



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CASE NO. 04 OF 2019 (OS)

RUFUS MUNYUA MUCHIRI.....PLAINTIFF/APPLICANT

VERSUS

JOHN MUCHIRI NJAGI

(sued as next of kin of John Njagi Nkanya (deceased)....DEFENDANT/RESPONDENT

RULING

1. This suit was filed by way of Originating Summons. It seeks a declaration that the plaintiff has acquired by way of adverse possession ownership of three (3) acres out of original land Parcel No. MWIMBI/N. MUGUMANGO/670 situated in North Mugumango Location of Tharaka Nithi County.
2. This suit was filed on **15th March, 2019**. On **10th April, 2019**, this court issued the following directions:
 1. Plaintiff/Applicant to properly serve the suit documents upon the defendant/respondent within the next 10 days.
 2. Plaintiff/Applicant to fully comply with order 11, CPR, within the next 14 days.
 3. Defendant to fully comply with order 11, CPR, within 14 days after receipt of the Plaintiff/Applicant's compliance documents.
 4. All parties to come to court for directions to fix a hearing date.
 5. Directions on 20.5.2019.
 6. Notices to issue.
3. On **20.5.2019**, the plaintiff's advocate, Nyambura Kithaka, told the court that the defendant had been served with apposite suit documents but had failed to enter appearance or come to court. She asked the court to enter an interlocutory judgment against the defendant and give a date for formal proof proceedings. Her request was denied but nevertheless a hearing date was given under **Order 10 Rule 9 to take place on 18th June, 2019**.
4. The plaintiff was ordered to appropriately serve the defendant with the hearing date. On **18th June, 2019**, the plaintiff's advocate told the court that she wanted to amend the plaint to reflect parcel numbers of subdivisions to the original suit land. It is noted that the defendant had not been properly served as although the affidavit of service sworn on 28.5.2019 said that the advocate had herself served the court orders, it also stated that they were served upon an uncle of the defendant. Pellucidly, this was not proper service.
5. Nevertheless, the plaintiff was ordered to properly serve the defendant and to amend his plaint. Again on 10th July, 2019, the plaintiff was once again ordered to serve the hearing date upon the defendant which date was on **23rd September, 2019**.
6. On **23rd September, 2019**, the court found that the defendant had not been properly served. Paragraph 3 of the affidavit of service indicated that the plaintiff had been served through his brother, one Joseph. Veritably, this was not proper service. The court delivered the following ruling:

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RULING

1. This matter was coming up for full hearing on **23rd September, 2019**.
2. Mr. Kaminza, holding brief for M/s Ann Nyambura Kithaka, told the court that the defendant, who is not represented by an advocate, had been served with the hearing date.
3. Upon perusal of the affidavit of service filed by advocate Ann Nyambura Kithaka, the plaintiff's advocate, it is clear that the service purportedly served upon the defendant amounted to improper service. Paragraph 3 of the affidavit of service avers that the Amended Originating summons was served upon one Joseph, the defendant's brother.
4. The plaintiff is hereby directed to effect proper service upon the defendant within 21 days of today.
5. It is noted that M/s Kithaka, the plaintiff's advocate, was in court when this ruling was delivered.
6. Parties to come to court for **directions** on **22nd of October, 2019**.
7. It is so ordered.

Delivered in open Court at Chuka this **23rd day of September, 2019** in the presence of:

CA: Ndegwa

Ann Kithaka for the defendant

P.M. NJOROGI

JUDGE

7. On **22nd October, 2019**, the plaintiff's advocate told the court that service had been effected upon the defendant on **19th October, 2019** (over a weekend) and as **20th and 21st of October, 2019** were public holidays she sought another mention before which she would have properly served the defendant. She asked the court to mention the matter on **25th November, 2019**.
8. On **25th November, 2019**, M/s Nyambura Kithaka told the court that she had served today's date upon the defendant through her clerk. The apposite affidavit of service states as follows:

AFFIDAVIT OF SERVICE

I ANN NYAMBURA KITHAKA of P.O. Box 3034 – 60200 MERU do hereby make oath and sate as follows:

1. That I am an advocate of the High Court of Kenya and all other sub-ordinate courts hence authorized to serve as court process (sic).
2. That on the 19th day October, 2019, at 10.30am I proceeded to the home of the defendant, one John Muriithi Njagi, located next to Ndumbene Primary School, in Maara, Tharaka Nithi County, where I found him in his house.
3. That I called him out and served him with a mention notice dated 14th October, 2019 coming up for mention on 22nd October, 2019, which he received, shred into pieces and warned me not to ever enter his compound again.
4. That I return this copy duly served.
5. That what is deponed to herein is true to the best of my knowledge, information and trust.

Sworn by the said ANN NYAMBURA KITHAKA at Meru this 22nd day of October, 2019

9. It is clear that this affidavit of service related to **22nd October, 2019** and not **25th November, 2019**. The plaintiff, therefore, had not been served.

10. Whereas M/s Nyambura Kithaka, the plaintiff's advocate, has told the court that her services had been effected upon the defendant by her clerk, the affidavits of service clearly depone that she personally effected the concerned services. This is incontestable evidence that the advocate filed lies. This impeaches the integrity of all the affidavits of service she had filed in this matter and also amounts to egregious infraction of professional ethics. I, therefore, make an inference that the defendant has all along never been served. As a consequence, valuable Judicial time has been wasted and this court's orders have been serially disobeyed by the defendant and her advocate.

11. A claim of land ownership by way of adverse possession must be taken seriously, as if it succeeds, it has the effect of dispossessing the registered owner of the land of his property. That claim must be fully proved. Attempts to take short cuts must be deprecated.

12. In the circumstances and in pursuance of section 3A of the Civil Procedure Act which grants this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court AND ALSO in pursuance of Order 11 Rule 3 subrule 2(o), I hereby strike out this suit. As a consequence, this suit should be removed from the register of pending ELC suits forthwith.

13. No costs are awarded.

14. Orders accordingly.

Delivered in open Court at Chuka this **3rd day of December, 2019** in the presence of:

CA: Ndegwa

Kithaka present for the Plaintiff

Respondent not present

P.M. NJORGE

JUDGE