



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1532 of 2005 (OS)

1. Land and Environmental Law Division
2. Subject of main suit – Land (House)

Adverse Possession

3. Application 7 February 2008
 - a) Seeks prayers for directions under Order XXXVI r 8 a 12 Civil Procedure Rules.
 - b) Originating Summons filed on 20 December 2005
 - c) Certificate of urgency filed 20 December 2005 seeking direction on manner in which the Originating Summons of 20 December 2005 may be heard.
 - d) Njagi J on 20 December 2005 gave orders that Originating Summons be personally served with proof of a notarised affidavit of service and that defendant to enter appearance within 21 days of service.
 - e) Defendant residence outside jurisdiction of country.
 - f) Plaintiff effects service on 26.10.06 at 14.30 hours outside jurisdiction of this court.
 - g) Plaintiff files application 7 February 2008 (2 years later) seeking for directions under order XXXIV r 8a, 12 Civil Procedure Rules as to manner of hearing of the Originating Summons.
4. Held:
 - a) The defendant/respondent resides outside the jurisdiction of this court
 - b) Njagi J ordered personal service. This meant that the plaintiff must comply with order V r 27 being service in a foreign country.
 - c) Service require that:-
 - i) Notice of summons (OS) must first be sealed with the seal of High Court for use out of Kenya; then
 - ii) Forwarded by the Registrar of the High Court of Kenya to the Minister Foreign Affairs (together with a copy of translation of the country if appealed.

- iii) That a request to further transmit through diplomatic channel to the Government of the country in which leave to service notice of summons has been given.
 - iv) That such request for leave must be by way of Form 9 Appendix A.
 - v) Substitute service is provided where personal service is not effected
 - vi) No service under Order V r 27 Civil Procedure Rules has in fact been effected.
 - vii) Compliance required before direction is given.
5. Case law – Nil
6. Advocate

E.O. Ongoya leading S. Sheikh of Shella Sheikh & Associates Advocates for the plaintiff/applicant (Ex parte) present

John Cecil Hawley – Defendant and unrepresented - the defendant-absent

ADRIAN RADCLIFFPLAINTIFF

VERSUS

JOHN CECIL HAWLEY BALLDEFENDANT

RULING

Application under order XXXIV r 8a 12 Civil Procedure Rules for directions:-

I: PROCEDURE

1. The main suit before me concerns land and has been brought by way of an originating Summons seeking prayers for adverse possession.

2. Under Order XXIV r 8a, 12 Civil Procedure Rules party may apply for directions in the manner in which the said Originating Summons may be heard. Either the respondent or the applicant are entitled to move the court for directions.

II: Background

3. The respondent herein resides outside the Jurisdiction of this court. He has been sued by the Plaintiff who filed this Originating Summons on 20 December 2005 seeking adverse possession. He also filed a certificate of urgency of 20 December 2005 seeking the court to urgently give direction as to the manner of hearing the Originating Summons. No injunction application had been filed.

4. The matter came before Njagi J on the same day of 20 December 2005 who ordered that the said Originating Summons be personally served upon the respondent.

5. On the 26 October 2006 the respondent was personally served outside the Jurisdiction of the country. No further action was taken on this file until 7 February 2008 when a fresh application by the plaintiff was made that there be direction given by the court as to the manner in which case should be disposed of. That the respondent having been served failed to enter appearance within 21 day as ordered by Njagi J. No service of the application before court had been effected on the respondent.

II: Opinion

6. The defendant/respondents resides outside the jurisdiction of this court. Njagi J ordered that there be personal service. This meant that the plaintiff was required to comply with order V r27 Civil Procedure Rules namely that any service that is to be effected by a person who is outside the jurisdiction of the court, an application under order v r 27 Civil Procedure Rules must be filed in forum 9 of appendix A. That is leave must be sought to service outside the jurisdiction through the Hon. The Chief Justice.

7. The notice of summons being in this case the Originating Summons must first be sealed with the seal of the High Court for use out of Kenya. It is forwarded to the Registrar the High Court of Kenya to transmit to the Minister of Foreign Affairs (where a transaction of the language of the other country is required it must be effected if applicable).

8. There is sought by the Registrar a request to transmit the documents through diplomatic channel to the Government of the country in which leave to service notice of summons has been given. As stated earlier such request for leave must be granted by way of form 9 Appendix A.

9. (Substitute service is provided for where personal service is not effected in the order V).

10. I therefore find that no service has in effect been made by the plaintiff. He requires to comply. For ease of clarification the plaintiff ought to first begin with a demand letter before filing suit. As a suit has been filed, where there is no demand letter the plaintiff is not entitled to costs.

11. I hereby direct that compliance of order V r 27 Civil Procedure Rules be effected. There will be no orders as to costs.

DATED THIS 8TH DAY OF APRIL 2008 AT NAIROBI.

M.A. ANG'AWA

JUDGE

E.O. Ongoya leading S. Sheikh of Shella Sheikh & Associates Advocates for the plaintiff/applicant (Ex parte) present

John Cecil Hawley – Defendant and unrepresented - the defendant-absent