



**Republic v County Surveyor Vihiga County; Egosangwa (Exparte Applicant);
Luhunza (Interested Party) (Environment and Land Judicial Review Case
E004 of 2021) [2023] KEELC 17487 (KLR) (23 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17487 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2021**

DO OHUNGO, J

MAY 23, 2023

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY SURVEYOR VIHIGA COUNTY RESPONDENT

AND

TOM MAHAGWA EGOSANGWA EXPARTE APPLICANT

AND

MATIA LUDENYO LUHUNZA INTERESTED PARTY

JUDGMENT

1. By Chamber Summons dated June 30, 2021 filed in ELC Misc No E015 of 2021, the ex-parte applicant sought leave of court to apply for judicial review orders against the respondent and the interested party. Leave was granted on July 12, 2021 by N A Matheka J.
2. Subsequently, the applicant filed Notice of Motion dated November 5, 2021 seeking the following orders:
 1. That there be an order of certiorari to move this Honorable Court to set aside the decision of the County Surveyor made on March 16, 2021 in respect of land parcel numbers S/Maragoli/Buyonga/855, 854, 785/795 cutting through plot No S/Maragoli/Buyonga/853 (Lotege - Idumbu Road) in dispute between the applicant and the interested party herein and to quash the same.



2. That there be an order of mandamus compelling the County Surveyor to open the alternative access road that has been under use ever since the demarcation as per the findings on the map and ground.
 3. That there be order of mandamus directing the county surveyor to close the road reserve between South Maragoli/Buyonga/855 and South Maragoli/Buyonga/854 as per the disputes tribunal since the road reserve between the two parcels of land have never been in use since demarcation and that the same is not currently reflected on the map.
 4. That there be an order of prohibition directing at the County Surveyor and land Registrar prohibiting them from implementing the decision made on the March 16, 2021 in whatever manner through the County Surveyor or the land Buyonga/855, 854, 785 and cutting through plot No S/Maragoli/Buyonga/856 (Lotego – Idumbu Road).
 5. That costs for this application be borne by Respondents.
3. Instead of filing the Notice of Motion in the same cause as the one through which he obtained leave, the ex parte applicant filed the application under a new case number: ELCJR No E004 of 2021. In the interest of justice, and with a view to getting to the root of the dispute, this court ordered on November 25, 2021 that the two causes be consolidated under the case number ELCJR No E004 of 2021.
 4. Notice of Motion dated November 5, 2021 is supported by an affidavit sworn by the ex-parte applicant who deposed that he is the administrator of the estate of Samuel Egosagwa T Mahangwa, his late father. That land parcel numbers S/Maragoli/Buyonga/853 and 854 belonged to his late father and that the interested party lodged a complaint with the Land Disputes Tribunal claiming the existence of a boundary dispute between parcel numbers S/Maragoli/Buyonga/853 and 855 and that in 1995 his father reported to the Land Registrar that he had a boundary dispute with the interested party. That the Land Registrar one Mr. Dickson Ayiga gave instructions vide a letter dated November 20, 1995 to the disputing parties to have the said parcel surveyed and that slightly thereafter, by a letter dated January 3, 1996, the said registrar gave orders that the road between S/Maragoli/Buyonga/855, 854 and 853 be opened. That following the said order, the said road was opened but thereafter the owner of parcel number 855 removed the beacons.
 5. The ex-parte applicant further deposed that following the events, his father reported the matter to the D O Vihiga division, one Mr. Okello who directed the chief to investigate beacons for purposes of marking the boundary. That vide a letter dated May 20, 1996, the interested party's advocate disputed the existence of a boundary dispute and on October 29, 2002, a new Land Registrar one Mr D Omollo issued boundary dispute summons through a notice to the residents and neighbours of the owner of parcel 855 to appear before him on November 20, 2002. That after conducting a hearing, the registrar found that the ex-parte applicant's father had not encroached on the interested party's land, that the road reserve on the map had ceased to exist on the ground as it was no longer in use and that there was an alternative road in use.
 6. The ex-parte applicant went on to state that despite the summoned parties being present at the scheduled venue on November 20, 2002, the registrar ignored them, but a resolution was thereafter made that the matter be resolved by the District Commissioner at his office in Mbale. That the District Commissioner thereafter inquired from the Land Registrar who informed him that the parties summoned had not paid for service, which position the ex-parte applicant contended was not true. That about seven months later, the interested party and his agents attempted to cut down trees



belonging to the ex-parte applicant's father in parcel number S/Maragoli/Buyonga/854 and 853 and a confrontation ensued which was reported to the chief who gave orders that the interested party could proceed to cut down the said trees. He also deposed that the suggestion by the respondent which was to cause all parties to remove all trees and structures which had been in existence for over forty years was an infringement to the applicant's rights to own property and the same ought not to have been allowed. That the tribunal's recommendation to amend the map to reflect the true position of the map by removing the road that was between S/Maragoli/Buyonga/854 and 853 which position was upheld by the respondent when he conducted his survey was illegal, made without jurisdiction and against the rules of natural justice.

7. The respondent opposed the application through a replying affidavit sworn on November 19, 2021 by Christopher K Tuwei, the County Surveyor Vihiga County. He deposed that his office received a complaint on opening of access road with respect to parcels 785, 790 and 855 from the Assistant Chief Emanda Sub Location through his letter dated January 21, 2021. That all the persons affected by the opening of the access road were invited to the meeting at the site including the ex-parte applicant who gave his view that he had no problem with the opening of the access road, and it was resolved that an access road be opened cutting both parcels 854 and 855. He concluded by deposing that the road access between parcel number 854 and 855 cannot be closed as the same is currently reflected on the map and further that it can only be closed after public participation.
8. The interested party opposed the application through a replying affidavit sworn on November 24, 2021 by Beatrice Adiso Ludenyo. She deposed that she is the administratrix of the estate of the interested party Matia Ludenyo Luhunza who was the registered owner of land parcel number South Maragoli/Buyonga/855 which is separated from land parcel numbers South Maragoli/Buyonga/854 and 853 by a road which is on the map but missing on the ground. That the ex-parte applicant's complaints were triggered by the respondent's report which was prepared on the request of members of the public and the local administration. That the re-opening of the road would permanently address the issue of encroachment.
9. The ex parte applicant passed away on December 10, 2021 and was substituted by his brother Kennedy Agama Egosangwa, pursuant to an order made on June 13, 2022.
10. The application was canvassed through written submissions. The ex parte applicant submitted that the County Surveyor's decision to close the road without the authority and attendance of the Land Registrar exceeded his jurisdiction and that his failure to involve the Land Registrar denied the ex parte applicant the right to be heard by the relevant authority, the land registrar. He further submitted that the County Surveyor acted ultra vires and in disregard of Sections 16 and 19 of the Land Registration Act. He relied *inter alia* on Republic v Commission of Customs Services Ex-Parte Imperial Bank Limited 2015 eKLR and urged the court to grant the orders sought.
11. The respondent filed his submissions on November 10, 2022 and argued that the ex parte applicant had failed to produce the grant of letters of representation to clothe him with legal capacity to file this suit and as such he lacks locus standi to institute the suit. Urging the court to strike out the suit with costs, he relied on the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR where the court (A C Mrima J) stated:

"Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus



standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

12. The respondent further submitted that the land registrar and the surveyor properly executed their mandate in terms of the complaint on opening of the access road. That the ex parte applicant was heard at the site and that the land registrar and the surveyor conducted the exercise in accordance with their mandate under Sections 18 (2) and 19 of the Land Registration Act. He therefore prayed that the suit be dismissed with costs.
13. The interested party filed his submissions on January 25, 2023 and argued that the process was well attended by the deceased, the MCA, chief, assistant chief, 75 % of the summoned parties and other community stakeholders. That the land registrar acted within his powers. She therefore prayed that the ex-parte applicant's suit be dismissed with costs.
14. I have considered the application, the affidavits, and the submissions. Before going into examining the merits of the application, I must deal with the issue of locus standi since it goes to the root of the matter before the court.
15. The ex parte applicant's position is that he is the administrator of the estate of Samuel Egosagwa T Mahangwa, his late father and that land parcel numbers S/Maragoli/Buyonga/853 and 854 belonged to his late father. He did not however produce any grant of letters of administration even after the issue was raised. The ex parte applicant is agitating his deceased father's case. He can only do so if he is a personal representative of the deceased. The term "legal representative" is defined in section 2 of the Civil Procedure Act as meaning:

"a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued."
16. The Court of Appeal stated in the case of Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR as follows:

"... The common law is that "action personalis moritur cum persona", that is, a personal action dies with the person. ... To determine who may agitate by suit any cause of action vested in [a deceased person] at the time of his death, one must turn to section 82 (a) of the Law of Succession Act, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person".
17. Thus, to validly agitate by suit any cause of action vested in a deceased person at the time of his death, the claimant or applicant must be an executor or administrator of the deceased's estate. The ex parte applicant has neither demonstrated being an executor nor administrator of the estate of Samuel Egosagwa T Mahangwa. He therefore lacks locus standi or the right to bring these proceedings on behalf of the estate of Samuel Egosagwa T Mahangwa. See *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* (*supra*).



18. The import of the foregoing is that the court lacks jurisdiction to determine Notice of Motion dated November 5, 2021, owing to the ex parte applicant's lack of *locus standi* to file and prosecute the application.
19. In the result, I strike out Notice of Motion dated November 5, 2021 with costs to the respondent and the interested party.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 23RD DAY OF MAY 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Ex Parte Applicant

Mr Simiyu holding brief for Mr Juma for the Respondent

Ms Beatrice A. Ludenyo present for the Interested Party

Court Assistant: E. Juma

