



**Kingoo v Mwangangi (Environment & Land Case 30 of 2022)
[2023] KEELC 17383 (KLR) (8 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17383 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 30 OF 2022
A NYUKURI, J
MAY 8, 2023
IN THE MATTER OF ADVERSE POSSESSION OVER
L.R. NO. NDALANI/MAVOLONI BLOCK 1/232
AND
IN THE MATTER OF THE LAND ACT NO. 6 OF 2013
AND
IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012
AND
IN THE MATTER OF THE LIMITATIONS OF ACTIONS ACT (CAP 22) LAWS OF KENYA
BETWEEN
ELIZABETH MUNANIE KINGOO PLAINTIFF
AND
ALEXANDER MUTUKU MWANGANGI DEFENDANT**

RULING

Introduction

1. Before court is a notice of motion dated December 15, 2022 filed by the Plaintiff seeking the following orders;
 - a. That the firm of Messrs Bamomin Advocates & Associates be granted to effect substituted service by means of advertisement by newspaper being the Daily Nation.



- b. That costs of this application be in the cause.
2. The application is premised on the grounds on its face and the affidavit sworn by Elizabeth Munanie Kingoo the Applicant herein on 15th December 2022. The Applicant's case is that she was born on 1st January 1982, is now aged 40 years and has been living on Plot Number Ndalani/Mavoloni Block 1/232 since she was born, yet she does not know the Defendant neither has she ever met him. Further that all efforts to trace the Defendant have been in vain. She stated that she knew the Defendant's name only after conducting an official search of the suit property.

Analysis and Determination

3. I have considered the application and the affidavit in support. The only issue that arise for determination is whether the Applicant has met the conditions for leave to serve by substituted service. It is trite law that upon institution of suit, a Plaintiff is duty bound to ensure that summons and the pleadings filed are served on the Defendant to enable the latter respond to the suit filed against them.
4. Order 5 rule 8 of the *Civil Procedure Rules* requires personal service of summons on the Defendant and provides as follows;
 1. Whenever 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.
 2. A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.
5. Substituted service is allowed only where it is not possible to effect personal service. Order 5 rule 17 provides for substituted service as follows;
 1. Whether 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.
 2. Substituted service under an order of the court shall be as effectual as if it had been made on the Defendant personally.
 3. Where the court makes an order for substituted service it shall fix such time for the appearance of the Defendant as the case may require.
 4. Unless otherwise directed, where substituted service of a summons is ordered under this rule to be advertisement, the advertisement shall be in form No. 5 of Appendix A with such variations as the circumstances require.
6. The requirement for proper, effective and sufficient service is to ensure a fair trial, which is a non derogable right for every person, as no one should be condemned unheard. Article 50 (2) (b) and (c) of *the Constitution* requires that anyone who has been sued ought to be made aware of the case filed against them and must be accorded sufficient opportunity to defend themselves. Therefore, service of summons on a Defendant is not merely a process to enable the Plaintiff tick in the procedural compliance box, but the same is at the core of the right to a fair hearing and access to justice enshrined in Articles 50 and 48 of *the Constitution* respectively. I take the view that the question of service of



summons is a significant question whose sufficiency the Plaintiff must demonstrate to the court's satisfaction before any other step can be taken in the matter.

7. The purpose of service is to ensure that the Defendant is made aware of the case against them. Therefore the Plaintiff ought to effect personal service on the Defendant. The court ought to allow substituted service only in circumstances where it is very clear that the Plaintiff has used all available means and efforts to effect personal service in vain and that the ends of justice requires that substituted service be allowed. Therefore substituted service shall not be the first port of call.
8. In the instant suit, the Plaintiff has sworn that she was born on Land Parcel Number Ndalani/Mavoloni Block 1/232 on 1st January 1982 and has for the last 40 years lived on that land without knowing who the owner is. She deponed that she has never met the Defendant and only came to know of the Defendant upon obtaining search of the suit land. The allegations made above by the Plaintiff in the supporting affidavit to the application are also the same averments made in the affidavit in support of the Originating Summons, which allegations are yet to be tested by way of cross examination. Therefore at this stage, this court cannot take the Plaintiff's word as the gospel truth on whether or not the Plaintiff has never met the Defendant since she was allegedly born on 1st January 1982.
9. Having considered the affidavit in support of the application, there is no demonstration by the Plaintiff that she has used all available efforts to trace the Defendant. She has not informed court the places she has gone, or the people she has inquired from on the Defendant's whereabouts. That being the case, and in the interest of justice this court makes the following orders;
 - a. The application dated December 15, 2022 lacks merit and is hereby dismissed.
 - b. The process server of this court, with the assistance of the local administrators, local leaders and the area OCS to serve the Defendant with the summons herein at the Plaintiff's expense.
 - c. The Plaintiff to avail the relevant information to the process server to enable him effect service.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 8TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Mona for Plaintiff

No appearance for Defendant

Ms Josephine – Court Assistant

