



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELC NO. 34 OF 2020**

**OYUNGE BARNABUS.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**MALACHI RATEMO NATAYO.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**KENNEDY MBAKA RATEMO.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**DANIEL RATEMO.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

***Suing as Administrators of the estate of MATHAYO RATEMO MAYAKA (deceased)***

**VERSUS**

**CHARLES OTEKI RIOBA.....DEFENDANT/APPLICANT**

**RULING**

**INTRODUCTION**

1. On 9<sup>th</sup> November, 2020, the Applicant filed a Notice of Motion dated 7<sup>th</sup> October, 2020 seeking the following orders;

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3. That the court be pleased to set aside, vary, vacate and annul the orders issued on 6<sup>th</sup> October, 2020 and list the Application dated 16<sup>th</sup> September, 2020 for hearing.
4. That the Applicant be granted leave to file a response out of time.
5. Costs of this application and interest thereon be provided **for**.

2. The application is anchored on the following grounds and a supporting affidavit sworn by the Applicant on 9<sup>th</sup> November, 2020;

- a) That the Applicant was not served with pleadings and the hearing notice for 6<sup>th</sup> October, 2020 personally.
- b) The Allegations in the Affidavit sworn by Silas Juma deponed on 5<sup>th</sup> October, 2020 are not true since the Applicant has never communicated to him.
- c) That the annexures to his Affidavit have not confirmed the delivery of the purported message to the Applicant and therefore if at all there was any communication or service which is denied, then the same was done without consent or knowledge.
- d) That the Applicant denies having received such communication to enable him appear in court on 6<sup>th</sup> October, 2020.
- e) That this court therefore through the Affidavit of the process server proceeded Ex-parte and the Applicant was condemned unheard.

f) That under article 50 of the Constitution of Kenya 2010 the Applicant is entitled to a fair hearing and therefore there is need for him to be accorded such opportunity in court.

g) That the Applicant stands prejudiced and will suffer loss and damages if the orders issued on 6<sup>th</sup> October, 2020 are not stayed or set aside.

h) That it is in the interest of justice that the Applicant's Application is allowed.

3. The Application is opposed by the Respondent through his Replying Affidavit dated 7<sup>th</sup> December, 2020 and filed in this court on 2<sup>nd</sup> December, 2020 where in the Respondent avers that the Applicant is mischievous when he states that he was not served personally with the pleadings and the hearing notice. This is so because he fails to appreciate that the Civil Procedure Rules (amended) allow service of court documents via electronic media, including but not limited to emails and WhatsApp.

4. He further avers that the Applicant was served by email and WhatsApp and his assertions are false and misleading.

5. It is his contention that this mode of service is allowed under Order 5 rules 22B and 22C of the Civil Procedure (Amendment) Rules, 2020 which is in line with the technological advancements in contemporary society and the challenges brought about by the COVID-19 Pandemic.

6. It is his averment that it is immaterial how the Process Server obtained his contact and email for purposes of the service as what matters is not how they were obtained, but the fact that he does not dispute ownership of the telephone contact and the email used to effect service upon him.

7. The Respondent avers that the Applicant's assertion that he was condemned unheard is self-defeating as he waived that right when he ignored summons to enter appearance that were served upon him.

8. It is the Respondent's contention that the Applicant was accorded an opportunity to be heard in line with the principles of natural justice and constitutional provisions but he ignored the court summons and failed to appear in court. He also failed to respond to the application and consequently he is estopped from invoking the principle of the right to be heard.

9. The Respondent contends that equity does not aid the indolent but the vigilant. That the Applicant has been sluggish and dismissive of the court orders and summons and to his amazement and regret he realizes rather too late that court directions and orders are not issued in vain.

10. The Respondent avers that the Applicant does not dispute that the email and WhatsApp number used to serve him were his and therefore he was duly served. Further, it is his contention that the Applicant was aware of the Judgment given that he was charged in Keroka CR. NO. 1555 of 2015 for chasing the Respondent's workers from the suit property and was found guilty.

