



**Kahoro v Gitahi (Environment & Land Case 267 of 2015)  
[2022] KEELC 13751 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13751 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 267 OF 2015**

**M SILA, J**

**OCTOBER 19, 2022**

**BETWEEN**

**RUTH WANJIRU KAHORO ..... PLAINTIFF**

**AND**

**GEORGE GITONGA GITAHI ..... DEFENDANT**

**RULING**

1. The application before me is that dated March 5, 2018 filed by the defendant. He seeks the following orders :-
  - i. That this suit be deemed as having abated and the same be struck out with costs.
  - ii. That costs of this application be provided for.The application is based on the following grounds :-
  - a. The plaintiff has failed to prepare summons to enter appearance for service upon the defendant.
  - b. The plaintiff has to date failed and or neglected to serve summons to enter appearance upon the defendant.
  - c. The suit is otherwise an abuse of the process of court
  - d. It is in the interests of justice that the suit herein be struck out with costs.
2. The application is supported by the affidavit of one Joyce Nyaguthi Kibetu who has averred that she holds a power of attorney donated by the defendant. I will get to this in a short while for I think that it is best that I first place the issues into context.



3. This suit was commenced by way of a plaint filed on October 21, 2015. The plaintiff pleaded that he purchased some sub-plots No XX, XX, XX, XX and XX from different persons in the year 2010 and 2014 which were subdivisions of a larger parcel of land owned by Voi Development Limited. It is pleaded that the defendant was a pastor with PCEA and was in the forefront of negotiations between Voi Development Limited and the individuals who were interested in purchasing the plots. The plaintiff avers that he has been waiting for issuance of titles for the sub-plots which process was being handled by the defendant. The plaintiff pleads that in September 2014, he saw an advertisement in the Standard Newspaper where the plots belonging to her but registered in the name of the defendant as CR No 6XXXX, 6XXXX, 6XXXX and 6XXXX, being respectively subdivision numbers 1503X/XX, 1503X/XX, 1503X/XX and 1503X/XX, were to be amalgamated to form a plot number 1503X/XX (original No 1503X/XX). The plaintiff contends that the registration of the defendant as proprietor of the sub-plots was done fraudulently and through misrepresentation of facts by the defendant to the Lands office, inter alia that the defendant knew that these plots belong to the plaintiff. In the suit, the plaintiff seeks the following orders (slightly paraphrased for brevity) :-
  - a. A declaration that plot No XX, XX, XX, XX and XX and 1503XXX belongs to the plaintiff and the plaintiff is entitled to possession, occupation and use of the same.
  - b. That titles to the suit lands be issued to the plaintiff and the registration of the defendant be cancelled.
  - c. A permanent injunction against the defendant from interfering with the plaintiff's peaceful occupation of the suit lands.
  - d. Costs of the suit.
4. On December 1, 2015 a notice of appointment of advocate was filed by M/s Mwakireti Ndumia & Company Advocates on behalf of the defendant. Through an application dated October 16, 2015, the plaintiff sought orders of injunction to restrain the defendant from dealing with the disputed parcels of land. A replying affidavit was filed by Joyce Nyaguthi Kibetu opposing the said application. The application was heard inter partes and dismissed.
5. There followed another application dated January 28, 2016 which was an application of stay pending appeal filed by the plaintiff. Again Joyce Nyaguthi Kibetu filed a replying affidavit opposing the said motion. This application was allowed on June 30, 2016.
6. A third application dated June 10, 2016 was filed, seeking that Joyce Nyaguthi Kibetu be cited for contempt for violating the order of June 30, 2016. As in the other two earlier applications, the said Ms Kibetu filed an affidavit replying to the said motion. The application was heard and dismissed on October 6, 2017.
7. This application was subsequently filed on March 6, 2018. The supporting affidavit is sworn by Joyce Nyaguthi Kibetu. She has attached the special power of attorney donated to her by the defendant. I can see that the said power of attorney was executed in Georgia on November 21, 2015 and I assume that the defendant operates out of the country thus the donation of the special power of attorney. Inter alia, Ms Kibetu has deposed that to date the plaintiff has failed to serve the defendant with summons to enter appearance and the plaint. She contends that failure to serve summons for more than 2 years renders the suit a nullity. She also claims that the suit filed by the plaintiff is an abuse of the court process.
8. The plaintiff filed an affidavit in response. In its, she deposed that she is informed by her erstwhile counsel Mr Eliakim Odhiambo, that his law firm served summons to enter appearance through email. A copy of email dated May 29, 2015 and reply by the defendant dated May 30, 2015 is annexed.



9. I have considered the application alongside the submissions of Mr Mwakireti for the applicant and Mrs Shariff for the plaintiff. The defendant through his appointed attorney of course contends that he has never been served with summons. The plaintiff insists that service was done through email. Certainly, if I hold that service was effected, then I must proceed to dismiss this application and need not interrogate whether or not the suit has abated pursuant to order 5 rule 2 for failure to serve the summons within two years.
10. I have already mentioned that this suit was filed on October 15, 2015. I have seen the annexed exchange of emails where it is said that service was effected. There is a query in one of the emails asking whether the defendant has received the documents and the defendant replied with one word 'some.' I note that subsequently there was appointment of counsel and donation of a power of attorney to Ms Kibetu. The power of attorney is telling. It states as follows :-

' I, George Gitonga Gitahi... do hereby appoint Joyce Nyaguthi Kibetu... my attorney to deal with the process of amalgamation and subdivision of LR No 1503XXXXXX ... belonging to me and also to represent me in the Mombasa Environment and Land Court Case Number 267 of 2015 ... and to make such appearances and applications and do all such acts, matters and things in my stead as may be necessary or expedient for carrying out the powers thereby given...'
11. It will be seen that the special power of attorney is very elaborate on the appointment of Ms Kibetu to represent the defendant in this suit. I ask myself, if indeed the defendant was never served as it is now alleged, how then did he come to appoint Ms Kibetu to be his attorney ? I have already shown that Ms Kibetu has consistently been filing affidavits in the matter since inception of the suit. In addition, there is no affidavit coming from the defendant himself contending that he was never served with summons.
12. The only reasonable conclusion that one can reach, and this is the conclusion that I so reach, is that the defendant was duly served with summons by way of email. He acknowledged the same and proceeded to appoint Ms Kibetu to represent him in the suit given that he is out of the country. His appointed attorney has been fully participating in the suit and I do not see how she could have fully participated without having seen the pleadings in this suit.
13. For the above reasons, it will be seen that I find no merit in this application. It is hereby dismissed with costs.

Orders accordingly.

**DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**MOMBASA**

Delivered in Presence of :-

Mrs. Shariff for the plaintiff/respondent.

No Appearance on the part of M/s Mwakireti, Ndumia & Company for the defendant/applicant.

Court Assistant : Wilson Rabong'o.

