



Koena Limited v Mugambi (Sued in the capacity of administrator of the Estate of Margaret Njiiru M' Rithaa) (Environment & Land Case E109 of 2023) [2023] KEELC 22508 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22508 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E109 OF 2023
EK WABWOTO, J
DECEMBER 20, 2023**

BETWEEN

KOENA LIMITED PLAINTIFF

AND

PAUL GITOBU MUGAMBI (SUED IN THE CAPACITY OF ADMINISTRATOR OF THE ESTATE OF MARGARET NJIIRU M' RITHAA) DEFENDANT

RULING

1. In an application dated 20th November 2023, the Defendant seeks the following orders;
 - i. Spent...
 - ii. That this Honourable Court be pleased to review, vary, set aside and or vacate the ex parte orders made on 16th October 2023 and issued on 23rd October 2023.
 - iii. That the plaintiff's application dated 29th September 2023 be re-opened for interparties hearing on merit and or to enable the applicant herein file replying affidavit thereto for the purposes of hearing and determination of the same on merit.
 - iv. That costs of the application be provided for.
2. The application is premised on the grounds on the face of it and supported by the Affidavit sworn on 20th November 2023 by Paul Gitobu Mugambi.
3. The Application was opposed by the plaintiff. In opposition to the same, the plaintiff filed a replying affidavit sworn by Paul Kiprotich Limoh, the Director of the plaintiff on 28th November 2023.
4. During the plenary hearing of the application, the defendant argued that there was no service of the application dated 29th September 2023, the orders issued on the 16th October 2023 were based on non-



disclosure of facts by the plaintiff in respect to the sale agreement dated 21st March 2019. It was also argued that there was no contractual relationship between the plaintiff and the defendant over the property L.R No/209/7985.

5. It was further argued that plaintiff had presented a party to be served as Okongo Omogeni Advocates yet the said advocates had no prior instructions to act for the defendant in the matter. The court was urged to allow the application and set aside the earlier orders issued.
6. The plaintiff in opposing the application relied on the replying affidavit filed sworn by Paul Kiprotich Limoh on 28th November 2023. It was averred that the defendant was initially served with the application dated 29th September 2023 through the law firm of Okongo Omogeni Advocates on 9th October 2023. It was also averred that on the same day the said firm indicated that they did not have instructions and provided the defendant's phone number upon which service could be effected. It was further averred that the defendant was subsequently served on 11th October 2023 with the application dated 29th September 2023 vide WhatsApp through phone number 0724 xxxxx. The court was urged to dismiss the application with costs.
7. The court has considered the application and oral submission made by counsel for the parties and the main issue for determination is whether this court should proceed to vary and or set aside its orders made on 16th October 2023 on account of lack of proper service.
8. Paragraph 6 of the affidavit of service sworn by Simon Velela, a process server on 13th October 2023 indicates that the defendant was served with the application dated 29th October 2023 and the court order dated 6th October 2023 vide Whatsapp. During the hearing of this application, the defendant denied ever being served through the said mode of service.
9. Section 20 *Civil Procedure Act* requires that upon the institution of a suit, the defendant should be served in the prescribed manner in order to enter appearance and answer the claim. Order 5 provides the details regarding service. Rule 1(1) requires that 'When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.' The mode of service, in line with Rule 6 is by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.
10. Rule 8 requires that service be made in person where it is practicable unless the defendant has empowered an agent to accept service on his behalf. Service upon an advocate with instructions to accept service and enter appearance would suffice. Further, in line with Rules 13 and 15 a person who has been served is required to sign acknowledgment of service on the original summons, and an Affidavit of Service must be consequently filed as proof that service has been effected. The Affidavit of Service should show the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.
11. Under Rule 12, where the defendant cannot be found service may be effected through an agent or adult member of the family. Any other mode of service, by substituted means must be, as Rule 17 prescribes, with the leave of the Court. This is allowed where service cannot be effected through the ordinary means of service.
12. While technology has evolved, the truth of the matter is that personal service remains the best form of service in all areas of litigation. In the instant case, the defendant having denied being served vide WhatsApp, the questions of authentication of such service would equally arise. Uncertainty on service can lead to miscarriage of service. That is why a court should proceed with caution when determining the question of service. Each party is also entitled to a right to be heard.



13. In view of the foregoing, this court will proceed to allow the application dated 20th November 2023 in the following terms;
- i. The orders given on 16th October 2023 and issued on 23rd October 2023 are hereby set aside.
 - ii. The plaintiff's application dated 29th September 2023 shall be fixed for hearing at a date to be set after delivery of this ruling.
 - iii. Each party to bear own costs of the application.
14. Orders accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF DECEMBER 2023.

E. K. WABWOTO

JUDGE

