



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
LAND CASE NO. 92 OF 2004

1. PAUL LAGAT
2. FREDRICK GICIMU KURIA
3. SIMON KAMAU NGANGA
4. PETER JUMA MWANDA
5. RICHARD WAFULA.....APPLICANTS/DEFENDANTS
6. JACKSON KOSKEI
7. FRANCIS MWAURA
8. JOSEPH KIRWA CHUMO
9. DANIEL KIPLAGAT

VERSUS

DOUGLAS NGUNJIRI WAICHUNGU.....DEFENDANT/PLAINTIFF

R U L I N G

1. The applicants' Notice of Motion dated 31/1/2017 seeks the following orders:-

1.spent

2.spent

3. That the order made *ex parte* on 24/1/2017 that the applicants herein be arrested for failure to attend court be lifted, and set aside.

4. Costs be in the cause.

2. The application is supported by the affidavits of Simon Kamau Nganga, Joseph Kirwa Chumo, and Phyllis Kanyi, all sworn on 31/1/2017. It is alleged that the 1st, 2nd, 4th, 5th, 6th, 7th, 8th and 9th applicants were not served with the Notice To Show Cause dated 11/1/2017, that the 3rd applicant was served but sat in the wrong court all through only to learn later that the matter was being dealt by the Deputy Registrar and had already been dealt in his absence, and that the 10th applicant died in 2010. It is in those

circumstances, the applicants state, that the *ex parte* order was made and warrants of arrest issued against all applicants hence this application.

3. I find that the only issue that arises in respect of the application before me is whether service of the Notice to Show Cause on each and every applicant was proper. If it is found to have been improper, or that there was no service at all, then the warrants of arrest would have to be lifted and set aside *ex-debito justitiae*.

4. Simon Kamau Nganga, the 3rd applicant, admits that he was served on 21/1/2017 but that on the morning of 24/1/2017 he sat in Court No. 7 at the Kitale Law Courts only to learn that the matter had been dealt with by the Deputy Registrar and warrants of arrest issued against the applicants.

5. The 3rd applicant terms as false the averment by the process server that he made telephone calls and invited the 1st, 4th, 5th, 6th and 7th applicants to his house and from where the process server served those applicants. However, he states that he contacted the 1st, 4th, 5th, 6th and 7th applicants on the issue of the warrants of arrest and thereafter they contacted their lawyer on the record.

6. Joseph Kirwa Chumo the 8th applicant has sworn the second affidavit supporting the application. He states that he works with the County Government of Trans-Nzoia as a driver and that on the 21/1/2017 he was in Kitale town and returned to Moi's Bridge only in the evening. He states that he was not served with any summons requiring his attendance in court on 24/1/2017 and that he only learnt of the warrant of arrest on 24/1/2017 from the 3rd applicant who came to his workplace and informed him of the warrants of arrest issued.

7. The third supporting affidavit has been sworn by Phyllis Kanyi, who avers that she is the 2nd applicant's biological daughter and that the 2nd applicant left Matunda centre in the year 2012 for some unknown destination. The process server had indicated that he had served the Notice To Show Cause on the 2nd applicant's daughter at what he referred to as the 2nd applicant's home behind Matunda police station. The deponent confirms she lives behind Matunda police station but states that her father the 2nd applicant does not reside with her in her home.

8. I wish to first of all deal with the time period between the date of the alleged service and the date of the appearance in court stated in the Notice To Show Cause. Article 50 of the Constitution states that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. In order to uphold the requirement contained in Article 159(2) (d) of our Constitution which states that the purposes and principles of the Constitution shall be protected and promoted, it is necessary to accord any person who is required to answer any question in a court of law in connection with a dispute to which he is a party, sufficient time to prepare for his defence.

9. It is true that service on the 3rd applicant was effected on 21st January, 2017. Service on the 2nd applicant is said to have been effected on her daughter on the same date, though her daughter claims she has no idea as to whereabouts of the 2nd applicant.

10. Service on behalf of the 1st, 4th, 5th, 6th and 7th applicants is said to have been served upon them in the 3rd applicant's house on an allegation which is denied on 21/2/2017. On the same date, service is alleged to have been effected upon the 8th defendant on his own behalf and on behalf of the 9th applicant, and one Paul Kirwa Chumo the 10th defendant who is now said to be deceased, an allegation denied by the 8th applicant.

11. In the circumstances I find that there was no proper service upon all the applicants for the reasons that there was no proof of service upon the 1st, 2nd, 4th, 5th, 6th, 7th and 8th applicants and that though the 3rd applicant admits that he was served, the period between 21st January, 2017 that date being a Saturday, and

24th January, 2017, was not sufficient to enable him prepare for the court appearance on 24th January, 2017.

12. Having found that service on all the applicants (except the 9th applicant) was not properly effected, I have no alternative but to issue curative orders.

13. An order will therefore issue vacating the order made on 24/1/2017 requiring the applicants herein to be arrested for failure to attend court. An order lifting and setting aside the warrants of arrest issued pursuant to the order of 24/1/2017 is hereby issued.

14. However, the grant of those orders will not come without any cost to the applicants. The applicants are all hereby ordered to appear before the Deputy Registrar without fail on 14th June 2017 for the purposes of the Notice to Show Cause which as demonstrated in their application dated 31/1/2017, they are now well aware of, failure to which the respondent will be at liberty to seek fresh warrants against them without any further ado.

Signed, dated and delivered at Kitale on this 30th day of **May, 2017**.

MWANGI NJOROGE

JUDGE

30/05/2017

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Mr. Kiarie for the defendants

Mr. Khisa for the Plaintiff

Ruling read in open court in the presence of Counsel for the partes.

MWANGI NJOROGE

JUDGE

30/05/2017