



**Tek v Kibet (Enviromental and Land Originating Summons
E022 of 2023) [2024] KEELC 6478 (KLR) (3 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E022 OF 2023
FO NYAGAKA, J
OCTOBER 3, 2024**

BETWEEN

ROSEBELLA CHEMUTAI TEK PLAINTIFF

AND

KIPTTEL KIBET 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/353. In the alternative, he sought that be 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 21/8//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
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. This is because Order 5 Rule 7 provides that where there is more than one recipient, service be effected on each one of them. Order 5 Rule 8(1) then provides that;

“Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.”
6. Order 5 Rule 12 provides;

“Where in any suit, after a reasonable number of attempts have been made to serve the defendant, and defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him.”
7. And Order 5 Rule 13 provides;

“Where a duplicate of the summons is duly delivered or tendered to the defendant personally or to an agent or other person on his behalf, the defendant or such agent or other person shall be required to endorse an acknowledgment of service on the original summons:
Provided that, if the court is satisfied that the defendant or such agent or other person has refused so to endorse, the court may declare the summons to have been duly served.”
8. Order 5 Rule 14 provides that;

“Where the serving officer, after using all due and reasonable diligence, cannot find the defendant, or any person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, together with an affidavit of service.”



9. And, lastly, Order 5 Rule 17(1) provides,

“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 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.”

10. As can be seen from the detailed manner in which the Rules Committee intended that service be effected, the process ought to be meticulous. This is because, in my humble opinion, service of process is an integral part of the constitutional right to fair hearing and the rules of natural justice that every party to a dispute ought to be given an opportunity to heard. Failure to serve, or serve properly, excludes the intended recipient from the proceedings due to a mistake not of his making. It therefore denies him and opportunity to be heard. And even where service is effected, the party should be given adequate time to put forth his case. In our jurisdiction, for summons to enter appearance, the time to be given to a Defendant or Respondent to take a step after service before any adverse step may be taken is not less than ten (10) days. Order 5 Rule 1(4) of the [Civil Procedure Rules](#) provides that,

“The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.”

11. In regard to the length of time for other notices, the Rules do not specify it but, unless the court otherwise directs, it should not be less than seven (7) clear days before the hearing. Thus, applying mutatis mutandis the Rule on the time given for parties to serve applications before they can be heard, as provided for under Order 51 Rule 13(3) of the [Civil Procedure Rules](#), 2010, the time should be not less than seven (7) clear days before the hearing date.

12. Thus, in the instant application, the Court having noted that all the many steps outlined above had not been taken and directed the Applicant to file an Affidavit of Service and demonstrate through it and any document that he could annex thereto, including one by the Area Chief or Assistant Chief, that indeed the Defendant or his family did not reside on the suit land or within his area of jurisdiction.

13. 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 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.

14. The letter was an annexure to the Affidavit sworn by George Mumali deposing that on the 12th of September 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 (sic), the Defendant, (however, the Defendant herein is Kiptel Kibet). 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.



15. I have considered the Application and law on service of process. 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.
16. 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(1). 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 the Rule, and in the manner specified under sub-rule 4 thereof.
17. 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. To determine whether the application is meritorious, the starting point is the legal basis for the grant of an order for substituted service. In [Ephraim Njugu Njeru vs. Justin Bedan Njoka Muturi & 2 others](#) [2006] eKLR held as follows:-
- “Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. Service in the ordinary way is generally personal service.”
18. Thus, one ought to start with an attempt to serve in person before taking the step of substituted service. At this point it is important for this Court to underscore how service using electronic means, as provided for under the Amendment introduced in the [Civil Procedure Rules](#) in 2020 *vide* Legal [Notice No. 22 of 26/02/2020](#). Under Order 5 Rule 22B(1) and (2), it is provided that;
- “1. Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
2. Service shall be deemed to have been effected when the Sender receives a delivery receipt.”
19. This Court indicates that from experience it has noted a lot of injustice visited on many parties by courts through purported service through these means. Often, this Court has noted that parties send emails containing summons to enter appearance or hearing or mention notices to the adverse parties and print out the email as was dispatched and do no more. Courts not keen on the application of the provision simply look at the copy of the printed email together with the attachment thereof and grant orders in absence of the adverse party said to have been served, without inquiring more as to whether the email was delivered or not.
20. It should be recalled that delivery of communication via email works the same way as the service through ordinary registered post or mail sent by post. For one to demonstrate such service, it is not enough for them to produce a postal registration slip. They must show by way of an acknowledgement



note signed by the intended recipient or his duly authorized agent that indeed the mail was received by him.

21. Thus, in service through email, in like manner as service via Mobile-enabled messaging e.g. WhatsApp by which the sender or Process Server ought to demonstrate, under Order 5 Rule 22C(3), that the message was received by exhibiting a “delivery receipt” or in a WhatsApp communication that the message has been “read” by showing “blue ticks” or by long-pressing the sent message to show “delivered” and “read”, sending the Email is not enough. One must go beyond the sent Email and show, through a printed Email Header, the path the Email took. He ought to show the IP Address of the sender, the IP of the intended recipient and the time the Email was actually received and read since all these features are the only ones that can demonstrate that indeed the Email was received and read.
22. Alternatively, in absence of evidence of delivery and receipt of the Email the sender must demonstrate, in addition to showing that the email was sent to the right recipient, that they used other extra means such as calls duly made to the intended recipient and received to indicate that an Email containing summons to enter appearance or Hearing or Mention Notice has been sent to them via Email and they ought to read it. Such detailed proof of electronic mail service or Mobile-enabled messaging should always be demonstrated so as to avoid causing injustice to an unsuspecting adverse party against whom orders are issued just because an Email or text message has been shown to the court by a process server.
23. Similarly, in the wake of service by way of personal service wherein, nowadays, many unscrupulous and dishonest process servers who have no regard to making false oaths, have emerged, courts should be extremely keen and critical of mere depositions by such deponents to the effect that they visited the intended recipients and delivered process but it was not acknowledged. Courts should go further and interrogate the process servers, by inquiring even from the local administration or summoning other independent persons who can verify the information as to the whereabouts of the intended recipients, before issuing drastic orders in absence of the persons said to have been served. One should not be tempted to think that the Judge is reading too much into the issue of service here: courts ought to remain temples and guardians of justice. Therefore, where an injustice is being visited on innocent people courts must be vigilant, stand and speak clearly and firmly against it.
24. 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.
25. The upshot is that the Application dated 19/08/2024 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 the next fourteen (14) days, and in this case and the one of advertisement, a detailed Affidavit of Service be filed.
 3. This matter shall be mentioned on 06/11/2024 to confirm compliance of these orders.



26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIRTUALLY VIA TEAMS
PLATFORM THIS 03RD DAY OF OCTOBER, 2024.**

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

Walter Wanyonyi Advocate.....for the Plaintiff/Applicant

