



REPUBLIC OF KENYA



KENYA LAW
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**Soy & another v Joseph (Civil Suit E003 of 2022)
[2022] KEHC 15132 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 15132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E003 OF 2022
SN MUTUKU, J
JULY 25, 2022**

BETWEEN

MARGARET WAITHERA SOY 1ST PLAINTIFF

GAN ELMA LTD 2ND PLAINTIFF

AND

VICTORIA MWIKALI JOSEPH DEFENDANT

RULING

1. On the 16th March 2022, the Plaintiff filed a Request for Judgment against the Defendant in the sum of Kshs 23,740, 199.00 together with costs and interest at court rates from 17th February 2022. The said request is dated 15th March 2022.
2. The said sum arises from special damages and lost income and profit as a result of alleged trespass and conversion by the defendant on the plaintiff's poultry farm situated on L.R No. Kajiado/Kitengela/10083.
3. The Plaintiff filed a Plaint on 22nd February 2022 claiming general damages for trespass and conversation, special damages in the sum of Kshs 16,597,465.00 and loss of income and profit amounting to Kshs 7,142,734.00, interest at court rates from the date of filing of the suit until payment in full and costs of the suit.
4. On 22nd February 2022, the plaintiffs filed a Notice of Motion under Certificate of Urgency supported by an Affidavit to which various documents were annexed, a Plaint, Verifying Affidavit and Witness Statements. These documents were served on the Defendant on the 28th February 2022 as averred in the Affidavit of Service dated 16th March 2022 and filed on the same date.



5. The Notice of Motion and the Certificate of Urgency were placed before me for directions on the 23rd February 2022. I declined to certify the matter as urgent and directed that the same be served and the matter be placed for mention on 30th March 2022.
6. On the 30th March 2022, Ms Agwata appeared for the Plaintiffs/Applicants while Mr. Njuguna appeared for the Defendant/Respondent. As at that date, there was no defence in the court file nor was there record of appointment of counsel for the Defendant. Ms Agwata sought to have judgment entered as requested on 16th March 2022. This was contested by Mr. Njuguna who contested service on the Defendant. This court directed that the process server and the defendant be cross-examined on the issue of service and set the date for 26th May 2022.
7. On 26th May, 2022, during virtual call over of the matters, a Ms Wambura told the court that she was holding brief for Mr. Njuguna for the Defendant. Ms Agwata was for the Plaintiffs. During the session in open court it became clear that counsel holding brief for Mr. Njuguna for the Defendant was attending court virtually from Nairobi and not from Kajiado. Ms Agwata and the process server were in court waiting for cross examination proceedings.
8. In the absence of the Defendant and her counsel the cross-examination could not take place. Ms Agwata addressed the court and sought to have judgment entered given that the defendant and her counsel were not present to cross examine the process server. Counsel submitted that service was proper and that the averments contained in the Affidavit of Service remained uncontroverted.
9. I have considered this matter. It is clear to me that the Defendant and her counsel did not attend court to cross-examine the process server on 26th May 2022 as directed by the court. During virtual call over of the files that morning, Ms Wambura appeared for the Defendant on behalf of Mr. Njuguna. She did not inform the court that she was not present in court even after Ms Agwata told the court that she was in open court to which the court directed that the matter would proceed in open court.
10. The Complaint, verifying Affidavit, Witness Statements, Summons to Enter Appearance and the Notice of Motion under Certificate of Urgency were served on the Defendant on 28th February 2022. She accepted service and appended her signature on the documents served on her. She did not enter appearance or file defence within 15 days as commanded in the Summons to enter appearance. Indeed, service was admitted by Mr. Njuguna on 30th March 2022. All he sought on that date is time to study the bundle of documents served on the Defendant.
11. I have read the Affidavit of Service sworn by Gedion Kathama Mulwa, the Process Server, on 16th March 2022. I am satisfied with the service on the Defendant. I note that the Defendant, even after accepting service and signing on the documents served, did not enter appearance and file defence.
12. The Claim against the Defendant is for both liquidated amount and other claim. Order 10 Rule 4 (2) of the Civil Procedure Rules provides that:

“Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, or request in Form No. 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim”.
13. Having satisfied myself that service was proper and having found that the defendant has not entered appearance or filed defence, I agree with the Plaintiff that judgment ought to be entered. However, this being a suit seeking both liquidated claim and general damages, I hereby enter judgment in favour of



the Plaintiffs in the sum of Kshs 23, 740,199/= being the amount claimed in liquidated form. I also award interest on that amount from 17th February 2022.

14. The Plaintiff shall proceed to set the suit down for hearing of the other claim for general damages after which the issue of costs can be determined. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 25TH JULY 2022.

S. N. MUTUKU

JUDGE

