



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. E61 OF 2021

HEZRON KAMAU GICHURU.....PLAINTIFFS/APPLICANT

VERSUS

KIANJOYA ENTERPRISES LTD.....1ST DEFENDANT/RESPONDENT

NAIVASHA DISTRICT LANDS REGISTRAR.....2ND DEFENDANT/ RESPONDENT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiffs' Notice of Motion application dated 13th July 2021. The said application is brought under certificate of urgency and seeks the following orders:

i) Spent.

ii) THAT pending hearing and determination of this application inter partes, this honourable court be pleased to issue orders of injunction restraining the Respondents by themselves, their servants, agents, proxies and r persons exercising authority from them from inhibiting, alienating, dealing, disposing, trespassing and/or any other manner (sic) interfering with the Plaintiff's quiet use, occupation and possession of all those parcels of land known as

- a. MITI MINGI MBARUK BLOCK 8/1373 (KIANJOYA 'D')**
- b. MITI MINGI MBARUK BLOCK 8/1375 (KIANJOYA 'D')**
- c. MITI MINGI MBARUK BLOCK 8/2548 (KIANJOYA 'D')**
- d. MITI MINGI MBARUK BLOCK 8/2549 (KIANJOYA 'D')**
- e. MITI MINGI MBARUK BLOCK 8/2550 (KIANJOYA 'D')**
- f. MITI MINGI MBARUK BLOCK 8/2551**

iii) THAT pending hearing and determination of this suit, this honourable court be pleased to issue orders of injunction restraining the Respondents by themselves, their servants, agents, proxies and or persons exercising authority from them from inhibiting, alienating, dealing, disposing, trespassing and/or any other manner (sic) interfering with the Plaintiff's quiet use, occupation and possession of all those parcels of land known as

- a. MITI MINGI MBARUK BLOCK 8/1373 (KIANJOYA 'D')**
- b. MITI MINGI MBARUK BLOCK 8/1375 (KIANJOYA 'D')**
- c. MITI MINGI MBARUK BLOCK 8/2548 (KIANJOYA 'D')**
- d. MITI MINGI MBARUK BLOCK 8/2549 (KIANJOYA 'D')**

e. *MITI MINGI MBARUK BLOCK 8/2550 (KIANJOYA 'D')*

f. *MITI MINGI MBARUK BLOCK 8/2551*

iv) *THAT this honourable court be pleased to issue orders of Mandatory injunction compelling the 2nd Respondent to remove the caution illegally placed by the 1st Respondent on the Applicant's parcel of land known as*

a. *MITI MINGI MBARUK BLOCK 8/1373 (KIANJOYA 'D')*

b. *MITI MINGI MBARUK BLOCK 8/1375 (KIANJOYA 'D')*

c. *MITI MINGI MBARUK BLOCK 8/2548 (KIANJOYA 'D')*

d. *MITI MINGI MBARUK BLOCK 8/2549 (KIANJOYA 'D')*

e. *MITI MINGI MBARUK BLOCK 8/2550 (KIANJOYA 'D')*

f. *MITI MINGI MBARUK BLOCK 8/2551*

v) *THAT costs of this Application be provided for.*

2. The application is based on the grounds on its face and supported by the affidavits sworn by Hezron Kamau Gichuru, the Plaintiff/Applicant herein, on 13th July 2021.

FACTUAL BACKGROUND

3. It is instructive to offer a brief background of the events and circumstances giving rise to reservation of this matter for a ruling on the application. The application was brought before the vacation Duty Judge on 4/8/21 and the Duty Judge ordered that the application and all other pleadings be served and further, that the application be fixed for inter partes hearing before me.

4. On the 20/9/21, Counsel for the Plaintiff/Applicant appeared before me and stated that he was in touch with the director of the 1st Defendant/Applicant and that the said director had asked to be given more time to engage an advocate. Counsel also informed the court that the 2nd Defendant/Applicant had not entered appearance. On the basis of these submissions, counsel for the Plaintiff/ Applicant sought and was granted another date; 4/10/21 for hearing of the application.

5. On the 4/10/21 when the application came up for hearing, counsel for the Plaintiff/Applicant submitted that the defendants had been served but had failed to enter appearance. On perusal of the record, I noted that there was no evidence of service and directed that the application and hearing notice be served on the defendants. The application was adjourned to 18/10/21.

In the interim, on the said 4/10/21 at about 11.00 am and after I had adjourned the application, the Plaintiff/Applicant filed affidavits of service in respect of the hearing notice of 4/10/21.

6. On the 18/10/21 when the application came up for hearing, counsel for the Plaintiff/ Applicant appeared and submitted that the Defendants/Respondents had neither entered appearance nor responded to the application dated 13/7/21 despite being duly served. On perusal of the court record, I noted that there was, again, no evidence of service and on request of counsel, the file was placed aside to allow him file his affidavit of service.

He, indeed, filed his affidavit of service and submitted that the application be allowed since there was no objection to it. I reserved my ruling for 25/10/21

7. The importance of setting out the circumstances in the preceding paragraphs is that counsel for the applicant submitted that the application is not opposed for the reason that despite service, the Defendant/ Respondents had neither entered appearance nor filed any response to the application. He prayed, therefore, that the orders sought be granted.

8. Before I proceed to interrogate the application, I must first convince myself that the Defendant/Respondents have been given adequate notice of the suit and application and have also been accorded reasonable opportunity to enter appearance and file appropriate responses.

ISSUES FOR DETERMINATION

9. The first issue for determination, therefore, is whether the Defendants/ Respondents have been properly served with the application, supporting affidavit, annexures and hearing notices. The second, on satisfaction of first, is whether the plaintiff is deserving of the orders sought in his application.