11. The Respondent avers that he is not opposed to calling the Process Server to be cross-examined on his Affidavit of Service should the Applicant wish so to do because he is aware that he was properly served.

12. It is the Respondent's averment that the Applicant will not suffer prejudice as he has no proprietary rights capable of protection in law as he is a trespasser and intermeddler.

13. The Respondent states that the Applicant has deliberately misled the court in claiming that he lives on the land and he has annexed photographs of the Respondents' late father's servants' quarters alleging it to be his house. It is his further contention that the Applicant only erected the temporary structure when he forcibly re-entered the land prompting the Respondent to file this suit, and the newly erected fence is evidence of such entry.

14. The Respondent contends that the Applicant has not disclosed cogent reasons why the court orders should be set aside as the suit property is in the name of the deceased who died a long time ago. The Applicant did not buy his land from the deceased and consequently he has no proprietary rights to be protected during the period the case is pending in court.

15. The Respondent contends that the Applicant is a very malicious and destructive individual who has since learning of the court orders engaged goons to destroy the suit property.

16. Consequently it is the Respondents contention that the Applicant's prayer to have the orders of the court set aside, if granted, will only work to facilitate more destruction of the suit property and cause more anguish to the beneficiaries who have been using portions of the suit property.

17. The application was canvassed by way of written submissions and the parties filed their respective submissions which I have considered.

## **BACKGROUND OF THE CASE**

18. In order to put this matter into perspective it is necessary to give a background of the entire suit more specifically the proceedings thus far before delving into the issues raised in the Applicant's Application.

19. The Plaintiffs/ Respondents herein filed this suit on 15<sup>th</sup> September, 2020 vide a plaint dated 15<sup>th</sup> September, 2020 seeking an order of eviction against the Defendant from the deceased's land parcel no. 9346/2. He also sought an order of permanent injunction restraining him from entering, trespassing, tilling, constructing, harvesting trees thereon or in any manner dealing with the suit property. The Plaintiffs also

filed a Notice of Motion under certificate of urgency on the same day seeking that;

a) The application be certified as urgent and service thereof be dispensed within the first instance.

b) pending the hearing and determination of this application, an order of injunction do issue restraining the Defendant/Respondent by himself, his employees, agents and/or servants or whosoever claiming through him from entering, developing/constructing thereon, cultivating, tilling and/or committing any acts of trespass or other acts which are prejudicial to the property of the estate of the Deceased in the property L.R NO.9346/2.

c) pending the hearing and determination of this suit, an order of injunction do issue restraining the Defendant/Respondent by himself, his employees, agents and/or servants or whosoever claiming through him from entering, cultivating, erecting structures/developments thereon, tilling, and/or Committing any acts of trespass or other acts which are prejudicial to the property of the estate of the Deceased in the property L.R NO.9346/2.

d) the Officer Commanding Station, Keroka Police Station, do supervise enforcement of the Court Orders and provide security.

e) Costs

20. The aforesaid application was presented before me on 17<sup>th</sup> September, 2020. I directed the same be served upon the Applicant herein and that it be fixed for *Interpartes* hearing on 6<sup>th</sup> October, 2020.

21. When the Application came up for *Interpartes* hearing on 6<sup>th</sup> October, 2020, the Applicant was not present and as such I proceeded to allow the Application in terms of prayers 3 and 4 of the Notice of Motion.

22. On 14<sup>th</sup> October, 2020 the Plaintiffs/Respondent filed another Application under Certificate of Urgency seeking to amend the orders issued on 6<sup>th</sup> October, 2020 specifically the order directing the Officer Commanding Station, Keroka Police Station to supervise enforcement of the Court Orders and provide security. They sought orders that the O.C.S Matutu Police Station in whose jurisdiction the property was situate be directed to supervise the implementation of the said orders. The Application was placed before me on 19<sup>th</sup> October, 2020 and after perusing the same, I allowed it.

23. It is against this background that the Applicant has filed this application seeking to set aside the orders of this court issued on 6<sup>th</sup> October, 2020.

