



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**MISC. CIV. APPLI. 673 OF 2005**

1. JOSEPH MBURU GITAU
2. FELISTA WARIARA NDUKU
3. ISAAC MBURU NJUGUNA
4. KEZIAH WANJA KINOTI
5. CECILIA WANJIRU GICHURU
6. GODFREY MUCHANJI AJIAMBO
7. FLACIA NJOKI MUIRURI
8. CHRISTIAN MUCHANJI AJIAMBO
9. MARY WAMBUI KARIRI
10. JOSPHAT NJUGUNA MWANGI & 626 OTHERS.....APPLICANTS

**V E R S U S**

**THE COMMISSIONER OF POLICE**

**THE COMMISSIONER OF LANDS**

**THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS**

**EX-PARTE**

1. JOSEPH MBURU GITAU
2. FELISTA WARIARA NDUKU
3. ISAAC MBURU NJUGUNA
4. KEZIA WANJA KINOTI
5. CECILIA WANJIRU GICHURU

6. **GODFREY MUCHANJI AJIAMBO**
7. **FLACIA NJOKI MUIRURI**
8. **CHRISTIAN MUCHANJI AMIAMBO**
9. **MARY WAMBUI KARARI**
10. **JOSPHAT NJUGUNA MWANGI & 626 OTHERS**

### R U L I N G

This is a Notice of Motion dated 13<sup>th</sup> October 2008 filed by E.K. Mutua & Company advocates for the exparte applicants who are 10 people in number, and are said to have sued on behalf of about 626 others. The respondents are named as **THE COMMISSIONER OF POLICE (1<sup>st</sup> respondent)**, **THE COMMISSIONER of LANDS (2<sup>nd</sup> respondent)**, and **THE ATTORNEY-GENERAL (3<sup>rd</sup> respondent)**.

The application is said to have been brought under the inherent jurisdiction of the court. The orders sought are that-

1. ***The applicants be granted leave of the court to effect service of the decree given on 2<sup>nd</sup> May 2008 and issued on 14<sup>th</sup> May 2008 to the respondents by way of substituted service by advertisement in the Daily Nation Newspaper.***
2. ***Costs of this application be in the cause.***

The application was filed with a supporting affidavit sworn by **JOSEPH MBURU GITAU**, the 1<sup>st</sup> applicant, on 15<sup>th</sup> October 2008. It was deponed in the said affidavit, inter alia, that on 22<sup>nd</sup> and 23<sup>rd</sup> September 2008 the said **JOSEPH MBURU GITAU** in the company of one **FRANCIS MBUVI (a court process server)** spent the whole day in the offices of the Commissioner of Police with the intention of getting an opportunity to serve him with the decree herein; that the said **FRANCIS MBUVI** subsequently attempted to serve the decree upon the Commissioner of Police in vain; that in order to determine whether compliance with the court decision herein is made, it is important that the decree herein be served by way of substituted service by advertisement. Also filed is an affidavit sworn on 15<sup>th</sup> October 2008 by **FRANCIS MAKAU MBUVI**, the said process server.

The application was opposed by the Attorney General, who on 13<sup>th</sup> March 2009 filed grounds of opposition, which were that –

1. ***The application is lacking both factual and legal basis to support it.***
2. ***The orders sought are not available in the circumstances.***
3. ***The application is scandalous vexatious and wholly abuse of the process of the court.***

On the hearing date, Mr. Mutua for the applicants and Mr. Njogu for the respondents addressed me.

This is an application brought in judicial review proceedings. As the law under the Law Reform Act (**Cap. 26**), and the rules under Order 53 of the Civil Procedure Rules do not provide for substituted service, this application is properly before this court under its inherent jurisdiction.

From the objections of counsel for the respondent, it is apparent that the respondents' counsel objects to the application because there are no facts to establish that attempts were made to serve, and that there was, in any case, no decree drawn which could be served at the Commissioner of Police.

Regarding the decree there is indeed, in the file, a decree issued by the Deputy Registrar on 14<sup>th</sup> May 2008, on the decision by Nyamu J (*as he then was*) granting prohibition orders on 2<sup>nd</sup> May 2008. That objection of an alleged lack of a decree has to fail. On the other reason that there was no factual basis of the attempt to serve, in my view, the affidavits filed by the applicants gave the factual basis of the aborted attempts to serve the Commissioner of Police. Those affidavits constitute evidence, which could only be challenged by filing replying affidavits. No replying affidavit has been filed by the respondents and therefore the facts in those affidavits stand uncontroverted. The Attorney-General should have obtained proper instructions and filed a response to the affidavits filed, if he wanted to controvert the contents thereof. The grounds of opposition filed cannot controvert the evidence of facts in the affidavits. The grounds of opposition can only highlight issues that arise therefrom or legal issues that arise therefrom. As things are, the facts in the affidavits of the applicants are uncontroverted, that the Commissioner of Police evaded service of the decree. This application cannot therefore be said to be scandalous, vexatious, or an abuse of court process.

In my view, this application is for success because this court cannot make decisions in vain. It cannot sit and fold its arms when parties deliberately want to behave as if they are not subject to the due process of the law.

Consequently, I order as follows –

- 1. The applicants are granted leave to effect service of the decree given on 2<sup>nd</sup> May 2008 and issued on 14<sup>th</sup> May 2008 to the respondents by way of substituted service by advertisement in the Daily Nation newspaper once, and that advertisement will be deemed to be personal service.***
- 2. The above order will be served by applicant's counsel on the Attorney-General.***

Dated and delivered at Nairobi this 29<sup>th</sup> day of June, 2009.

**GEORGE DULU**

**JUDGE**