



Khamis & another v Mwarome (Sued as the Administrator of the Estate of Masha Dena Kideswe) (Environmental and Land Originating Summons 41 of 2015) [2025] KEELC 4727 (KLR) (17 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 41 OF 2015**

FM NJOROGE, J

JUNE 17, 2025

BETWEEN

AMRI KHAMIS 1ST PLAINTIFF

OMAR KHAMIS 2ND PLAINTIFF

AND

SYLVESTER CHIBO MWAROME RESPONDENT

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF MASHA DENA
KIDESWE**

RULING

1. The defendant's Notice of Motion Application dated 23/1/2025 has been brought under Order 22 Rule 17 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya. The Applicant prays for the following orders:
 - a. That the Honourable Court be pleased to certify this matter as urgent and service of the same be dispensed with in the first instance;
 - b. That this Honourable Court be pleased to order a stay of execution of the Decree dated 8th October, 2021 pending the hearing and determination of this application;
 - c. That the Honourable Court be pleased to set aside the ex parte Judgment entered on the 16th day of July, 2021 together with its consequential orders pending hearing and determination of this application;
 - d. That the Defendant/Applicant be allowed to file his reply/defence to the OS out of time and the draft reply/defence herein attached be deemed as duly filed on payment of the court fees;



- e. That the costs be in the cause.
2. The application is premised on the following grounds:
 - a. The plaintiffs filed a civil application as an originating summons and went ahead to prosecute their case and judgment was given in their favor on 16th of July 2021;
 - b. The judgment so entered was irregular and was obtained in breach of the rules of procedure of service of summons and hearing notices;
 - c. No personal service was effected upon the defendant as he was away in Germany;
 - d. The only document which was served on him or sent to Germany and the applicants counsel in Germany wrote to the court explaining that the defendant was not in Kenya as at that time, and that he was unable to attend court;
 - e. That defendant was not served with any invitation or notice to fix the matter or hearing or to attend a hearing;
 - f. The plaintiffs continued prosecute their case without involving the defendant;
 - g. The plaintiffs relied on affidavits of service which do not even have their alleged hearing notices attached to the affidavits of service;
 - h. That the plaintiff claims to have bought the suit premises from the deceased owner but this is not true and the truth can only be established if the defendant is allowed to defend himself;
 - i. The deceased owner had a spouse who was not involved in or made aware of the arranged sale or purchase and she stayed on the suit premises believing that this is family property left by her late husband and therefore they alleged sale is false;
 - j. The plaintiff has never lived on the premises;
 - k. The plaintiff took advantage of the defendant's absence to obtain favorable orders from the court;
 - l. The defendant has a good defense to the originating summons and should be granted a chance to defend himself;
 - m. The plaintiff shall suffer no loss if the order sought are granted since the defendant is in actual position of the suit premises to date.
 3. The application is supported by the affidavit of Sylvester Chibo Mwarome, the defendant. In that affidavit he states as follows: that he has resided in Germany since 2001 and he visits Kenya randomly. He is the administrator of the estate of Masha Dena Kideshwe. He became the registered proprietor of the suit land vide succession proceedings conducted at the Malindi High Court. He has always taken care of the property. He also took care of the wife of the deceased known as Kache Masha Dena. However, the plaintiff filed an originating summons, prosecuted the same and finally obtained judgment in his favor on 16th July 2021. In the defendant's opinion upon advice by his advocates, the judgment so entered was irregular and in breach of procedural rules regarding service of summons and hearing notices. He depones that no personal service was effected on him as he was in Germany; that when a document served on 20th April 2016 was sent to Germany his counsel one Dr Michael Grophich wrote to this Court explaining that he was not in Kenya at the time; that he could not therefore attend court; that in the meantime the plaintiff continued to prosecute his case without involving him; that contrary to the plaintiff's version, the correct position is that the plaintiff's elder brother is the one who



came to ask for permission to build on the suit land and was allowed to do so; that however, after a few years the structure built collapsed and the plaintiff's brother disappeared; that there was no sale of the suit land to the plaintiff; that the plaintiffs obtained the fingerprints of the deceased fraudulently when the deceased was still alive and suffering from sickness, during which period the plaintiff took the deceased from the suit premises ostensibly to take him to hospital. Attached to the affidavit is what the defendant refers to as the draft reply/ defense to the Originating Summons.

4. To place the two applications before me in proper context, it is good to set out a history of the matter. This suit was commenced by way of an Originating Summons filed on 17th March 2015. That pleading was seeking a temporary injunction restraining the defendant from interfering with the suit land and a declaration that the suit property belonged to the plaintiffs. The grounds on which they said orders were sought were that by a sale agreement made on 27th June 1983, whose copy is attached to the Summons, the plaintiffs purchased the suit land from Masha Dena Kideshwe. It is stated that immediately thereafter, the vendor was taken ill and he asked them to pay the outstanding payments for him to get medical treatment and so the plaintiffs completed the payment of consideration; that before the vendor executed the transfer in their favor, he passed on. The vendor was survived by his wife and the couple were childless. Although the terms of the agreement were that possession would be taken immediately, upon the demise of the vendor the plaintiffs did not take possession as the vendor's wife was elderly and childless, and was living on the suit land. At that time the suit land had not been registered and it was later registered under the Title Number Kilifi Roka 750. The defendant petitioned the High Court at Malindi in Succession Cause Number 21 Of 2003 for a grant of letters of administration describing himself as an adopted son of the late Masha Dena Kideshwe and was issued with such a grant on 25th May 2007. The plaintiffs were not aware of the succession cause that the respondent had filed and they came to discover it on 19th September 2007; that a title document had been issued to the respondent in his name on the strength of the grant issued in that succession cause. The plaintiffs also aver that another Succession Cause Number 21 Of 2013 was filed at the Kilifi Magistrate's Court by one Sulubu together with others who claimed to be sons of the deceased. The said Sulubu Charo Dena also filed another Succession Cause Number 40 Of 2012 at the High Court in Malindi, seeking a grant over the same estate. In both succession causes the name Kideshwe has been omitted and the suit land has been listed as an asset of the estate. It is averred that through the land is situate in Chumani the Petition Number 21 Of 2013 was commenced on the strength of a letter from their Assistant Chief of Tezo Location, of which the deceased was not a resident. It is also claimed that the plaintiffs have lodged a complaint with a Criminal Investigations Department regarding the foregoing matters.
5. On 26th April 2016 the court (Angote J.) was satisfied that the defendant had been served with a Notice of Motion dated 13th April 2016 and granted against him an order of injunction as sought in that application, pending the hearing thereof which order was confirmed on 25th April 2016.
6. A letter addressed to the court by the defendant through his advocate abroad, which is dated 16th May 2016 and is in the court record demonstrates that summons were served on the defendant and on 20th April 2016; it is an acknowledgment of receipt of process.
7. On 19th April 2018, the matter came up in court when Olola J. granted an order that the defendant in the OS be served through the German Embassy. It was also ordered that the defendant be served through his last known address being registered post, which was Post Office Box Number 95350 Mombasa. One Victor Otieno Morris, process server swore an affidavit of non-service dated 17th August 2018 showing that service upon the respondent at the German Embassy had proved not possible on the basis that the officer in charge of that office had declined service and recommended that other suitable avenue be employed to serve the defendant since the embassy was not a party to the matter.



An affidavit of service by the same Victor Otieno Morris dated November 2018 and filed on 14th December 2018 is in the court record, in which he confirms service by way of registered post as ordered by Court. An original receipt from the Postal Corporation of Kenya dated 1st October 2018 is attached to that affidavit of service. A request for interlocutory judgment against the defendant was filed on 14th December 2018. A hearing notice dated 28th February 2019 for hearing scheduled for 14th March 2019 was, according to the record, vide the affidavit of service of Alois Kitsango Mwandeka dated 4th March 2019 and filed on 11th March 2019 served upon the respondent by way of registered post. A Postal Corporation of Kenya receipt, number dated 1st March 2019 is attached thereto.

8. The Plaintiffs' request for service upon the defendant abroad, dated 3rd June 2020 is in the court file.
9. Judgment delivered on 16th July 2021 is in the court file. Frederick Obach Adeny has sworn an affidavit of service dated 6th October 2021 regarding service of the draft decree and judgment on the defendant vide registered post.
10. Gazette Notice number 6761 of 10th June 2022 is in the court file showing that the intention to have the land registered in the names of the plaintiffs as ordered by this Court was gazette on that date. From the following: a copy of the application for Land Control Board Consent, copy of the consent dated 9th February 2023 and a copy of the transfer of interest in land to Amri Hamis the first plaintiff, and a copy of the title deed in his name, which are all retained in the court file, it is apparent that the Deputy Registrar of this court pursued registration of the suit land in the plaintiff's name to conclusion.
11. Having considered all the documentation inside the court file I find that the plaintiffs served the defendant in the proper manner and the defendant acknowledged receipt of summons in this suit through an advocate while abroad, and no step was skipped in the prosecution of this case. Service upon the defendant abroad is allowed by the rules. In this court view all that matters in this case is that summons reached the defendant and that he acknowledged them. That was proper service. This court thus finds that the defendant received the summons and plaint. It was for the defendant to file appearance and defense through that advocate and not to indicate to the court that he would attend to suit at his own pleasure. If business of the court was conducted in that manner it is doubtful that any reasonable amount of litigation would ever be concluded in any year.
12. The upshot of the foregoing is that the application dated 23rd January 2025 lacks merit and it is hereby dismissed with costs.
13. On the other hand, the application dated 26th August 2024 has merit and it is hereby allowed in terms of prayers number (1) and (2) thereof.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 17TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

