



**Kimotho ( Suing as the administrator of the Estate of Thomas Kimotho Gichuhi) v Attorney General & 4 others (Environment & Land Case E26 of 2022) [2023] KEELC 17003 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17003 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E26 OF 2022**

**LA OMOLLO, J  
APRIL 20, 2023**

**BETWEEN**

**SUSAN NJERI KIMOTHO ( SUING AS THE ADMINISTRATOR OF THE ESTATE OF THOMAS KIMOTHO GICHUHI) ..... PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT  
DISTRICT LAND SURVEYOR - NAIVASHA ..... 2<sup>ND</sup> DEFENDANT  
DIRECTOR PHYSICAL PLANNING ..... 3<sup>RD</sup> DEFENDANT  
COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT  
DISTRICT LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction.**

1. This ruling is in respect to the Applicants' Notice of Motion Application dated April 26, 2022. The said application is expressed as being brought under Section 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules*, Article 40 of the *Constitution of Kenya* and Section 18,19,20 & 21 (sic).
2. The application is filed under certificate of urgency and seeks the following orders:
  - i. Spent.
  - ii. That the 2<sup>nd</sup> Respondent resurveys the suit properties as per the original sheet and not the alleged amended sheet.



- iii. That an injunction be issued restraining the parties and other persons (sic) from taking further action (sic) such as construction on the suit hearing (sic) pending the hearing and determination of this case.
  - iv. An order to dismiss the surveyors report adjusting the boundaries of the suit properties.
  - v. That the cost of this application be awarded to the Appellant.
  - vi. That the court be pleased to grant any other relief it may deem fit for ends of justice to be met.
3. The application is based on the grounds on its face and is expressed as being supported by an affidavit sworn by one Thomas Kimotho Gichuhi. However, the affidavit annexed is sworn by Susan Njeri Kimotho sworn on April 26, 2022.

### **Factual Background**

4. This suit was commenced by way of a plaint dated April 26, 2022. I note that there is an amended plaint on record but leave was not obtained to file it. It was filed in July 8, 2022, long after pleadings had closed.
5. For purposes of making a determination herein, I will go by the original plaint. It seeks the following orders:
- a. That an injunction be issued barring the parties and other persons from interfering with the suit properties pending the hearing and determination of this suit.
  - b. An order to dismiss the surveyors report.
  - c. An order to resurvey the suit properties and establish the perimeters as per the original sheet map.
  - d. Each party to bear its own costs
  - e. Any further Relief or orders that this Honourable court may deem just and fit to grant.
6. The Respondents' have filed a joint statement of defence and are represented by the Attorney General.
7. The Respondents have also filed a replying affidavit to the application but have erroneously described it as a response to the application dated July 5, 2022 instead of April 26, 2022.

### **Analysis and Determination.**

8. In other circumstances, I would give a summary of the Respondents' response to the application and also a summary of the rival submissions filed by both parties.
9. My initial analysis of the present application is that it contains material inconsistencies and/or defects making it incapable of determination by this court.



10. The inconsistencies are set out as hereunder:
- a. The application is incomplete. It contains only one ground on its face and is neither dated nor signed. This court brought this fact to the attention of the Applicant who later furnished the court with another incomplete copy of the application.
  - b. The application, as incomplete as it is, is expressed as being supported by the affidavit of one Thomas Kimotho Gichuhi. However, the affidavit in supported is sworn by of Susan Njeri Kimotho.
  - c. The prayer (3) on the face of the application as drafted is unintelligible. It is as follows;
    - i. That an injunction be issued restraining the parties and other persons (sic) from taking further action (sic) such as construction on the suit hearing (sic) pending the hearing and determination of this case.
11. The Respondents have also flagged the ambiguity in prayer 3 and submit that an interpretation of the said prayer means that the applicant is seeking orders of injunction against herself and others (whom she does not disclose). The Respondents submit that this prayer if granted would be impossible to implement. They go on to state that these other parties not disclosed and against whom orders of injunction are sought would be condemned unheard if the prayer is allowed.
12. Prayer (iv) on the face of the application seeks an order to dismissing the surveyors report adjusting the boundaries of the suit properties. This is a prayer that goes to the root of the dispute herein and is better reserved for determination after hearing all parties herein. The Respondents, in their submissions have also noted that granting this prayer would be tantamount to determining the suit at the interlocutory stage and would have the effect of denying the Respondents an opportunity for fair hearing.

**Disposition.**

13. In view of the foregoing, I find that the Application dated April 26, 2022 is incurably defective. Further, it is unintelligible and seeks orders the grant of which would have the effect of disposing the suit without granting the Respondents an opportunity to be heard. Consequently, it is dismissed with costs to the Respondents.
14. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 20<sup>TH</sup> DAY OF APRIL, 2023.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Wanjiru for Mr. Mwenda for the Plaintiff/Applicant.**

**Ademeyon for Chepukurui Defendant/Respondent.**

**Court Assistant; Monica Wanjohi**

