



**Maalim v Musa (Suing as the administrator ad litem of the Estate of Fatuma Ahmed) & 2 others (Environment & Land Case E001 of 2022) [2023] KEELC 21878 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21878 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E001 OF 2022  
LN MBUGUA, J  
NOVEMBER 21, 2023**

**BETWEEN**

**MOHAMED DAHIR MAALIM ..... PLAINTIFF**

**AND**

**AMINA MUSA (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF FATUMA AHMED) ..... 1<sup>ST</sup> DEFENDANT**

**COLONEL FARAH ..... 2<sup>ND</sup> DEFENDANT**

**GULED ALIAS PS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. There are 2 applications for determination before this court.

**Application dated 11.7.2023**

2. The above application is the first one brought forth by the 1<sup>st</sup> defendant seeking orders that there be a stay of execution of the judgment delivered on December 8, 2022, that the said judgment be set aside, and that the applicant be allowed to defend the suit. She also seeks orders to examine on oath the serving officer, one Kivisu Amos Mutambu.
3. The application is based on grounds on its face and on the supporting affidavit of Amina Musa sworn on July 11, 2023. She avers that she is the registered proprietor of parcel LR No. 36/1/50 together with her co-proprietor Fatuma Ahmed (deceased). She contends that there was no service.
4. She points out that in his affidavit of service sworn on May 30, 2022, the Plaintiff's process server one Kivisu Amos Mutambu indicates that he served pleadings and summons to enter appearance dated January 3, 2022 at a construction site office to a lady of Somali descent namely Fatuma Ahmed, yet the said Fatuma passed away in the year 2009.



5. She also avers that the deceased's last address was Nanyuki, thus the process server could not have served as alleged.
6. The application is opposed by the Plaintiff vide his replying affidavit sworn on August 1, 2023. He avers that he is the holder of a genuine title to the property known as LR 36/1/50 Eastleigh vide purchase on January 14, 2007 and has been remitting rates to City Council of Nairobi. He avers that the woman identified at the site by the process server was Fatuma Ahmed and she was properly served.
7. The application was heard by way of written submissions. The 1<sup>st</sup> Defendant submits that the default judgment entered herein was irregular as there was no proper service of summons to enter appearance thus it should be set aside and the draft defence which raises triable issues should be considered. To this end, the case of *Gulf Fabricators v County Government of Siaya* [2020] eKLR as well as the case of Pacifica *Bonareri Nyakina v Rose Obaga* [2020] eKLR were relied upon.
8. The Plaintiff filed submissions dated August 30, 2023 arguing that since service of summons was done on the site and the developer was made aware of this suit, the non-service is a non-issue.
9. He further submits that the 1<sup>st</sup> defendant has come to court with unclean hands as she made the Plaintiff believe that Fatuma Ahmed was alive and by misrepresenting her on many occasions from her dealings of entering into a joint venture to acquiring National Construction Authority's approvals without grant of letters of administration.
10. It is also submitted that the process server in question (Amos Kivisu Mutambu) effected service properly where the owner of the suit property was believed to be conducting business and the services were exchanged after the lady of Somali descent affirmed that indeed she was Fatuma Ahmed.
11. Should this court set aside the default judgment? The judgment was entered in this matter on December 8, 2022, of which the defendants were permanently restrained from dealing with the plaintiff's property known as LR 36/1/50. The defendants did not enter appearance and now contend that service of summons was not effected.
12. In *Lee Mwathi Kimani v National Social Security Fund & another* [2014] eKLR it was held that:-

“....Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the defendant, the defendant has no valid invitation to defend the suit”
13. The affidavit of service sworn on May 30, 2022 by Kivisu Amos Mutambu indicates that the process server was accompanied by one Sahala Galgolo, on arrival they found a guard who;

“in turn pointed at me the Somali decent woman now the 1<sup>st</sup> defendant who was seated at the front office”.
14. There is no evidence to indicate that the woman in question introduced or identified herself as Fatma Ahmed, or was introduced as such by any one.
15. There is an averment advanced by the applicant that Fatuma Ahmed had passed on, but no supporting documents to that effect were availed.
16. I find that the Applicant has established that the alleged service of summons herein was not proper. She is however not a party to this suit and she has not availed the letters of administration for Fatma Ahmed.



17. The applicant cannot therefore present herself as the administrator of the estate of Fatma Ahmed. Since Amina Musa claims to be a co-owner, her participation in the proceedings shall be limited to her own claim, unless and until she demonstrates that she has legal capacity to represent Fatma Ahmed.

**Application dated 4.8.2023**

18. The above application is the second one, brought forth by the plaintiff seeking orders that pending determination of this suit, a temporary injunction do issue restraining the Defendants whether by themselves or by their servants from dealing with the property known as LR 36/1/50.
19. The application is based on grounds on its face and on the Plaintiff's supporting affidavit sworn on 4.8.2023. He avers that he is the registered owner of LR No. 36/1/50 and that the Defendants are claiming ownership by relying on the City Council of Nairobi's rates payment receipts and an indenture of conveyance that was not properly executed.
20. He avers that unless restrained, the Defendants will continue trespassing on the suit property and also continue with construction.
21. The application is opposed by one Amina Musa via her Affidavit sworn on 6.10.2023. She avers that she is registered as proprietor of the suit property with Fatuma Ahmed as her co-proprietor, having acquired the same in 1987.
22. I have considered all the arguments raised herein including the rival submissions. I find that at the time of filing the instant application for injunction, the Plaintiff already had a permanent injunction restraining the Defendants from interfering with the suit parcel in light of the judgment entered herein on December 8, 2022. However, the court has found that service was not proper.
23. The suit land is hotly contested and there appears to be competing claims of ownership. However, the person identified as Fatuma Ahmed is allegedly deceased, while the other alleged co-owner of that land, one Amina Musa is not a party in these proceedings. In such circumstances, the court cannot grant the injunction orders sought.

**Final orders:**

24. In the final analysis I proceed to give the following orders:
1. The Application dated August 4, 2023 is hereby Dismissed.
  2. The application dated July 11, 2023 is allowed to the extent that:
    - a. The Judgment dated December 8, 2022 is hereby set aside.
    - b. One Amina Musa is hereby joined in these proceedings as a 4<sup>th</sup> defendant.
    - c. The plaintiff is directed to serve fresh summons to enter appearance and pleadings upon all the defendants including the 1<sup>st</sup> defendant. Any party is however at liberty to avail evidence of the death of Fatma Ahmed.
  3. Each party is to bear their own costs of the applications.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**



**In the presence of:-**

M/s Ndiege for Plaintiff

Hosea for 1<sup>st</sup> Defendant

Court Assistant: June

