



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

PETITION NO. 4 OF 2017

**IN THE MATTER OF: CHAPTER FOUR, THE BILL OF RIGHTS, ARTICLES 19, 20, 21, 22, 23, 40 AND 159(2) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: AN ALLEGED VIOLATION OF THE RIGHT TO OWN LAND BY THE RABAI COMMUNITY UNDER
ARTICLE 40 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: ARTICLE 63 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF: THE COMMUNITY LAND ACT, NO. 27 OF 2016

AND

**IN THE MATTER OF: A PETITION BY THE RESIDENTS AND MEMBERS OF THE RABAI COMMUNITY FOR THE
ILLEGAL AND IMPROPER ACQUISITION OF KILIFI/KINUNG'UNA/15 BY LEAH MASINDE, HAMISI AMBALE BUGO
AND MUGO**

BETWEEN

1. MAZERA KATEMBO MAZERA.....1ST PETITIONER
2. EMMANUEL MASUMBUKO CHIVATIS.....2ND PETITIONER
3. GIBSON NDENGE CHAI.....3RD PETITIONER
4. ELIUD MWANZISE CHENGO.....4TH PETITIONER

(Suing on their own behalf and on behalf of their families and all the members
and residents of the Rabai Community, living on plot Kilifi/Kingung'una/15
situated in Ribe Location, Kingung'una area)

AND

1. LEAH MASINDE.....1ST RESPONDENT
2. HAMISI AMBALE BUGO.....2ND RESPONDENT

3. JOHN MUGO.....3RD RESPONDENT
4. THE LAND REGISTRAR KILIFI.....4TH RESPONDENT
5. THE CHIEF LAND REGISTRAR.....5TH RESPONDENT
6. THE HONOURABLE ATTORNEY GENERAL.....6TH RESPONDENT
7. THE NATIONAL LAND COMMISSION.....7TH RESPONDENT
8. THE COUNTY GOVERNMENT OF KILIFI.....8TH RESPONDENT

RULING

1. By this Notice of Motion application dated 18th February 2020, the four Petitioners pray for Orders:

2) That this Honourable Court be pleased to review its orders issued on 6/4/2018;

3) That leave be granted to serve the Petition and the application dated 23rd March 2018 by way of substituted service to the 3rd Respondent last known address(of) P.O. Box 302 Kaloleni;

4) That this Honourable Court be pleased to strike out the 1st Respondent from this Petition; and

5) That the costs of this application be provided for.

2. The Motion which is supported by an Affidavit sworn by the 3rd Petitioner Gibson Ndenge Chai is based on the grounds that:

a) Through an order issued on 6/4/2018, this Court directed the Petitioners to serve the Petition and notice to the 1st to 3rd Respondents by way of an advertisement either in the Daily Nation or Standard Newspaper;

b) The Petitioners proceeded to obtain quotations from the named print media but the costs were too high for the Petitioners to raise;

c) The Petitioners have since learnt of the 3rd Respondent's address through a search application that the 3rd Respondent conducted at the Kilifi Land Registry and they now seek to serve the 3rd Respondent through the said address being P.O. Box 302 Kaloleni; and

d) The Petitioners have unanimously agreed to withdraw the Petition against the 1st Respondent.

3. I have considered the application which was not opposed by the other Respondents. In regard to the request for substituted service, there are a number of authorities which point out that the primary consideration in such cases is to bring the suit instituted to the personal attention of the Defendant.

4. In this respect, Order 5 Rule 17 of the Civil Procedure Rules provides:

“(1) 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 the summons to be served by affixing a copy thereof in some conspicuous part of the house if any in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

2) Substituted Service under an order of the Court shall be as effectual as if it had been made on the defendant personally.

3)

5. In the matter before me, the four Petitioners suing on their own behalf and on behalf of their families and those described as all the members and residents of the Rabai Community living on Plot No. Kilifi/Kinung'una/15 instituted this Petition against the eight Respondents named in the Petition. A perusal of the Petition reveals that the 3rd Respondent who is said to be one of the registered owners of the suit property is simply named as “Mugo”.

6. The reason for the use of the single name for identify can be discerned from paragraph 12 of the Petition wherein the Petitioners state as follows:

“12. The Petitioners have recently discovered that the property was transferred to Hamisi Ambale Bugo, the 2nd Respondent and

another unknown person whom the Petitioners identified as Mugo the 3rd Respondent”.

7. In an application filed after the institution of the Petition dated 22nd March 2018, the Petitioners sought at prayer No. 4 thereof an order as follows:

4. That leave be granted to serve the Petition and this Motion by way of advertisement once either in the Daily Nation Newspaper or the Standard Newspaper upon Leah Masinde and John Mugo as per annexure GNC ‘2’ ”.

8. While it was not clear how and when the Petitioners came to know that the 3rd Respondent sued herein as Mugo also went by the name John, that application was allowed by this Court on 5th April 2018.

9. It is however apparent that those Respondents were not served despite the leave and by this present application, the Petitioners now urge this Court to be allowed to discontinue the claim against the said Leah Masinde (the 1st Respondent) and to review its orders of 5th April 2018 and to be allowed to serve the 3rd Respondent through a Postal address which the Petitioners claim they found from a Search application that the 3rd Respondent is alleged to have conducted at the Kilifi Land Registry.

10. I have looked at the undated Application for Official Search annexed to the Petitioners application. It was not clear to me how the Petitioners came across it and how they established that the address thereon belonged to the 3rd Respondent. Furthermore, the document is in the name of one John Mugo Githaiga and it was not clear to me whether the person named therein is the same one described invariably as ‘Mugo’ in the Petition and as John Mugo in the Prayer for leave aforementioned.

11. As it were, the Rules provide for the Court to be satisfied that the substituted mode of service brings the suit instituted to the personal attention of the Respondent. It was not clear to me how the address sought to be used had been procured and how the Petitioners ascertained that it belonged to the 3rd Respondent.

12. At any rate, this Court had already on the application made by the Petitioners directed an appropriate mode of substituted service. I did not think that the claim that the Petitioners cannot afford to meet the costs of the advertisement was sufficient reason to depart from the requirements that this Court should be satisfied that the mode of substituted service brings notice of the instituted suit to the personal attention of the Respondent.

13. Accordingly, I decline to allow Prayers Nos. 2 and 3 of the application. I do however allow the application in terms of Prayer No. 4 to the effect that the name of the 1st Respondent is hereby struck out of this Petition.

14. I make no order as to costs.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE