

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
MISCELLANEOUS APPLICATION NO. E019 OF 2022

**JOEL MWANIKI MACHARIA &
JANNEFFER MUTHONI.....
RESPONDENT**

-VERSUS-

**EDWIN MBOGO GITONGA..... 1ST
APPLICANT**

**CHARLES MWEMBU KAMARI..... 2ND
APPLICANT**

**RUTH WAMUYU MBOGO..... 3RD
APPLICANT**

**SEBASTIAN MBA..... 4TH
APPLICANT**

RULING

1. Before the Court is the application filed by way of Notice of Motion dated 15th March 2023 by the Applicants, praying for

ORDERS:-

1) *Spent*

2) *THAT this Honourable Court be pleased to set aside the order issued in the matter on 27th October 2022,*

forthwith until this application is heard and determined interpartes.

3) THAT the applicants herein be granted leave to file a replying affidavit and grounds of opposition to Notice of Motion dated 14th June 2022

4) The Court do issue a permanent injunction restraining the respondents, their servants, agents, representatives and anybody claiming under him from interfering with boundary for Land Parcel Nos. Gaturi/Weru/4961, 4962, 4963 and 4964.

5) The costs of this application be provided for.

2. The Grounds upon which the reliefs are sought are found on the face of the application and the accompanying supporting affidavit, which was sworn by the 2nd Applicant. The 2nd applicant deposed therein that the 1st Applicant is now deceased and that he has been authorized by the 3rd Applicant to swear the affidavit on her behalf.

3. The deponent said he is the registered owner of Land Parcel Gaturi/Weru/4961 measuring approximately 1.09Ha; that the deceased 1st Applicant - Edwin Mbogo Gitonga - is the registered owner of Land Parcel Gaturi/Weru/4962 measuring approximately 1.20Ha; that the 3rd Applicant is the registered owner of Land Parcel Gaturi/Weru/4965 measuring approximately 0.47Ha; and that Kenneth Karuwe Mbogo(not

party to this suit), is the registered owner of Land Parcel Gaturi/Weru/4963. The deponent annexed the respective titles to the supporting affidavit.

4. The 2nd Applicant denied being served with the Notice of Motion Application dated 14th June 2022 and denied the contents of the affidavit of service sworn by Wilfred Njeru Kigoro which was filed in Court on 12th October 2022. He stated that he resides and works in Nairobi and not Riamachiri village as alleged. He also stated that the 1st Applicant could not have been served as he is deceased.
5. He further also denied that the other applicants were served with the notice to vacate from LR Gaturi/Weru/5677. He stated that all the applicants are occupying their respective portions of land.
6. The 2nd Applicant was surprised to learn that the said application dated 14th June 2022 was prosecuted by Janeffer Muthoni, who is not the registered owner of LR Gaturi/Weru/5677 and has no power of attorney from Joel Mwaniki, who is the registered owner. The 2nd applicant wondered why the registered owner himself could not file the

matter in court. Therefore, Janiffer Muthoni allegedly has no *locus standi*.

7. It is their claim that the respondent has misrepresented facts and misled the court into granting the order dated 27th October 2022. She failed to inform the court that there was a boundary dispute relating to the mentioned parcels of land, which dispute was reported to the District Land Registrar, Embu.
8. The Land Registrar, Embu, notified the respondents, the applicants, and the Kenya Airport Authority of his intention to visit the disputed land to fix boundaries. This was done and he prepared a report dated 8th April 2016. The report was not made available to the court. The 1st Respondent was party to the said dispute before the land registrar and did not raise any objection or contestation to the findings of the Land Registrar.
9. Owing to the Respondent's omission and pursuant to the order issued by the court, a road has been created running across Land Parcels LR Gatari/Weru/4961,4962,4963 and 4964. The fence along the said Land Parcels was consequently and subsequently destroyed, which cost the

applicants a sum of Kshs. 50,000/= to erect. This was said to be the second time as the respondent had earlier caused destruction of yet another fence, which also cost them money. They pray that the respondents be condemned to pay this money also.

10.The Applicants thus pray that the order issued on 27th October2022 be set aside and the applicants be granted an opportunity to file their replying affidavit. They also pray that a permanent order of injunction be issued against the respondents.

The Applicants' supplementary affidavit

11.The 4th Applicant filed a supplementary affidavit in response to the respondents' replying affidavit. This affidavit is not on record in the Court file or even in the Court Tracking Online System. They denied paragraph 14 thereof which allegedly stated that they were summoned to a surveying process.

12.In response to paragraph 16 of the alleged replying affidavit, they stated that they cannot be evicted from their own land without getting an opportunity to be heard. According to them proper pleadings should be instituted for such a remedy.

13. The applicants insisted that the respondent failed to disclose that the Land Registrar heard and determined the dispute.
14. The 4th Applicant also deposed he is surprised that the Kenya Airports Authority, whose land is Gatari/Weru/7877 was not included yet it shares a boundary with Land Parcels No. Gatari/Weru/2962, 4963 and 4965.
15. The applicants said further, that the letter dated 7th November 2018 drawn by the Ministry of Lands and physical planning and signed by one Philip Makini has never been served upon them and that they have never seen any report of the purported site visit referred to in the letter dated 4th October 2023.

Parties' written submissions

16. Counsel for the Applicants filed written submissions. She reiterated the contents of the applicant's application. The narrative in the submissions largely consists of the substance of the application and the supplementary affidavit filed by the applicants later. Counsel asked that the court be guided by Article 159 (2) (d) of the Constitution and Sections 1A and 1B of Civil Procedure Act.
17. The 2nd Respondent now representing herself also reiterated the contents of their replying affidavit, submitting that the

Applicants used their power to influence initial report by the Land Registrar. Therefore, being dissatisfied with the said exercise, the respondents made an application for the same exercise to be repeated on 21st February 2017, in the presence of their own private surveyors, which the court allowed on 2nd March 2017.

18. The boundaries were determined and the beacons placed properly. This is what led to the application for eviction and issuance of eviction orders by this court.

19. On the issue of service, the 2nd Respondent submitted that it is she herself who took the process server to the homestead of the 4th Respondent, identified him, and he was served on behalf of the other applicants.

20. She urged the Court to exercise its discretion so as to not assist in obstructing or delaying the course of justice as was held in the authority of **Shah v. Mbogo & Another (1967) EA 116**. She submitted that the applicants are being evasive and urged the court to put this matter to a close.

Analysis & Disposition

21. The instant application seeks an order to set aside this Court's order that was given on 27th October 2022, which

arose from the Applicants application dated 14th June 2022.

The order reads as follows:

1) THAT an order of eviction be and is hereby issued against the Respondents, from Land Reference Number GATURI/WERU/5677 in Embu, Kathangari sub-location, pursuant to the provisions of Section 152E of the Land Act 2012, Laws of Kenya, contained in the Notices issued by the Applicants on 18th February 2022.

2) THAT the Officer Commanding Police Division(OCPD) and the Officer Commanding Itabua Police Station(OCS) be and is hereby ordered to enforce compliance of the Court Order of eviction on the Respondents.

22. The Applicants in the instant application, who were the Respondents in that earlier application, contend that they were never served with the application and court order and that the issue of boundaries had already been determined and resolved by the Land Registrar.

23. Referring to the wide discretion to set aside given to the court, the court observed as follows in the case of **Esther Wamaitha -vs- Safaricom Ltd. [2014] eKLR.**

“The discretion is free and the main concern of the court is to do justice to the parties before it (see Patel -vs- E.A. Cargo Holding

Services Ltd.). The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See Shah -vs- Mbogo)..."

24. In the matter at hand it seems clear to the court that one party - EDWIN MBOGO GITONGA - was already dead even at the time the respondents in this application were bringing their matter to court. A document dated 2/6/2021 made available by the applicants shows this to be the position.
25. The law on setting aside court orders arising from the judgement or rulings is clear and well settled. The court possesses wide discretionary powers to set aside. But the orders are never granted as a matter of absolute right. The applicant has to show sufficient cause. Key considerations include filing the application to set aside timeously, explaining adequately why setting aside is justified, and proffering a good draft response or defence to the matter in which the order was given.

26. In **David Kiptanui Yego & 134 others -vs- Benjamin Rono & 3 others [2021] eKLR**, it was observed *inter alia*, that the court should also consider the prejudice to be suffered by the respondent's side if the application is allowed and also whether it is in the interest of justice to grant the order.
27. The factors to consider were also stated well in the cases of **Mbogo & Another -vs- Shah: [1968] EA 93, Patel -vs- E.A. Cargo Handling Services [1975] EA 75, Chemwolo & Another -vs- Kubende: [1986] KLR 492 and CMC Holdings -vs- Nzioki [2004] 1KLR 173**, among others.
28. The respondents misled the court by including a dead party in their application thus creating the impression that the party is a living person. The court issued orders affecting the estate of the party, which is something that would not have happened had the fact of his death been brought to the court's attention. The respondents have no excuse for misleading the court. They were duty-bound to do due diligence to establish that the people they were bringing to court were viable living adults of sound mind. It seems clear

that there was no due diligence conducted. This alone is enough to allow the application filed here as the orders granted by the court on 22/10/2022 cannot be allowed to stand against a dead party. The court's integrity and ability to make a proper order was compromised or affected by the applicant's blunder.

29. But there are other reasons given in the application, among them being that the applicant's live on their own pieces of land and that it is not true to say that all of them were served. The applicants are also saying that the matter had been resolved earlier through the involvement of the necessary officials from the Lands Office. These are not simple averments to be wished away. The court would need to consider them.

30. It seems to me clear that when all this is considered, it is necessary to allow the application in terms of prayers 2 and 3. These two prayers are hereby granted.

31. The applicants have also prayed for a permanent injunction in terms of prayer 4. In **Watson Wahome Njuru -vs- Co-operative Bank of Kenya Ltd: HCC No. 67 of 2006 (2010) eKLR**, the court observed, inter alia, that

before granting an order of permanent injunction, the plaintiff must show that he has a legal right to protect and secondly that there is a probability of future serious injury or harm. The applicants have failed to demonstrate this. They have not even attempted to justify their prayer from this legal perspective. The prayer for permanent injunction is therefore declined.

32. Ultimately therefor, the application is allowed in terms of prayers 2 and 3. Prayer 4 is declined. Costs of the application to be in the cause.

RULING DATED, SIGNED and DELIVERED virtually at **KITUI** this **28th day of April, 2026** pursuant to notice dated **21/4/2026**.

In the presence of,
Court Assistant - *Musyoki*
No counsel present

A. KANIARU
JUDGE- ENVIRONMENT & LAND COURT, KITUI