



**Barasa v Mireri & 2 others (Environment & Land Case E006 of 2023)
[2023] KEELC 20565 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE E006 OF 2023
FO NYAGAKA, J
OCTOBER 12, 2023**

BETWEEN

RISPHAH MUKHAYE BARASA PLAINTIFF

AND

KEPHA MIRERI 1ST DEFENDANT

CHARLES OMWKWE OTINGA 2ND DEFENDANT

THE REGISTRAR OF LAND KITALE 3RD DEFENDANT

RULING

1. By a Notice of Motion dated May 29, 2023 the plaintiff moved this court under Oder 51 Rule 1 and 3, Order 5 Rule 17, Section 1A, 1B and 3A of the [Civil Procedure Act](#) and all enabling provisions of law. Needless to say, that Order 51 and 5 that are cited are not in the parent Act, the [Civil Procedure Act](#), but the [Civil Procedure Rules, 2010](#). Additionally, the phrase “all enabling provisions of the law” is a meaningless one to the extent that none of the provisions of law said to be enablers of the application have been highlighted on or pointed out. Thus, the court will proceed on the basis of only the provisions cited.
2. The applicant prayed for order that:
 - (1) The plaintiff be granted leave to serve summons to enter appearance upon the 2nd defendant herein through advertisement on a daily newspapers(sic) with a countrywide reach.
 - (2) The costs of this application be in the cause.
3. The application was based on the ground that the plaintiff filed the defendants(sic) and took out summons to enter appearance; that all reasonable efforts to trace the 2nd defendant herein has proved futile as the said defendant cannot be traced; the orders ought are to enable the speedy determination of the matter herein; and it is in the interest of justice that the application be granted.



4. The application was supported by the affidavit of one Justus Mulinge which was sworn on May 29, 2023. He deponed therein that he was a Process Server of the High Court and the Subordinate Courts and duly authorised to serve process. That he received summons to enter appearance from the plaintiff's Advocates firm with instructions to serve the defendants. That all reasonable efforts to serve the 2nd defendant had proved futile as he could not be traced. That the pleadings, summons to enter appearance against the 2nd defendant therefore remained unserved. That the only remaining avenue to serve the 2nd defendant was through advertisement in a daily newspaper of nationwide circulation. That it was prudent that the application be allowed.
5. I have considered the application. The only issue herein is whether the application is merited or not. Service of summons to enter appearance is provided for under Order 5 of the Civil Procedure Rules. In regard to service of such summons on a defendant, Order 5 Rule 6 provides for delivery or tendering of a duplicate thereof signed by the judge or an officer duly authorised in that behalf and sealed by the court. Order 5 Rule 7 provides for service on each defendant where there is more than one defendant. Order 5 Rule 8 provides for service to be made on the defendant in person where it is practicable except where he has empowered an agent to accept service or his advocate who has instructions to accept service. Rule 12 of the procedure provides that where a reasonable number of attempts have been made to serve the defendant, and the defendant cannot be found, service may be made on an agent of the defendant duly empowered to accept service or on any adult member of the family of the defendant who is residing with him. Order 5 Rule 14 provides for affixing a copy of the summons to enter appearance on the outer door or some conspicuous place of the house in which the defendant ordinarily resides, if all due and reasonable diligence has been used to trace the defendant but he cannot be found. Order 5 Rule 15 provides that if a court is satisfied that for any reason the summons cannot be served in accordance with the preceding Rules the court may order the summons to be affixed in the court house or any conspicuous part of the house where the defendant last resided or carried out business for gain or by advertisement.
6. In *Grobe Dawn Watertech Fitting Pty Ltd -vs- Ideal Ceramics* [2018] eKLR, the learned Judge allowed an application for substituted service for reasons that it had been shown in details how the process server could not effect service on the defendant despite several attempts. It is understanding of the law that an application of this nature is not one granted as a matter of course. The applicant has to demonstrate clearly and in detail the attempts he or she made to serve the summons in accordance with the provisions preceding Order 5 Rule 17 of the Civil Procedure Rules. In that regard, even if he called to aid the provisions of Section 1A, 1A and 3A of the Civil Procedure Rules they would be of no avail. The rules of procedure ought to be followed. While they are not to be mistresses but handmade of justice they ought to be followed in a functioning democracy that prides in the rule of law.
7. In the instant case the process server deponed at paragraph 3 of his affidavit as follows, "all reasonable efforts to serve the 2nd defendant herein has proved(sic) futile as he cannot be traced". This court wonders what efforts these were, where and when and how the process server attempted to serve the 2nd defendant. With these details lacking, I am not convinced that the provisions of Order 5 Rules 6, 7, 8, 12 and 13 have been followed. If such efforts were made, then the process server was too casual to demonstrate any proper service when he swore the affidavit of service in support of the application. That cannot merit the application being granted. I also note that even the affidavit he swore on September 21, 2023 is deponed in that casual manner and cannot pass for proper service. Moreover, it is not convincing that he would remember to swear an affidavit as to service properly effected three months earlier that the one in support of the instant application but four months after deponing to the one on on-service yet he never demonstrate the 'proper' service in time or at the time. While this observation about the affidavit sworn on September 21, 2023 has not in any way influenced



the instant decision, it has been made as a cautionary measure to put the plaintiff on notice that he should not wait to delay the court in making unnecessary applications later about that service, which too is obviously defective.

8. The application herein is dismissed. Costs in the cause. The matter is to be mentioned on November 2, 2023 to confirm proper service.

RULING DATED, SIGNED AND DELIVERED ONLINE THIS 12TH DAY OF OCTOBER, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

