

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT HOMABAY**  
**ELC (OS) NO. E001 OF 2025**

**THOMAS MWITA MUTUNDI-----1<sup>ST</sup>**  
**APPLICANT**  
**MICHAEL MUTUNDI JOHN----- 2<sup>ND</sup>**  
**APPLICANT**  
**SUMY MARWA MUTUNDI----- 3<sup>RD</sup>**  
**APPLICANT**  
**ATIENO MATAHE MUTUNDI----- 4<sup>TH</sup>**  
**APPLICANT**

**-VERSUS-**

**GINI GETEIGE-----1<sup>ST</sup>**  
**RESPONDENT**  
**REGISTRAR OF LANDS KEHANCHA----- 2<sup>ND</sup>**  
**RESPONDENT THE HON. ATTORNEY**  
**GENERAL-----3<sup>RD</sup> RESPONDENT\_**

**RULING**

**1.** The Plaintiffs who are now the Applicants filed this Originating Summons dated 3<sup>rd</sup> January 2025 on 23<sup>rd</sup> January 2025. Their claim was for the Court to determination on a number of issues. Among them was that the Court does issue a declaration that the title of Gini Geteige, the 1<sup>st</sup> Defendant/Respondent, being land parcel No. Bukumbe/Masaba/76 be declared extinguished since the Applicants had been in adverse possession of the suit

parcel of land for more than 12 years. Further, the court declares that the applicants were entitled own the suit land through adverse possession; the suit land be registered in favour of the applicants in place of Gini Geteige; and the 2<sup>nd</sup> Respondent be directed that the Orders granted in respect of the foregoing be instruments of transfer of ownership and transfers the suit land to the plaintiffs' names.

- 2.** Upon filing the Originating Summons, the Plaintiffs set out to serve the Respondents. They managed to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents who instructed the Attorney General to file papers in that behalf. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant though served had not entered appearance or filed defence by the date of the arguments on the application.
- 3.** The applicants failed to serve the Originating Summons on the 1<sup>st</sup> Respondent despite several attempts. They filed an Application dated 8th October 2025. They brought it under Order 5 Rule 17 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and and all enabling provisions of the law. He sought for the Orders that:-

1. This Honourable Court be pleased to grant leave to the Applicants' Counsel, Messr. Mike Atieno & Co. Advocates to effect service of the Applicants' Application/Summons herein to the 1st Respondent, by means of substituted service, through advertisement in the Daily Nation newspaper once and by affixing a copy thereof in a conspicuous place within the court's precincts.
2. A time be fixed for the Respondent to enter appearance.
3. Costs of this application be provided for.
- 4.** They relied on four grounds, namely, that despite all reasonable and diligent efforts by the Applicants' Advocates on record to effect service of the Applicants' Application/Summons filed on 8<sup>th</sup> January 2025 upon the 1st Respondent, the said Advocates have been unable to do so. The whereabouts of the 1st Respondent were unknown. Despite all reasonable and due diligence efforts exercised by the Applicants' Advocates to trace and serve him, the 1st Respondent cannot be traced; It is imperative that service be effected before the matter can be heard. It was only just, fair and equitable that the Applicants' Application is allowed to effect service upon 1st Respondent.

**5.** The application was supported by the Affidavit of one, Clifford Ouko Gombe. In it he deposed that he was a licensed court process server duly empowered to serve civil processes. On 8th August 2025, he received instructions from Mike Atieno & Co. Advocates to effect service of the Originating Summons, supporting affidavit and the annexures thereto dated 3<sup>rd</sup> January 2025 upon the 1st Respondent. That he received information from the Applicants, information which he believed in. The 1st Respondent resided around Masaba location within Migori County.

**6.** That he had tried all possible means but failed to locate the physical address of the 1st Respondent herein. He was unable to trace the 1st Respondent or learn of his whereabouts despite all diligent and reasonable efforts to enable me to effect service of the said Originating Summons, Supporting Affidavit and the annexures thereto. All leads to the 1<sup>st</sup> Respondent's last known physical addresses had borne no fruits. The delay caused by the inability to effect service of the Originating Summons, the Supporting Affidavit and the annexures thereto

upon the 1st Respondents severely hampered the Applicants' effort to conclude this matter.

7. In submissions, learned counsel for the applicant argued that the applicant had even employed the help of the Area Chief and village elder to trace the Respondent in vain. He prayed that the application be allowed so that they advertise the Summons and the Summons to Enter Appearance in the Daily Nation and affix others the precincts of the Court.
8. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not oppose the application. She did not submit on it.

### **ANALYSIS AND DETERMINATION**

9. The court considered the Application and the supporting Affidavit, sworn on 8<sup>th</sup> October 2025. The issue before me is whether the Applicant has demonstrated that he is entitled to the grant of orders that he serves the Application through substituted service.
10. Service of summons on a defendant who is natural person in his private capacity, to enter appearance, is provided for in Order 5 of the Civil Procedure Rules. A Plaintiff, Petitioner or Claimant has a number of steps to follow. First the attempt of

the service has to be personal as provided under Rule 7 or on an agent duly authorized to accept service as provided for under Rule 8 if he has an authorized agent or advocate. If the process server fails to trace the defendant or his agent after a number of attempts he can serve an adult member of the family as provided for under Rule 12. The person served has to accept service by affixing his signature or mark of acceptance on the copy of summons which is returned to the judge as a confirmation of the act but where the defendant refuses to append his signature or mark on the summons the process server may do an affidavit of service stating as much.

**11.** In the event that the attempts referred to above fail, the Plaintiff may apply to the court for service through substituted service, as provided for under Rule 17. This may be “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”. The other manner may be by advertisement as provided for under Rule 17(4).

**12.** In the instant application the Applicants' learned counsel appeared and argued that attempts of service of Summons had been demonstrated. He explained in the Affidavit of Service the number and manner of the attempts he had made to trace the 1<sup>st</sup> Respondent. The Court formed the opinion that the Applicant had complied with Order 5 Rules 7, 8, 12, 13, 14, 15 and 17 of the Civil Procedure Rules.

**13.** The upshot is that the Application dated 8<sup>th</sup> October 2025 is allowed as prayed but on the following conditions:-

1. First, the Applicant shall advertise the summons to enter appearance and the pleading herein within the next twenty-one (21) days in either the Daily Nation or the Standard Newspaper of at least an eighth (1/8<sup>th</sup>) of a page in size, and is should not be in the business section of the paper.
2. Second, the Plaintiff is required also to make copies of the summons to enter appearance and affix copies thereof in the A3 size of the paper on the outside of the Defendant's gate and conspicuous placed of the four (4) corners of the parcel of land in issue and other copies on the court Notice Board, within the next seven (7) days.

3. This matter shall be mentioned on 15<sup>th</sup> December, 2025 to confirm compliance of these orders.

**14.** Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this **06<sup>th</sup>** day of **November 2025**.

**HON. DR. IUR NYAGAKA,**

**JUDGE**

**In the presence of**

Court Assistant: Ms. Lola

Mr. M. Atieno for the Plaintiffs/Applicants

Mrs. Opiyo SC for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents