



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 12 OF 2014
FORMERLY KERUGOYA E.L.C 295 OF 2013

NDATHI N. KANIKI.....PLAINTIFF

VERSUS

JOHN NJIRU NJUKI..... 1st DEFENDANT
BARNABAS NJERU NJUKI..... 2nd DEFENDANT
AGNES WATHURA NJUKI..... 3rd DEFENDANT
MILKA MBUYA NJUKI..... 4th DEFENDANT
GITHUMBU NJERU 5th DEFENDANT
JOHN MAINA MWANGI 6th DEFENDANT
MIRIAM NJOKI NJUKI..... 7th DEFENDANT
BRIAN NJOKA MUTURI..... 8th DEFENDANT
NJAGI PETER NTHIGA..... 9th DEFENDANT
PIUS IRERI NJAGI..... 10th DEFENDANT
JOHNSON GICHUHI NJUGUNA..... 11th DEFENDANT

RULING

INTRODUCTION

By their notice of motion grounded upon Order 5 Rule 17 of the Civil Procedure Rules, 2010, counsel for the plaintiff/applicant has applied to this court for the following orders:

1. That the court grants leave to the plaintiff to effect service upon Brian Njoka Muturi (the 8th defendant) by way of notice of substituted service by advertisement in one of the daily newspapers with a wide circulation.

2. That the costs of this application be provided for.

Counsel for the 1st, 2nd, 3rd, 4th, 5th and 11th defendants does not oppose the application. The other defendants, numbers 6th, 7th, 9th and 10th have not filed any documents opposing the application.

The Applicant's Factual Basis:

Mr Ndathi Kaniki (the applicant) and Mr Wilfred Njeru Kigoro (the process server) have deponed the supporting affidavits to the application. According to the applicant, it is only the 8th defendant who has not been traced for service. It is his evidence that he accompanied the process server to the land of the 8th defendant on four occasions in 2013. They were unable to trace the 8th defendant on those four occasions.

Furthermore, in 2014 they again went to the land of the 8th defendant four times and they were unable to trace him. When asked as to the whereabouts of their employer, the workers of the 8th defendant refused to disclose his whereabouts.

The evidence of the of applicant's attempts to serve the 8th defendant is supported by that of the process server. According to the process server, the workers of the 8th defendant told him that their employer was away and they did not know when he would come back. He then requested the workers to provide him with the telephone number of the employer. They refused to do so. As a result, he left copies of summons to enter appearance, an amended plaint of 7th August 2013 and a notice of motion of 26th February 2013 next to the house of the 8th defendant. He did this because the workers refused to receive them. It is also his further evidence that the applicant has never received any response from the 8th defendant.

In addition to the affidavit evidence, the counsel for the applicant has also stated three grounds set out in the notice of motion in support of the application for substituted service by advertisement in one of the newspapers. They have stated that the 8th defendant has not been traced for service despite numerous attempts to do so. Furthermore, he has stated that all efforts to effect personal service on the 8th defendant have been unsuccessful. In his opinion, substituted service remains the only option to enable them prosecute this case, which cannot be done unless the 8th defendant has been served with summons to enter appearance.

The Applicable Law

The law that governs the grant of leave to effect substituted service is set out in **Order 5, Rule 17 (1) of the Civil Procedure Rules of 2010**. According to the provisions of that Order, substituted service may be ordered by the court in the following circumstances:

17. (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.

Furthermore, substituted service has been judicially approved by the High Court at Nairobi (*Nyamweya, J*) in *Mary Mbula Mukuvi v. David Mwose Mwaluko T/A Aberdeen Properties Ltd and five others in E.L.C suit number 6 of 2014*.

Issues for Determination:

In the light of the applicable law and the affidavit evidence in support of the application, I am of the view that the following are the issues for determination:

1. Whether or not there is sufficient evidence in support of the application.
2. Who should pay for the costs of this application.

Evaluation of the Evidence and the Law:

I have considered the evidence of the two deponents, the submissions of the counsel and the applicable law. Having done so, I have come to the conclusion that the applicant has met the evidentiary threshold for the grant of leave to serve the 8th defendant by way of substituted service by advertisement in one of the daily newspapers with wide circulation. According to the affidavit evidence, four attempts were made to trace and serve the 8th defendant in 2013 without success.

Additionally, five attempts were also made in 2014 to trace and serve him with the court process without success. On all these nine occasions, the workers of the 8th defendant refused to disclose his whereabouts. They also refused to receive the court documents. This forced the process server to leave them next to the house of the 8th defendant.

Furthermore, in terms of **Order 5 Rule 17**, the court is authorized to grant leave to effect service upon a party by way of substituted service by advertising in one of the daily newspapers with wide circulation, after it is satisfied that for any reason that the service of summons cannot be served in the ordinary way upon the concerned party. I therefore find that it has not been possible to serve the 8th defendant personally with the summons to enter appearance, the amended plaint and the notice of motion.

Verdict and Disposal Order:

In the light of the above reasons:

1. I grant the order applied for in prayer 9 of the notice of motion.
2. The applicant to serve the court process by way of advertisement in one of the daily newspapers with wide circulation during a week day.
3. The 8th defendant is required to enter appearance within 30 days.
4. Costs of this application shall be in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **3rd** day of December, **2014**

In the presence of

Mr. Okwaro for the Plaintiff/Applicant and in the absence of the Respondents

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Court clerk Mr Muriithi

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Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE