



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 199 OF 2016

JACKSON KAMAU MAINA.....PLAINTIFF

VERSUS

JOSEPH GACHERU MUTHEKI.....1ST DEFENDANT

MARGARET WANJIRU GOKO.....2ND DEFENDANT

THE COUNTY LANDS REGISTRAR MACHAKOS.....3RD DEFENDANT

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

THE NATIONAL LAND COMMISSION5TH DEFENDANT

RULING

1. In his Application dated 20th April, 2018, the 2nd Defendant is seeking for the following orders:

a. That this Honourable Court be pleased to set aside and or discharge the orders issued on 26th January, 2017 against the 2nd Defendant/Applicant over the parcel of land known as Machakos/Ndalani 1/305 pending the hearing and determination of the suit.

b. That costs of this Application be borne by the Plaintiff/Respondent.

2. According to the Affidavit of the 2nd Defendant/Applicant, she is the registered proprietor of land known as Machakos/Ndalani 1/305 having purchased it from the 1st Defendant; that the Plaintiff proceeded with the hearing of the matter on 26th January, 2017 on account of a false Affidavit of Service purporting to have served her with the pleadings and that she is in actual possession of the suit land.

3. The 2nd Defendant finally deponed that there is no evidence showing that the Plaintiff served the other Defendants with the pleadings; that the Plaintiff acted in bad faith by seeking for orders of injunction before serving all parties and that she will suffer grave prejudice because she cannot carry out the projects she intended to carry out on the suit land.

4. In response, the Plaintiff/Respondent deponed that vide a letter of the Chief, the 1st Defendant gave him the suit land in the year 1979; that he has been paying the requisite taxes in the name of the 1st Defendant since 1979 to 2014 and that he is the one who is in possession of the suit land.

5. According to the Plaintiff, the pleadings, including the Notice of Motion and the Plaint for the 1st Defendant and the 2nd Defendant were served upon the 1st Defendant who undertook to serve the 2nd Defendant because he knew where she was and that the 1st and 2nd Defendants have colluded to deprive him of the suit land.

6. The 2nd Defendant's advocate deponed that the 2nd Defendant was never served with the summons or pleadings relating to this suit; that the Plaintiff failed to comply with the provisions of Order 5 of the Civil Procedure Rules and that the orders of 26th January, 2017 were granted on account of false information. Counsel relied on numerous authorities which I have considered.

7. The Plaintiff's advocate submitted that the Plaintiff acquired the suit land from the 1st Defendant in 1979; that he has been in possession of the suit land for over 38 years uninterrupted and that the Defendants' rights over the suit land have been extinguished.

8. The Plaintiff's advocate submitted that the 1st Defendant received summons on behalf of the 2nd Defendant and that the law on personal service has since changed. Counsel relied on authorities which I have considered.

9. The main ground on which the 2nd Defendant's Application is premised on is that she was never served with the Summons to Enter Appearance or the Application dated 21st November, 2016. Indeed, the record shows that when the Application dated 21st November, 2016 came up for hearing on 26th January, 2017, the Plaintiff's advocate informed the court that all the Defendants had been served with the Application. The court allowed the Application on the basis that the same was not opposed.

10. The Plaintiff has admitted that the 2nd Defendant was not served with the Application dated 21st November, 2016 personally. In the Affidavit of Service sworn by the process-server on 6th December, 2016, the process-server deposed as follows:

“Lastly, on the same day, [6th December, 2016] I proceeded to Gatundu Mutomo at the residents of the 1st and 2nd Defendants where I met the 1st Defendant who accepted service on her behalf and on behalf of the 2nd Defendant but refused to sign on my copy.”

11. The process-server never indicated in the Affidavit of Service if indeed the 1st Defendant was an agent of or a relative of the 2nd Defendant.

12. Order 5 Rules 8(1) of the Civil Procedure Rules provides that service of the Summons (*and all pleadings*) shall be made on the Defendant personally, unless he has an agent empowered to accept service. Order 5 Rule 7 provides that where there are more Defendants than one, service of the Summons shall be made on each Defendant.

13. The non-service of the Summons to Enter Appearance and the Application dated 21st November, 2016 on the 2nd Defendant dictates that the orders that were issued by the court on 26th January, 2017 should be set aside *ex debito justitiae*. Indeed, as was held in the case of ***ABC Ltd vs. Generation Farmers & Co. Ltd (2014) eKLR***, service of Summons to Enter Appearance on a party, or any pleading for that matter, is an enabler of fair trial.

14. Having not served the 2nd Defendant with the Application dated 21st November, 2016 as required by the provisions of Order 5 of the Civil Procedure Rules, I find the 2nd Defendant's Application dated 20th April, 2018 to be meritorious.

15. For those reasons, I allow the Application dated 20th April, 2018 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE