



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 73 OF 2015**

**ESTHER WANGECHI MWANIKI.....APPLICANT**

**VERSUS**

**J. WARUI MWANIKI & 36 OTHERS.....RESPONDENTS**

**RULING**

The application before me is the Notice of Motion dated 29<sup>th</sup> January 2019 brought under Order 45 Rule 1, Order 5 Rule 14 CPR, Section 3A CPA. The Applicant is seeking the following orders:-

*(1) Spent.*

*(2) That the orders made on 30<sup>th</sup> November 2016 directing service be done by advertisement in the local Daily Nation or Standard Newspaper be reviewed and/or set aside.*

*(3) That leave be granted to the Applicant to serve the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 12<sup>th</sup>, 20<sup>th</sup>, 22<sup>nd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, 30<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup> and 36<sup>th</sup> Respondents by affixing the summons and any other relevant Court pleadings on Courts Notice Boards within Kirinyaga County.*

*(4) That costs of this application be provided for.*

The application is premised on the affidavit of the Applicant sworn the same date and ground apparent on the face of the said application. The said application is opposed by the 2<sup>nd</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 11<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 23<sup>rd</sup>, 29<sup>th</sup> and 30<sup>th</sup> Respondents who filed grounds of opposition. When the matter came up for hearing on 8<sup>th</sup> October 2019, the parties agreed by consent to have the said application canvassed by written submissions.

**APPLICANT'S CASE**

The applicant contends that she was unable to serve the 18 Respondents and sought leave to effect service upon them by substituted service by affixing summons on the Courts Notice Boards but the Court directed that she serves by way of advertisement in the daily Newspapers. She stated that she went to three media houses and upon inquiry, she found that the cheapest was coming to 236,000/= which amount she has not been able to raise the same. She stated that she has no means of raising the money and that she is blind and ailing. She pleads that owing to her health condition, the Court should consider her application and review its orders issued on 30<sup>th</sup> November 2016 and allow her to use a cheaper mode of service by affixing all Court pleadings on Notice Boards of all Courts within Kirinyaga County. She stated that no prejudice will be suffered by the Respondents.

**APPLICANT'S SUBMISSIONS**

The plaintiff through the firm of Ann Thungu & Co. Advocates submitted that the defendants sought to be served in the present application are not known to her and that the only defendants who were served through personal service are the ones who are living on the suit land and who have entered Appearance and filed defence. She submitted that the Applicant managed to get the names of the defendants after conducting official searches in the Lands office and that the Respondents who sought to be served by substituted service in the current application do not occupy their plots which are currently vacant, un-developed and their whereabouts are unknown. On the issue of summons, the learned counsel submitted that unlike a plaint, this suit is commenced by Originating Summons (O.S) under Order 37 Rule 1 CPR. As such, the counsel submitted that the issue of expiry of summons does not arise.

**2<sup>ND</sup> RESPONDENT'S SUBMISSIONS**

The 2<sup>nd</sup> Respondent through the firm of Wangechi Munene & Co. Advocates submitted as follows:

- That for a Court to review its order/decreed, the Applicant has to show there is discovery of a new and important matter/evidence which after the exercise of due diligence was not within his knowledge.
- That the Applicant does not also allege the existence of any mistake or error apparent on the face of the record to warrant a review.
- That the issue of costs of advertisement is not a new matter which was not within the knowledge of the Applicant and which after due diligence was not within her knowledge.
- That the Applicant cannot allege that she cannot afford advertisement fee yet she can afford lawyer's fees.
- That there is inordinate delay in bringing the present application.

### **7<sup>TH</sup>, 8<sup>TH</sup> AND 11<sup>TH</sup> RESPONDENTS SUBMISSIONS**

The counsel for the 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Respondents submitted as follows:

- That the Applicant in an earlier application dated 17<sup>th</sup> August 2016 sought similar orders as the present application and that the order was never extracted until 27<sup>th</sup> November 2018 which is a period of 2 years.
- That Applicant has not made any other attempt to effect service on the Respondents.
- That the Applicant has not satisfied the principles for the grant of orders for review under Order 45 Rule 1 CPR.
- That the Applicant has stayed for a period of two years since this Honourable Court issued orders to serve summons upon the proposed Respondents through the daily Newspapers and that the delay is inordinate and no explanation given.

The learned counsel cited the case of:

1. *Kellen Karimi Nduma Ndambiri & Another Vs the Hon. Attorney General & 2 others ELC No. 32 of 2012 (Kerugoya) (U.R).*
2. *Grace Akinyi Vs Gladys Kemunto Obiri & Another ELC No. 193/2015 (Eldoret) (U.R).*

### **14<sup>TH</sup>, 15<sup>TH</sup>, 17<sup>TH</sup>, 20<sup>TH</sup>, 23<sup>RD</sup> & 29<sup>TH</sup> RESPONDENTS SUBMISSIONS**

The counsel for the 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 20<sup>th</sup>, 23<sup>rd</sup> and 29<sup>th</sup> Respondents submitted that the application dated 29<sup>th</sup> January 2019 lacks merit and the same is an abuse of Court process. The counsel also submitted that the said application does not meet the legal threshold for granting Review orders under *Section 80 CPA and Order 45 (1) CPR*. It is submitted that by the time the Applicant moved the Court by her application dated 17<sup>th</sup> August 2016 and the issuance of the orders of 30<sup>th</sup> November 2016, the issue of costs of advertisement were well within the knowledge of the Applicant. Finally, the counsel submitted that if indeed the Applicant is poor, blind and surviving through well wishers as alleged, she has not filed this suit as a pauper under *Order 33 CPA*.

### **ANALYSIS AND DECISION**

I have considered the application dated 29<sup>th</sup> January 2019, the grounds of opposition, the submissions by counsels for the Applicant and the Respondents. The Applicant is seeking to have the orders of this Court issued on 30<sup>th</sup> November 2016 reviewed and instead be allowed to effect service of summons and other Court processes upon the remaining defendants by substituted service by affixing the same on all the Court Notice Boards within Kirinyaga County. It is trite law that personal service must be effected on all Court process. However, the law allows substituted service where personal service is impractical or on other reasons which the Court may be satisfied. The Applicant has annexed a copy of an affidavit of service by one Justus Njagi Bwangima where at paragraph 8 stated as follows:

***“That on 5<sup>th</sup> July 2016, I made another attempt to trace the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 17<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup>, 30<sup>th</sup>, 32<sup>nd</sup>, 33<sup>rd</sup>, 35<sup>th</sup> and 36<sup>th</sup> Respondents but could not and their land parcels are vacant and undeveloped and it is not known where they reside”.***

If what the process server who is an officer of this Honourable Court is anything to go by, how then will the Respondents who are sought to be served by way of affixing the Court processes at all notice boards within Kirinyaga Courts be able to know that a suit has been filed against them?

**Order 5 Rule 14 CPR** contemplates that the substituted mode of service by way of affixing the summons on the outer or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain is to enable him to see the summons easily. It has not been stated that the proposed defendants ordinarily reside or live near the Law Courts within Kirinyaga County where they can easily see the affixed summons. The process server has not alluded that the defendants whom he intends to serve live within Kirinyaga County. I find the mode of service proposed by the Applicant does not meet the threshold set out under **Order 5 Rule 14 CPR**. The application lacks merit and the same is hereby dismissed. The costs shall abide the event.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 19<sup>th</sup> day of June, 2020.**

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**E.C. CHERONO**

**ELC JUDGE**

In the presence of:

1. Mr. Okwaro holding brief for Ann Thungu
2. Mr. Muriithi holding brief for Wangechi Munene
3. Mr. Muchangi holding brief for Kiguru Kahigah
4. Mr. Ombachi for 7<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Respondents
5. Mbogo – Court clerk.