#### ISSUES FOR DETERMINATION

24. Having considered the pleadings, Notice of Motion and rival submissions, the singular issue for determination is whether the Applicant is entitled to a stay and setting aside of the orders of this court issued on 6<sup>th</sup> October, 2020.

#### ANALYSIS AND DETERMINATION

25. Essentially, setting aside an *ex parte* order is a matter of the discretion of the court. In the case of **Esther Wamaitha Njihia & two others vs. Safaricom Ltd[2014] eKLR** the court citing relevant cases on the issue held *inter alia*: -

*"the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling 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). The nature of the action should be considered, the defense if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. It also goes without saying that the reason for failure to attend should be considered."*

26. In the case of **Captain Philip Ongom v Catherine Nyero Owota SCCA 14/2/2001 [2003] eKLR** the court held *inter alia* that the court must be satisfied about one of the two things namely: -

(a) either that the defendant was not properly served with summons;

(b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

27. It is important for me to mention that in the above case, the court defined what constitutes *sufficient cause* and in this respect the following paragraph is relevant to the issues before me: -

*"Once the defendant satisfies the court on either, the court is under a duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case."*

28. From the foregoing therefore can it be said that the Applicant herein has demonstrated that there was a sufficient cause why he failed to

enter appearance and respond to the Application whose order he seeks to set aside?

29. The Applicant raises improper service as the reason why he never entered Appearance or attended court for the hearing of the application. Improper service is a *'sufficient cause'* that can if proved by the Applicant, compel me to set aside the orders. This is because I believe that it is not sufficient for a Plaintiff to institute suit against a party, that party must be invited to submit to the authority of the court in order for the legal process to commence. The Summons must be served in the manner provided for in the Civil Procedure Rules to enable the defendant to submit to the jurisdiction of this court. The Defendant's knowledge of the existence of the suit is not sufficient to proceed against him or her. He may be aware of the suit but unless he is prompted by the summons in the manner provided for in the Civil Procedure Rules, 2010, the jurisdiction of this court is not invoked and therefore he may choose not to appear or respond to the suit.

30. In the instant suit the Applicant alleges that he was not personally served with the summons and pleadings and Hearing Notice for 6<sup>th</sup> October, 2020 and thus he could not enter appearance and respond effectively to the application. He contends that the allegations in the Affidavit of Service sworn by one Silas Juma, a Process Server on 5<sup>th</sup> October, 2020 are not true since he has never communicated with him. He avers that the annexures to the said Affidavit of Service have not confirmed the delivery of the summons and pleadings and that if at all there was any communication or service which is denied, then the same was done without his consent or knowledge.

31. In response to the above averments by the Applicant the Respondents averred that the Applicant was served via email and WhatsApp and his assertions are false and misleading. It is the Respondent's contention that the mode of service used is allowed under Order 5 rules 22B and 22C of the Civil Procedure (Amendment) Rules, 2020 which law forms the law of procedure in line with the current technological advancements.

32. The general practice has always been that service must be effected personally. Where it is impossible to effect personal service, the courts usually grant leave to the person who is supposed to effect service upon a party by way of substituted service after it is satisfied that service of summons cannot be served in the ordinary way. Courts have previously regarded any other form of service such as the one the Respondents used as improper unless leave of the court was granted.

33. However, through Legal Notice No. 22 dated 26<sup>th</sup> February, 2020, the Civil Procedure Rules, 2010 were amended and amongst the new provisions introduced were rules regarding mode of service provided for under Order 5 of the rules. I agree with learned counsel for the Respondent that the changes in the rules have been developed to fit the prevailing circumstances as we are experiencing the COVID-19 Pandemic which makes personal service difficult. Specifically, Order 5, rule 22B and Order 5, rule 22C which rules have introduced other modes of service other than the traditional physical service of the defendant.