ANALYSIS

10. The affidavits of service filed on 4/10/21 are sworn by one Elvis Oure. He introduces himself as a court process server. In respect of the 1st Defendant/Respondent, he deposes that he effected service on one James Mwangi Njoroge by means of the mobile phone application known as “Whatsapp” and that he used his mobile phone number - +254723713360

Elvis Oure deposes that he served the hearing notice through James Mwangi Njoroge’s email address.

In respect of the 2nd Defendant/ Respondent, there is a hearing notice filed, but no accompanying affidavit.

11. In the intervening period and before the application came up for hearing on 18/10/21, James Mwangi Njoroge on whom service was effected on behalf of the 1st Defendant/Applicant filed an affidavit on 15/9/21. In the said affidavit he deposes that he is not a director of the 1st defendant/ Applicant and that he is alien (sic) to its existence and/or operation.

12. The second set of affidavits was filed on 14/10/21 and is in respect of the hearing notices dated 9/10/21. The said hearing notices were meant to inform the Defendants/ Respondents that the application was scheduled for hearing on of 18/10/21. These second set of affidavits of service are sworn by two individuals. The first one is by one Arasa Kinara who describes himself as a process server and deposes that he effected service on the 1st respondent.

In respect of the 1st Defendant/Respondent, he (Arasa Kinara) states that he called an officer of the 1st defendant whom he had previously served with pleadings and the pleadings had been accepted but in this instance, the said officer directed that he serves the documents (sic) on the Law Firm of Kembu-Gitura in Nairobi. He goes on to depose that he proceeded to Nairobi and served the hearing notice which was received by a secretary at the said Law Firm. Indeed, the hearing notice bears a stamp purporting to be of Kembu –Gitura Advocates and is signed.

In respect of the 2nd Defendant/Respondent, the affidavit of service is sworn by Anthony Mukira who describes himself as an Advocate of the High Court of Kenya. He deposes that he caused the hearing notice to be served upon the Naivasha District Land Registrar. He deposes further that the secretary of the said offices acknowledged receipt by stamping and dating his principal copy (emphasis is mine) which he returns as duly served.

13. The law pertaining to service of summons upon corporations is in Order 5, Rule 3 of the Civil Procedure Rules. It provides;

Subject to any other written law, where the suit is against a corporation the summons may be served—

(a) On the secretary, director or other principal officer of the corporation; or

(b) If the process server is unable to find any of the officers of the corporation mentioned in rule 3(a)—

(i) by leaving it at the registered office of the corporation;

(ii) by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or

(iii) if there is no registered office and no registered office or physical address of the corporation, by leaving it at the place where the corporation carries on business; or

(iv) by sending it by registered post to the last known postal address of the corporation.

14. Order 5, Rule 8 provides that:

1) 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.

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.

15. Having analysed the affidavits of service filed in respect of the hearing notices herein, the affidavit filed by one James Mwangi Njoroge and the law pertaining to service of summons and court processes, I am not persuaded that there has been proper service on the 1st Defendant/Respondent. It must be appreciated that service of court processes is crucial in the administration of justice and cannot and should not be treated casually.

The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system (See *Onyango Oloo v. Attorney General [1986-1989] EA 456*). The Learned Judges of Appeal also made reference to the decision of The Supreme Court of India in *Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 664 at 711* which forcefully underlined the importance of the right to be heard:

“[There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them.]”

16. James Mwangi Njoroge in his affidavit states that he is not a Director of the 1st Defendant/Respondent and is an alien (sic) to its existence and operation. It is absurd that he subsequently offers advice that the hearing notice should be served on a firm of advocates; Kembi Gitura & Co. Advocates. It is even more puzzling that the said firm accepted service of a hearing notice but did not enter appearance in the suit and also failed to file any response to the application dated 13/7/21. Going by the affidavit filed by James Mwangi Njoroge, which affidavit has not raised any objections, it is my humble view that James Mwangi Njoroge is not a director of the company. He cannot therefore accept service of summons and court processes on behalf of the 1st Defendant/Respondent and cannot also give instructions that someone else or entity receives summons and court processes on behalf of the 1st Defendant/Respondent. Simply stated; he lacks authority and/or is a stranger.

17. I am also not persuaded that there has been proper service on the 2nd Defendant / Respondent. The hearing notice attached to the affidavit of service sworn by Anthony Mukira does not bear a stamp, signature, name of person receiving or date of receipt. This is contrary to his deposition that secretary of the said offices acknowledged receipt by stamping and dating his principal copy.

DETERMINATION

18. With the flaws as set out above, I find that there was no proper service effected on the Defendants/Respondents and it would go against the principle of natural justice to make a determination on the application without their participation. In view of the foregoing, the second issue for determination -the merit or otherwise of the application- is not ripe for consideration at this stage and it would be futile to do so.

19. Consequently, I order that the plaintiff/Applicant effects proper service on the Defendants/ Respondents herein with due regard to the law pertaining to service of summons and court processes. The plaintiff /Applicant is at liberty to move the court by way of appropriate application to aid in effecting service on the 1st Defendant/Respondent should he find any difficulty in doing so.

19. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 25TH DAY OF OCTOBER 2021

L. A. OMOLLO

JUDGE

In the presence of: -

MR. MUKIRA FOR THE PLAINTIFFS/APPLICANTS.

NO APPEARANCE FOR THE 1ST DEFENDANTS/RESPONDENT.

NO APPEARANCE FOR THE 2ND DEFENDANT/RESPONDENT.

COURT ASSISTANT: MONICA