wairimu Munene, Ex parte Applicant vs Ihururu Dairy Farmers Cooperative Society Ltd** to support their arguments.

On the issue as to whether the boundary dispute proceedings undertaken by the 1st Respondent to determine the boundary dispute was illegal and biased, amounting to an injustice against the Applicants. The Applicants contend that the Land Registrar should not have proceeded with determining the boundary dispute since there was already a stay order granted by the Court on 24th February, 2012.

From a keen perusal of the proceedings before the Land Registrar, I note the Applicant as well as the Interested Parties participated in the proceedings therein and at no time did the Applicants inform the Land Registrar of the stay order granted on 24th February, 2012 in respect of the suit land. In this instant judicial review, it is pertinent to verify if the Applicants' were granted due process by the Land Registrar in hearing and determining the boundary dispute between the parties.

First and foremost, I wish to refer to section 18 (2) and (3) of the Land Registration Act which mandates the 1st Respondent to resolve boundary disputes. It provides as follows; '**(2)The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section. (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary'**

These provisions mandate the Land Registrar to handle boundary disputes and I find that he indeed acted within his legal mandate to handle the dispute herein. In the 1st Respondent's report that the Applicants' seek to quash, I note the proceedings to determine the boundary dispute commenced in 2015 and an excerpt from a meeting held on 22nd October, 2015 where the parties herein were all present states this: '**The purpose of today's meeting to pick the beacon of parcel no. 588 which were not picked on 14th April, 2015 due to lack of time. I request all the parties to cooperate as the owners of parcel No. 588 show us their beacons. The District Surveyor has picked all the beacons as shown. We shall proceed to compile a report and give both parties the outcome as well as the ruling.**'

From the onset, it is clear all Applicants had been included in the proceedings to determine the boundaries herein and the District Surveyor had actually been involved in the measurement of the respective boundaries contrary to the Applicants' averments.

In his ruling the Land Registrar observed as follows '**1. The Registry Index Map differs with ground layout; 2) All the Group Members were to get equal shares (220 Acres); 3) There exists a road between the parcel No. 594 and 588; 4) The ground area for parcel No. 594 excluding the disputed area is approximately 122 HA (302 Acres); 5) The ground area for parcel No. 588 now 1071 – 1073 is approximately 102 HA (252 Acres) excluding the disputed area; 6) the disputed area is approximately 38 HA (94 acres).....It goes without saying that the Lantey's and the Saidimu's got 32 acres extra from the group ranch contrary to the equal allocation of 220 acres per member. I noted that the extra 38 Hectares (94 acres) disputed land lies between parcel nos. 594 and 588 (1071 – 1073) since there is no any other party claiming this portion of land except for Lantey's and Saidimui's. I now direct that the District Surveyor do a sketch subdividing the disputed portion two into portions of equal acreage (approximately 19 HA – 46 acres) each less area to be taken by the road. The road from the undisputed point be made and or created in such was as to be the boundary between the two portions. I also direct that one such portion of 19 HA approximately do form part and parcel of land No. 594 thereby increasing its acreage to 141 Ha (384. 411 acres). The remaining portion of 19 HA also do form part and parcel of land 588 thereby increasing its acreage to 121 HA (299 Acres).**'

According to the Applicant's arguments, the Land Registrar should not have proceeded with hearing the dispute as there was already a stay. I have referred to the Court Order issued in 2011 which was in respect to the Land Dispute Tribunal's finding that had been adopted was in relation to a purchaser's interest in land and not to determine a boundary dispute. Further, I note the parties were all given a hearing during the proceedings of the Boundary dispute before the Land Registrar made his final determination. . It is trite law that Judicial review is not concerned with the merits of the decision being challenged but with the decision making process.

In the case of **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision...It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

From land registrar's findings, whose excerpt I have cited above, It is clear each party was initially entitled to get 220 acres from the Group Ranch, which they each got but there was an extra 94 acres that was undisputed.

Section 47 of the Constitution provides that: **'(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—**

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration'.

In relying on the above cited judicial authorities including the legal provisions quoted above, I find that Land Registrar acted within the law to convene the hearing and determination of the boundary dispute herein. During the proceedings, I find that the 1st Respondent's actions of giving each party a chance to present their evidence as well as identifying their respective beacons was rational and he observed the Constitutional principles of reasonability and procedural fairness. I opine that the findings of the Land Registrar was logical as he arrived at it after considering the evidence presented during the proceedings which I have pointed out commenced in 2015. It is my view that there was no 'procedural impropriety' during the boundary dispute proceedings as the basic rules of natural justice as well as procedural fairness was observed during the said process.

I indeed concur with the respondents that this instant application is an abuse of the Court process. The Applicants' seems to be crying foul as a result of the Land Registrar's report and yet he failed to divulge to him that he had obtained a stay in the previous judicial review proceedings which have since been dismissed. It is in the circumstances that I hold that the Applicants' through their actions of fully participating in the boundary dispute proceedings are indeed stopped from seeking to quash the Land Registrar's determination of the boundary.

It is against the foregoing that I find the Notice of Motion dated the 29th May, 2018 unmerited and dismiss it with costs.

Dated signed and delivered in open court at Kajiado this 18th day of December, 2018.

CHRISTINE OCHIENG

JUDGE



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