Order 5, rule 22B provides as follows;

1. *Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.*
2. *Service shall be deemed to have been effected when the Sender receives a delivery receipt.*
3. *Summons shall be deemed to have been served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.*
4. *An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.*

35. Order 5, rule 22C provides that;

1. *Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.*
2. *Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.*
3. *Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.*
4. *An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.*

36. The question that I need to determine is whether the Respondents met all the conditions set out in the aforementioned new rules. In their response to the Application, the Respondents have pointed this court to an Affidavit of Service sworn by a Process Server, one Silas Juma on 5<sup>th</sup> October, 2020. In the Affidavit of service, the process server averred that;

- a) "On 18<sup>th</sup> September, 2020 at 12.00 P.M, I received duplicate copies of court directions, Summons to enter appearance, Certificate of urgency, Notice of Motion, Plaint, supporting affidavit, annexures, Plaintiffs list of documents, written statements of the Plaintiff, verifying affidavit and affidavit and plaintiffs list of witnesses from Mutai J.K & Company Advocates with instructions to serve the same upon Charles Oteki Rioba the Defendant herein.

b) On the same day I called the Defendant's number given to me by the Plaintiff's advocate (0722524211) and inquired his whereabouts, he informed me that he was in Nairobi. I informed him the purpose of my call and my intention to serve him with the court papers afore-stated.

c) He however, informed me that he was in Nairobi and that he was not coming back to Nyamira or Kisii soon as he operates business in Nairobi and stays there with his family.

d) I informed him that I was going to serve him via his email address otekirioba@yahoo.com and WhatsApp through his personal line number 0722524211.

e) On 21<sup>st</sup> September, 2020 I served the documents via email address otekirioba@yahoo.com at 1.52hrs and via WhatsApp No.0722524211.

f) On 24<sup>th</sup> September, 2020 I again sent the documents via the email address otekirioba@yahoo.com at 13.19hrs".

37. In his Supporting Affidavit the Applicant has vehemently denied the above averments. In particular he avers that;

a) "I did not receive the documents as averred by the Process Server nor has he ever communicated with me. I have not received the said documents through the mode he alluded to in his Affidavit of Service".

38. One thing that stands out is that the Applicant does not deny that, the email address and the mobile number used by the Process Server are his. In fact, he believes that the process server might have obtained them from one of the Respondents. His only contention is that he did not receive the documents via email or WhatsApp. He appears to state that even if the documents could have been sent to him, he did not have an opportunity to see or use the said page of WhatsApp platform or email address to confirm or receive service of the said documents.

39. The above new provisions are only concerned with the sender receiving a delivery receipt. Therefore, once it is confirmed that the platforms used are the *defendant's last known and used* platforms, the challenge will only be ensuring he or she (the Plaintiff) gets a *delivery receipt*. However, I take judicial notice that a delivery receipt in case an email is used can only be obtained when the Defendant acknowledges receipt of the email which did not happen in this case and thus it cannot be said the Applicant was properly served via email when there was no acknowledgement of receipt. However, in WhatsApp messaging platform I believe the mode of confirming delivery is different.

40. It is common knowledge that delivery in most cases is confirmed by double ticks which turn blue immediately the recipient views the message sent. The Respondents have attached a document showing a screenshot message sent to the number that the Applicant has acknowledged to be his that shows two blue ticks signifying that the documents were indeed delivered to the aforesaid number belonging to Applicant. The Applicant indicated that he wanted his Advocate to call the Process Server for cross examination with a view of proving that his allegations were not true but he failed to do so. He also seemed to suggest that there was need for him to give his consent before his particulars were used which to me has no legal basis. I agree with counsel for the Respondent that, all that the Respondents needed to establish was delivery and that the number used belonged to the Applicant. It did not matter how and from whom he obtained the number as long as the number used belonged to the Applicant. The Applicant also seems to imply that the message might have been generated by illegal means, but he has not demonstrated the legal steps he has taken against the persons he accuses of having generated such messages.

41. From the foregoing, I do not find any reason to doubt that the Respondents properly served the Applicant in accordance with the provisions of Order 5, rule 22C of the Civil Procedure (Amendment) Rules, 2020.

42. The upshot is that the application lacks merit and I dismiss it with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT KISII THIS 23<sup>RD</sup> DAY OF MARCH, 2021.**

**J.M ONYANGO**

**JUDGE**