



Maiyo & another v County Government of Trans-Nzoia (Environment & Land Case 3 of 2023) [2023] KEELC 19175 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 3 OF 2023
FO NYAGAKA, J
JULY 27, 2023**

BETWEEN

AMOS GIKURU MAIYO 1ST PLAINTIFF

ALICE NJAMBI GAKURU 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TRANS-NZOIA DEFENDANT

RULING

1. I have considered the application by Mr. Waswa and the response by Mr. Kiaire. I understand the Respondent to be saying that he wishes the process server to be called to court for cross-examination as to the truthfulness of his affidavit sworn on July 19, 2023. Mr. Waswa argues that the ultimate aim of the cross-examination is to set aside the orders issued on 20/7/2023. He has relied on the Order 19 Rule 2 of the *Civil Procedure Rules*.
2. Mr. Kiarie opposes the application to summon the process server, first by arguing that the process server may not be available today. I understand learned counsel to mean here that time is short. Also, he argues that if orders obtained *ex parte* are to be set aside, then the party ought to move the court under Order 40 Rule 7 of the *Civil Procedure Rules*.
3. I have considered the application before me. I have also considered both the law and the submissions by learned counsel. Order 40 Rule I of the *Civil Procedure Rules* provides for the procedure for grant of temporary injunctions. Order 40 Rule 4(x) of the Civil Procedure Rules provides that where the court is satisfied that the object of the injunction may be defeated it may grant the injunction *ex parte*. The Rule therefore implies that if the court is not satisfied, it will hear the application inter partes.
4. When this matter came up before me *ex parte* on July 17, 2023, I was satisfied as to the urgency thereof but was of the view that the defendants be notified of the application. I directed that service be effected



- and the matter be mentioned for directions on July 20, 2023 online. Service was allegedly effected. I was satisfied as to the same by the affidavit of service of one George Munali, sworn on July 19, 2023.
5. The Respondent disputes the service. He alleges that the same is based on a stamp that is alleged to be for the County Attorney of the Defendant but is not the truth as it is superimposed. Again, learned counsel, by asking for summoning
 6. of the process server wishes to demonstrate to the court that the stamp is not of the County Attorney. He intended to do so by way of cross-examination of the process server.
 7. This court is of the view that the prayer for cross-examination of the process server at this point and in the manner sought to be achieved is misconceived and premature. It is, if permitted at this stage meant to take the court's time without basis. The reason I say so is that the court will not have material to confirm the authenticity or otherwise of the alleged stamp other than hearing questions about it being answered. The court is not a document examiner as per the rules of evidence, Section 48 of the [Evidence Act](#).
 8. Lastly, Mr. Waswa argues that if the court is satisfied with the defectiveness of service then he will be moving the court to set aside the orders of July 20, 2023. With due respect, this court finds the procedure being adopted by learned counsel improper. Order 40 rule 7 of the [Civil Procedure Rules](#) provides for the setting aside or discharge of an order of injunction. This is upon a party making an application if he is dissatisfied with it. With the determination of the contentious issue of service being the ultimate aim of the defendant herein. I find that he defendant has put the court before the horse. He needs first to make an application to set aside the injunction and then apply to summon the process server for cross-examination on his affidavit of service. This reliance on Order 19 Rule 2 of the [Civil Procedure Rules](#) at this stage is premature.
 9. I find the application without merit and I dismiss it with costs.
 10. Ruling read in presence of Miss Masai for Kiarie for plaintiff and Waswa for Defendant.

RULING READ IN PRESENCE OF MISS MASAI FOR KIARIE FOR PLAINTIFF AND WASWA FOR DEFENDANT THIS JULY 27, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

Hearing of application dated July 17, 2023 for October 4, 2023. Interim orders extended.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

JULY 27, 2023

