



Cheburet v Gichuru (Environmental and Land Originating Summons E024 of 2024) [2024] KEELC 6656 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6656 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2024
FO NYAGAKA, J
OCTOBER 9, 2024**

BETWEEN

BENARD KEITANY CHEBURET PLAINTIFF

AND

ROBERT GICHURU DEFENDANT

RULING

1. The Plaintiff/Applicant filed this suit on 14/06/2024 based on an Originating Summons dated 13/06/2024. He sought a determination on a number of issues. Among them was that the Court does issue a declaration that the Defendant/Respondent holds the suit property in trust for him. Another one was that the Defendant be directed to execute, deliver and hand over documents of transfer and application for consent the title deed in respect the suit land, namely, Kwanza/Namanjala Block 4/ Kapsitwet/349 measuring 3.370 Hectares. In the alternative, he sought that the original title deed documents in respect of the suit land currently in the custody of the Defendant be dispensed with. He also sought for an order of a prohibitory injunction against the Defendant, whether by himself or his servants, agents and or any other persons claiming through him whatsoever from offering for sale, selling, transferring or charging, leasing or interfering with the suit property.
2. Upon filing the suit, the plaintiff filed an Application dated 13/08/2024 on 21/08/2024. He brought it under Order 5 Rule 17 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya, 2010 and all enabling provisions of the law. He sought for the Orders that:-
 1. That the Plaintiff herein be granted leave to serve the Defendant herein through substituted service by advertising the Summons in one of the local circulating dailies.
 2. That costs me in the course.



3. He relied on four grounds, namely, that he had instituted the suit against the Defendant for a declaration that he had acquired the title to the suit land by way of adverse possession; the whereabouts of the Defendant remained a mystery despite exercising due diligence, and all efforts to the Defendants could not be traced; to fast track the hearing and conclusion of the matter leave of the court was necessary to facilitate substituted service.
4. He relied on the Supporting Affidavit sworn by himself on 13/08/2024. He reiterated in deposition from the contents of the grounds in support of the application. He added that the summons in this matter were issued on 10/07/2024 and efforts to trace the Defendant had proved futile. That the application was brought timelessly after failing to trace the Defendant.
5. When the court considered the Application and the supporting Affidavit, on 28/08/2024, when the Court had fixed it for hearing, learned counsel for the Applicant appeared and argued that attempts of service of summons had been demonstrated. However, the Court formed the opinion that the Applicant had not complied with Order 5 Rules 7, 8, 12, 13, 14, 15 and 17 of the Civil Procedure Rules, because the Applicant had not annexed an Affidavit of Service or filed one to show the attempts of service the process server had made on the Defendant. It therefore directed that the Applicant files an Affidavit of Service and demonstrates through a document given by the Area Chief or Assistant Chief to confirm that indeed the Defendant or his family did not reside on the suit land or within his area of jurisdiction.
6. The Applicant filed an Affidavit of Service on 18/09/2024 sworn by one George Mumali, the process server. He swore the same on the same date. To it was annexed a letter dated 13/09/2024 written by the Assistant Chief of the of the Kapsitwet Sub-location. By it the author explained that the Defendant neither resided in his area of authority nor was he known to him. Further, that the Applicant resided on the land and had developed the land.
7. The letter was an annexure to the Affidavit sworn by George Mumali deposing that on the 12/09/2024 he had received the summons to enter appearance, the originating summons and supporting affidavit, together with their annexures from the Plaintiffs advocates with instructions to serve them upon one Robert Gichuru, The Defendant herein. Further, he proceeded on the said date to the office of the Assistant Chief of Kapsitwet in Kwanza Location. Upon arrival he met the Assistant Chief from whom he inquired the whereabouts of Defendant. The Area Chief informed him that he did not know where the Defendant resided, and even his village elders did not know or have any idea where he resided. Further, the Area Chief informed him that the suit land had always been occupied by the Plaintiff for over 20 years. He then deposed that his efforts to trace the Defendant were in vain and his whereabouts unknown.
8. I have considered the Application. The issue before me is whether the Applicant has demonstrated that he is entitled to the grant of orders that he serves the Application through substituted service.
9. Service of summons to enter appearance on a Defendant who is natural person in his private capacity is provided for in Order 5 of the Civil Procedure Rules. The Plaintiff, Petitioner or Claimant has a number of steps to follow. First the attempt of the service has to be personal as provided under Rule 7 or on an agent duly authorized to accept service as provided for under Rule 8 if he has an authorized agent or advocate. If the process server fails to trace the Defendant or his agent after a number of attempts he can serve an adult member of the family as provided for under Rule 12. The person served has to accept service by affixing his signature or mark of acceptance on the copy of summons which is returned to the judge as a confirmation of the act but where the defendant refuses to append his signature or mark on the summons the process server may do an affidavit of service stating as much.



10. In the event that the attempts referred to above fail, the Plaintiff may apply to the court for service through substituted service, as provided for under Rule 17. This may be “by affixing a copy thereof in some conspicuous place in the court-house, and also upon 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”. The other manner may be by advertisement as provided for under Rule 17(4).
11. In the instant application the Applicant has not demonstrated that he made actual attempts to serve the summons to enter appearance as summarized above. In these circumstances, the Court could as well refuse the application. However, and as an exception, that is to say, it is not to be the norm or a basis for establishing a custom or practice in future situations akin to the instant one, this Court relies on Article 159(2)(d) of *the Constitution*, to accept the attempt to trace the Defendant through the area sub-chief but in vain, as a fulfillment of the requirements of Rules 7, 8 and 12 of the Order 5 of the Civil Procedure Rules, 2010.
12. The upshot is that the Application dated 13/08/2024 is allowed as prayed but on the following conditions:-
 1. First, the Applicant shall advertise the summons to enter appearance and the pleading herein in either the Daily Nation or the Standard Newspaper, of a size to be specified by the Deputy Registrar, within the next twenty-one (21) days.
 2. Second, the Plaintiff is required also to make copies of the summons to enter appearance and affix copies thereof in the A3 size of the paper on the outside of his gate and conspicuous placed of the four (4) corners of the plot, within the next seven (7) days for 14 days.
 3. This matter shall be mentioned on 06/11/2024 to confirm compliance of these orders.
13. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA TEAMS PLATFORM THIS 9TH DAY OF OCTOBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Miss Keya Advocate-----for the Plaintiff/Applicant

