



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E016 OF 2021

RICHARD MULULU.....1ST PLAINTIFF

MARY MBITHE MULULU.....2ND PLAINTIFF

(Suing as the administrators of the estate of the late

JOSEPHAT MULULU MWENZWA)

-VERSUS-

GEOFFREY ORARO OBURA.....1ST DEFENDANT

ALEXANDER NDOLO KILELE.....2ND DEFENDANT

GALAXIA ENERGY LIMITED.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR.....4TH DEFENDANT

AND

PAUL MASILA KIMEU,

THE ADMINISTRATOR, SYOKIMAU FARM LTD.....INTERESTED PARTY

RULING

1. By a Notice of Motion dated 2nd August, 2021 brought pursuant to Order 5 Rule 2 (1) and (2), Order 5 Rule 17 and Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, the Applicants sought for the following Orders; -

a) Service of this Application be dispensed with and this application be heard ex-parte.

b) The Honourable Court be pleased to order service of summons to the 1st and 2nd Defendants/Respondents through substituted service by placing it in one of the local dailies with national circulation.

c) The cost of this application be provided for.

2. The Application is anchored on the grounds on the face of it and supported by the Affidavit sworn on 2nd August 2021 by Reginald Kimeu, Advocate for the Plaintiffs/Applicants in this matter. He deponed that the Applicants filed the current suit on 19th February, 2021 and summons were issued on 2nd March, 2021. He stated that despite their diligent efforts to effect service upon the 1st and 2nd Defendants/Respondents, they were unable to do so as they could not trace them.

3. Counsel deposed that in their attempts to trace the 1st and 2nd Defendants'/Respondents, they employed technology; including searching them over the internet without success. He deposed that it was not possible to personally serve the 1st and 2nd Defendants/Respondents and that the only way is to effect substituted service through placing an advertisement in one of the local newspapers with national circulation.

4. The Applicants further relied on the affidavit of service sworn on 2nd August 2021 by one Jacob Malelu, a process server, who stated that on 3rd March 2021 he received instructions from MMK & Company Advocates to serve summons, pleadings and Notice of Motion dated 30th December 2020 upon the 1st, 2nd and 3rd Defendants/ Respondents. The Process Server averred that while he had been successful in serving the 3rd Defendant/Respondent, he was unsuccessful in effecting service upon the 1st and 2nd Defendants/Respondents, as he could not trace them despite all diligent efforts including use of technology.

5. The Applicants stated that it was in the interest of justice that this Honourable Court issues the orders sought in the application for timely determination of this matter.

6. The Application was unopposed. I have considered the Application, the grounds and the respective affidavits in support. The only issue that arises is whether service of summons on the 1st and 2nd Defendants in this matter should be effected through substituted service.

7. Order 5 Rule 17 of the Civil Procedure Rules provides for substituted service as follows; -

(1) 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.

(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 by advertisement, the advertisement shall be in form No. 5 of Appendix A with such variations as the circumstances require.

8. The Applicants have demonstrated having applied diligent efforts to effect service on the 1st and 2nd Defendants, which attempts were unsuccessful as is evident from the process server's affidavit of non-service. According to Counsel, they tried to trace and serve the 1st and 2nd Defendants in person but their efforts were unsuccessful. Counsel proceeded to return to this court the original copy of the said summons having not been served on the 1st and 2nd Defendants/ Respondents.

9. Order 5 Rule 17 authorizes this court to order service by way of substituted service, where it is satisfied that for any reason, personal service of summons cannot be effected on a defendant. **See Mary Mbula Mukuvi v. David Mwose Mwaluko T/A Aberdeen Properties Ltd and five others in E.L.C suit number 6 of 2014.**

10. It is clear that the Plaintiffs have previously tried to effect personal service on the 1st and 2nd Defendants in vain. This court is enjoined by section 1B of the Civil Procedure Act to ensure that matters brought before it, are determined in a just, efficient, timely and affordable manner. As regards substituted service, courts have held in several authorities that the essence of such application is to bring the instituted suit to the personal attention of the defendant. See **Simon Gichangi Mugo v Pierre Asabi Misambi & 2 Others civil case No. 107 of 2011.** I therefore find that it has not been possible for the Applicants to serve the 1st and 2nd Defendants personally with the summons to enter appearance.

11. The upshot of all this is that the Notice of Motion Application dated 2nd August, 2021 is therefore allowed as follows;

a) The Applicants to serve summons upon the 1st and 2nd Defendants/Respondents through substituted service by advertisement in one of the daily newspapers with national circulation during a week day.

b) The 1st and 2nd Defendants /Respondents are required to enter appearance within 30 days of service of summons.

c) Costs of this application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF OCTOBER, 2021.

A. NYUKURI

JUDGE