



REPUBLIC OF KENYA

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

Civil Case (ELC) 183 of 2007

ANDREW MUYUA KARANJA.....PLAINTIFF

VERSUS

EMILIO WANDERI KAHIGA.....DEFENDANT

RULING

This suit was commenced by way of Originating Summons by the Plaintiff in person seeking orders that the Defendant's title in respect of land parcel **LR No RUIRU/RUIRU EAST/BLOCK 1/68** and now subdivided to give rise to new titles being **LR No RUIRU/RUIRU E/BLOCK 1/2518** and **LR No RUIRU/RUIRU E/BLOCK 1/2527** all measuring 0.50 Hectares or thereabouts be deemed and declared to have been extinguished through adverse possession and the Applicant be declared as the proprietor of the whole of the original suit land being **LR No RUIRU/RUIRU E/B1/68** and now subdivided to give rise to new numbers being **LR No. RUIRU/RUIRU E1 B1/2518** and **2527** and the subdivision be cancelled and or be declared null and void.

The summons were served upon the Defendant through the Advocate then on record **M/s MOSES SIAGI & CO. Advocates**.

The said firm of Advocates entered appearance on 13th August 2007 but did not file a replying affidavit to the originating summons.

On 2nd October 2007 the Plaintiff brought a Chamber Summons under **Order XXXVI R 8A** and 12 of the Civil Procedure Rules seeking directions in the suit. The application for directions was served upon **M/s MOSES SIAGI** the Advocates on record then for the Respondent who did acknowledge service by stamping and signing the same.

On 19th October 2007 the Plaintiff appeared before the Aganyanya J. in Chambers and directions were taken in the absence of the Defendant and/or his advocate. The Judge gave directions that the suit be heard in Nairobi for one day by viva voce evidence.

On 8th February 2008 the firm of **M/s G. W. WAMBUGU & CO Advocates** came on record and filed Notice of Change of Advocates which was served on **M/s MOSES SIAGI & CO. Advocates** who were previously on record for the Defendant as well as the Plaintiff in person.

On 12th February 2008 the firm of **G. W. WAMBUGU & CO. Advocates** who had just come on record for the Defendant wrote the Plaintiff inviting him to send his representative to meet theirs at the High Court Registry on 27th February 2008 at 10 am with a view to fix a hearing date for the originating

summons dated 20th June 2007.

On the 27th February 2008 the record bears that the Plaintiff did not send his representative as invited and the hearing date was taken ex parte and the Defendant was ordered to issue hearing notice to the Plaintiff.

The hearing notice which the Defendant issued read as follows.

HEARING NOTICE

To: ANDREW MUNYA KARANJA

P. O. Box 166

RUIRU

TAKE NOTICE that the originating summons dated 20th June 2007 has been fixed for hearing at 900 O'clock in the forenoon or soon thereafter.

TAKE FURTHER NOTICE that in default of your attendance on the said date and time, the court may proceed to hear the same ex parte and will be decided in your absence and any such order may be given as the court may deem just.

DATED at NAIROBI this 1st of March 2008.

There is a return of service filed on 8th July 2008 by JAMES M. MASIKA which stipulates how service was effected upon the Plaintiff herein.

AFFIDAVIT OF SERVICE

I, JAMES MASIKA of Post Office Box 19920 Nairobi in the Republic of Kenya do hereby make oath and state as follows:-

- (1) That I am a process server duly authorized to serve court process of this Honourable Court
- (2) That on 6th March 2008 I received a Hearing Notice dated 1st March 2008 from M/s W.G. Wambugu & Co. Advocates with instructions to serve the same upon the Applicant herein Andrew Munya Karanja of P. O. Box 166 Ruiru.
- (3) That on the same day 6th March 2008 I proceeded to the GPO Post Office whereby I served the Applicant by way of substituted service through his known address and was issued with a postal receipt.
- (4) That I hereby return the said hearing notice to this Honourable Court duly served upon the Applicant.
- (5) That what is stated herein is true to the best of my knowledge, information and belief.

From the affidavit evidence by the process server it is clear that the process server on receipt of the hearing notice, he proceeded to the GPO post office and effected service upon the Applicant by substituted service through his known address. This was not proper service.

As provided for under Order V Rule 9 of the Civil Procedure Rules whenever it is practicable service must be made on the Defendant or the Plaintiff in this regard in person unless he has an agent empowered to accept service in which case service on the agent shall be sufficient or on any adult member of the family.

Personal service is the ideal service. Before it is departed from there must be circumstances which would reasonably support the departure and the process server must swear an affidavit showing the attempts he made to effect personal service. And Rule 17 of the Order provides that where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order the court may on application order that service be effected through substituted service.

The Defendant having not filed a replying affidavit to the originating summons dated 20th June 2007 the pleadings had not closed and there being no evidence of proper service the application for dismissal of the suit was premature and the same is dismissed.

Dated and delivered at Nairobi this 17th day of October 2008.

J. L. A. OSIEMO

JUDGE