



Rotich (suing as the legal administrator of estate of Fredrick Kipkosgei Rotich) v County Government of Baringo & 13 others (Environment & Land Case 196 of 2017) [2022] KEELC 15315 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 196 OF 2017
FM NJOROGE, J
DECEMBER 8, 2022**

BETWEEN

**ESTHER J ROTICH APPLICANT
SUING AS THE LEGAL ADMINISTRATOR OF ESTATE OF FREDRICK
KIPKOSGEI ROTICH**

AND

COUNTY GOVERNMENT OF BARINGO & 13 OTHERS RESPONDENT

RULING

1. This is a ruling in respect of the plaintiffs/applicants notice of motion dated May 18, 2022 which seeks the following orders:
 - a) ...Spent
 - b) That an order for resurvey of parcel of land known as Lembus/Kiptuim/182 the same to be conducted by Director of Surveys, Kenya.
 - c) That costs of this application be provided for.
2. The application is supported by the affidavit sworn by Esther J Rotich, the plaintiff/applicant Herein where she deposed that on November 18, 2021 the court issued *inter alia* orders that the Surveyor Baringo to visit the suit parcel and establish boundaries thereto; that the surveyor prepares a report on the land making note whether the defendants are on occupation thereof and if so the extent of each defendant's occupation; that on January 11, 2021 the District Surveyor Koibatek visited the suit parcel and prepared a report dated January 13, 2022 where the surveyor alluded to the existence of a stock route measuring approximately 2.27ha which route does not appear in the RIM map or ground; that the court will not arrive at a fair and just decision if it relies on the said report and it would thus be in



the interest of justice that a resurvey be conducted; that unless the resurvey is conducted, she stands to suffer irreparable harm as she would lose a portion of her parcel of land.

Response

3. The 1st defendant/respondent in opposition to the application filed its grounds of opposition dated 7/06/2022 on the following grounds:
 1. That the application is a nonstarter, misconceived and hinged on air as there are no reasonable grounds advanced in support of the application.
 2. That the application is a desperate ploy by the plaintiff/ applicant to escape from the findings of a report by the District Surveyor Koibatek/Mogotio, which report emanates from a survey carried out in the presence of and with the full participation of the plaintiff/applicant, and in fact without participation of the respondents.
 3. That the application is stale and contains generalized unsubstantiated allegations to the effect that the Surveyor's report alludes to existence of a stock route that does not allegedly exist in the RIM map, while even failing to annex the said RIM map that the applicant relies on. It is a desperate attempt to flag off a dead horse
 4. That the applicant has not provided any evidence to demonstrate that the findings of the District Surveyor Koibatek/Mogotio were inaccurate so as to necessitate re-survey of the property.
 5. That the orders sought in the application herein only amount to forum shopping and should not be granted without concrete evidence as is the case before this honourable court.
4. In opposition to the application the 2nd to 9th defendants/respondents filed their grounds of opposition dated September 15, 2022 which are as follows:
 1. That the District Surveyors report and the annexed extracts of the plan and layout of the land in dispute confirmed that the area occupied by 2nd to the 9th respondents is not part of Lembus/ kiptuim/182.
 2. That the District Surveyor is part and parcel of the Director of Survey and any survey done by the District Surveyor is a survey done by the Director of survey.
 3. That the applicant has not demonstrated that if the survey is done by the Director of Survey in person a different report will be generated.
 4. The orders the applicant is seeking are meant for time wasting and delay in the resolution of the dispute, hence an abuse of the court process.
 5. The 2nd to the 9th respondents pray that the applicant's application be dismissed with costs.

Submissions

5. The plaintiff/applicant filed their submissions dated October 28, 2022 on 2/11/2022 while the 4th to 9th defendants/respondents filed their submissions dated October 26, 2022 on the same day.
6. The plaintiff submits that as per the report, the defendants are not in occupation of the suit property and as per the RIM map, there is no stock route as alleged by the District Surveyor as it is no longer in existence. She further submits that the said report was not conclusive to enable the court arrive at a fair determination.



7. She argues that the District Surveyor has not explained whether the suit parcel had boundary marks and whether he took the same into consideration while marking out the boundaries. The plaintiff/applicant further submits that the District Land Surveyor did not disclose whether the defendants had taken possession. She added that RIM map of the area does not show any plots available for allocation by the 1st defendants. In conclusion, she submits that it would only be fair that a resurvey be conducted and that the application be allowed as prayed.
8. The 4th to 9th defendants/respondents submit that the Surveyor's report being clear, the applicant is not justified to apply and request for resurvey of the suit land by the Director of Surveys. They submit that by urging such a resurvey the applicant is insinuating that the surveyor who visited the disputed site was not competent to comply with the court order.
9. They relied on section 2 and 3 of the Survey Act (cap 299) and submit that whatever had been done by the Baringo County Surveyor was as good as done by the Director of Survey. They further submit that the boundaries of the suit property are fixed and that it belongs to the applicant and that the respondents have not entered or occupied the said land.
10. In conclusion, they submit that the application is geared towards delaying the conclusion of the case and urges the court to dismiss the same with costs.
11. The 1st defendant/respondent relied on the submissions filed by the 4th to 9th defendants/respondents.

Analysis And Determination

12. This court has considered the application, grounds of opposition and submissions and the main issue for determination is whether an order for resurvey on the suit land ought to be conducted by Director of Surveys.
13. This court on November 18, 2021 gave orders that the Surveyor Baringo visits the suit land, establish boundaries thereto and prepare a report making note whether the defendants are in occupation and if so to what extent. The District Surveyor prepared a report dated January 13, 2022 where he indicated the said boundaries and confirmed that the defendants are not in occupation of the suit land.
14. The applicant contends that as per the RIM map there is no stock route as alleged by the District Surveyor as it is no longer in existence. The respondents on the other hand contend that the application is geared towards delaying the conclusion of the case.
15. This court notes that according to the order issued by the court on November 18, 2021 the specific requirements had been fulfilled by the District Surveyor to the extent set out by the court. The applicant's argument in favour of a resurvey is due to the finding that there is a stock route which she disputes. The District Surveyor works under the direction of the Director of Surveys. I would hardly think it probable that the Director of Surveys is not briefed of the exercise on the ground in respect of such a vital matter regarding the suit land which involves a devolved unit, or that if he himself conducted the survey, a different outcome would be arrived at. What the applicant ought to have applied for is an order that an independent Surveyor be engaged for the task, but she did not do so.
16. In view of the foregoing this court is of the view that a resurvey, as requested in the application, should not be allowed and in the upshot this court makes the following orders:
 - a. The plaintiff/applicant's application dated 18/05/2022 is without merit and is hereby dismissed
 - b. Costs of the application shall be borne by the plaintiff/applicant.



**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY
OF DECEMBER, 2022.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU

