



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 102 of 2003

BERNARD KANAMPIU MUKUNGI.....PLAINTIFF/RESPONDENT

V E R S U S

KAMENDE M. MUGAMBI.....1ST DEFENDANT/APPLICANT

KARUGU KANYIRU.....2ND DEFENDANT/APPLICANT

GATORO KANYIRI.....3RD DEFENDANT/APPLICANT

KIOGONDOKI M. MWIKIAMBU.....4TH DEFENDANT/APPLICANT

MBERIA NTOCHOKERA.....5TH DEFENDANT/APPLICANT

JULIUS KAROBIA MICANGI.....6TH DEFENDANT/APPLICANT

SARAH THAIRORA MUGAMBI.....7TH DEFENDANT/APPLICANT

OBADIAH J. MURIUKI.....8TH DEFENDANT/APPLICANT

ISAYA KUBIRIA.....9TH DEFENDANT/APPLICANT

R U L I N G

1. The Application dated 14.3. 2007 is premised on Order IXA Rule 6 and 10, Order XXI Rule 22 of the Civil Procedure Act. The specific prayers sought are;-

- 1. That service of this application be dispensed with at 1st instance.**
- 2. That there be a stay of execution of the judgment of this court dated 27th July 2004 pending hearing and determination of this application or until further orders of this court.**
- 3. That the judgment of 27th July 2004 and all consequential orders be set aside or vacated and the Defendants be allowed to file their Defence and defend suit herein.**
- 4. That the Defendants' Defence annexed hereby be deemed properly filed and served.**

5. That the court to grant any other relief.”

2. The only substantive ground set out support thereof is that the Defendants were never served with the summons to Enter Appearance and that the judgment entered in default of appearance would adversely affect them. The Application is supported by the Affidavit of M.G. Kaume, advocate and a draft Statement of Defence is attached to that Affidavit and it includes a counter-claim against the Plaintiffs. The Counter-Claim is a prayer for a permanent injunction to restrain the Plaintiffs from interfering with the user of 4 acres of land within Ngongoaka area, where the suit land is situated.

3. In other Supporting Affidavits sworn by the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th and 9th Defendants respectively, service of summons to enter appearance is denied and the contents of an Affidavit sworn on 15.7.2003 by Stephen Waititu Kimani are faulted.

4. The plaintiff through his advocates filed elaborage Grounds of Opposition and a Replying Affidavit and in the latter, the Respondent deponed that the Applicants disregarded the court summons and that their Application has no merit.

5. I listened to the detailed submissions by both advocates appearing and for my part, the only issue to consider is whether indeed the applicants were served but ignored the summons, and whether in the circumstances of this case, they are entitled to the orders they now seek. The point to start would be the Affidavit of Service. In the course of arguments on the Application, I ordered that Stephen Kimani Waititu be summoned to testify on oath regarding service of summons on the applicants. The Advocate for the Respondent swore an affidavit stating that the said person had relocated to Southern Sudan and could not be produced in court as required. I am therefore unable to know his side of the story regarding the contested service.

6. In any event, the said Stephen Kimani Waititu swore two Affidavits of Service. In the one sworn on 15.7.2003, he states as follows at paragraphs 2, 3, 4, 5 and 6;

“2 That on the 4th day of July 2003 I received certified copies of order issued on the 4th day of July 2003, a chamber summons application filed under certificate of urgency together with the supporting Affidavit and the annexures thereto. I also received summonses to enter appearance together with copies of plaints and the verifying affidavits all on the above matter from the firm of GITAU J.H. MWARA advocate with instructing to effect service of the same upon all the defendants herein, who resides at Thangatha Location in Tigania East Constituency within Meru North District in the Eastern Province.

3. That on the 7th day of July 2003, I was accompanied by the plaintiff herein Mr. Bernard Kanampiu Mukungi whom we had arranged to meet herein in Nairobi whereby we hired a taxi at around 7.00 a.m. then we proceeded to Thangatha Location via Meru Town, Mikinduri Township, Kunati townships and to Ngongoaka.

4. That on arrival to EKANA VILLAGE we proceeded to the houses of all the defendants herein while being accompanied by the plaintiff herein and another elder man by the name Mr. Mwenda whereby they pointed out to me all the defendants individually whom I served personally from house to house whom they accepted service but some refused to sign.

5. That the 1st, 4th, 5th, 6th, and 9th defendants acknowledged their signatures on my reserved copy of order while the 2nd, 3rd defendants were accepted by their wives who also acknowledged their signatures on behalf of their husbands, but promised me that they would let them have their copies once they arrive home.

6. That the 7th and 8th defendants accepted service which I served to them personally but refused to acknowledge their signatures, by becoming hostile to me and the plaintiff”

7. In another Affidavit sworn on 1.9.2003 he depones as follows at paragraphs 2,3,4 and 5

“2.) That on the 4th day of July 2003 I received summonses to enter appearance together with copies of plaints and the verifying affidavits all on the above matter from the firm of GITAU J.H. MWARA Advocate with instructing to effect services of the same upon all the defendants herein, who resides at thangatha location in Tigania East constituency within Meru North District in the Eastern Province.

3. That on the 7th day of July 2003, I was accompanied by the plaintiff herein Mr. Benard Kanampiu Mukungi whom we had arranged to meet at Nairobi whereby we hired a taxi at around 7.00 a.m. Then we proceeded to Thangatha Location via Meru Town Mikinduri township, Kunati townships and to Ngongoaka Village.

4. That on arrival to EKANA VILLAGE I proceeded to the houses of all the defendants herein while being accompanied by the Plaintiff herein and another elder man by the name Mr. Mwenda whereby they pointed out to me all the defendants individually whom I served personally from house to house whereby the 3rd and 4th Defendants accepted service but the 1st, 2nd, 5th, 7th, 8th, and 9th Defendant refused to sign with a lot of hostility.”

8. It is clear that the two Affidavits relate to purported service at the same time and place but their contents are wholly contradictory of each other. I say so because in the one of 15.7.2003 he purportedly served the 2nd and 3rd Defendants through their wives but the one of 1.9.2003 says something different because he allegedly served those Defendants personally and in fact that the 3rd Defendant actually accepted service. In the Affidavit of 15.7.2003, he depones that only the 7th and 8th Defendants refused to accept service and refused to sign the reverse copy of the Summons and order but in the other the 1st, 2nd, 5th, 7th, 8th and 9th Defendants all refused to accept service. Further, while in the earlier one, only the 7th and 8th Defendants were allegedly hostile to the process server, the list grows longer in the latter Affidavit because the 1st, 2nd, 5th and 9th Defendants are added as hostile recipients. To my mind, these are material contradictions that effect the credibility of service. It is worse when the process server could not be traced to explain the anomalies in the two Affidavits of Service.

9. I am aware that where the service of summons is discredited as is the case here, then most likely than not, no service was effected or at the least, whatever was called service was a nullity. If that be so, then the applicants are entitled to setting aside of the judgment ex debito justitiae. Had Onyancha, J. who heard the suit been given the circumstances of the purported service, as I have endeavoured to set out above, the learned Judge would not have proceeded to formal proof.

10. It is also my considered view that because setting aside is a matter of discretion and the discretion is a free one and without fetters, this court has to do justice in the circumstances of the case and the principles to guide it are;

(i) That there are good reasons for failure to enter appearance and in this case, I find the reason given to be sound and reasonable because the process server cannot conclusively and lawfully be said to have effected service.

(ii) That the nature of the action; necessitates hearing on the merits; in this case I have noted that the dispute relates to large tracts of land in Ngongoaka area which include on them schools and residences. Land is always a sensitive and emotional matter and as Ringera J. said in Kenya Star Enterprises Ltd vs Group Four Security Ltd and Another HCCC 4976/1992 (Nai. – U.R.), in such circumstances, **“unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by failure to follow any of the rules of procedure”**

(iii) That there is an arguable defence; the draft statement of Defence attached to the Supporting

Affidavit of M.G. Kaume raises a number of issues which need to be determined on the merits. They include whether the Defendants are entitled to the suit land or at least 25 acres of it; the developments on it; rights of the Plaintiff vis-avis other parties and the nature of the registration of the suit land i.e. whether it is freehold or unadjudicated land. All these matters need to be canvassed and determinate findings made by this court.

(iv) Whether the Plaintiff can be compensated with an award of costs; I will leave this aspect to the end of this Ruling.

11. In coming to an end however, lengthy submissions were made by advocates appearing but having taken the approach that service was the only fundamental issue to address, once I have done that, I see no good reason to touch on other issues so raised.

12. As was stated in Sebei District Administration vs Gasvali and others (1968) E.A. 300, any court properly addressing itself to the circumstances of a case, should only deny any party or subject a hearing as a last resort. That holding was also amplified in Mwalia vs Kenya Bureau of Standards [2001] EA 148 (CAT) and by this court in Kenya National Union of Teachers vs Michael Kungu Kigia HCCC 122/2003 (Meru – U-R.).

13. For the above reasons and as a matter of judicial duty to uphold the integrity and dignity of the judicial process, each party must have its day in court and the interlocutory and ex-parte judgment entered in this case together with all consequential orders made must be vacated and set aside. In the event, prayers 3 and 4 of the Application dated 14.3.2005 are hereby granted.

14. As to costs, the Defendants are not in any way to blame for their eventual predicament and I shall make no order as to costs for that reason.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In presence of

Mr. Gitau Advocate for the Plaintiffs/Applicant N/A Advocate for the Defendant/Respondent

ISAAC LENAOLA

JUDGE