



**Mcharo v Kisomba (Environment & Land Case E010 of 2023)
[2024] KEELC 414 (KLR) (Environment and Land) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E010 OF 2023
LL NAIKUNI, J
JANUARY 24, 2024**

BETWEEN

CALEB MUNDE MCHARO PLAINTIFF

AND

COSMUS ROPAKI KISOMBA DEFENDANT

RULING

I. Introduction

1. The Ruling of this Honourable Court is for the determination of the Notice of Motion application dated 7th September, 2023 by the Defendant/Applicant herein – Caleb Munde Mcharo. The application was brought pursuant to the provision of Article 25 (c) and Article 50 (1) of *the Constitution* of Kenya 2010, Order 5 rule 1 and rule 16, Order 51 rule 1 and rule 3 of the Civil Procedure Rules 2010 and Section 1A and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and any other enabling provisions of the law).
2. Upon service, the Plaintiff/Respondent herein filed his replies in form of a Replying Affidavit dated 3rd October, 2023. In the course of the proceedings, the Defendant/Applicant filed a further affidavit dated 23rd October, 2023. The Honourable Court will deal with this matter in depth at a later stage of this Ruling.
3. It is instructive to note that the suit was firstly filed at Mombasa – Environment & Land Court but eventually due to the geographical jurisdiction and upon the establishment of this Court in July, 2023 was transferred to Voi ELC.

II. The Defendant/Applicant's case

4. The Defendant/Applicant sought for the following orders:-



- a. Spend.
 - b. That this Honourable Court be pleased to arrest the Hearing scheduled on 20th November, 2023 pending hearing and determination of this Application.
 - c. That the person who allegedly effected services of the Summons to Enter Appearance and the Plaintiff's pleadings be ordered to attend court for purposes of his cross-examination.
 - d. That the Plaintiff's suit be struck out with costs to the Defendant/Applicant.
5. The application was based on the grounds, testimonial and averments from the 16 Paragraphed Supporting Affidavit of Caleb Munde Mcharo C/O P.O. BOX 86446 Mombasa and a resident of Taita Taveta County within the Republic of Kenya and four (4) annexures marked as "CMM – 1 to 4" annexed hereto. He averred as follows:-
- a. He was the Defendant/Applicant herein hence conversant with the matters deponed to herein wherefore competent and duly authorized to swear this Affidavit herein.
 - b. The Defendant/Applicant came to know of the existence of the suit herein instituted by the Plaintiff/Respondent when an Advocate from the Law firm of M/s. Amuma Dulu & Company Advocates stumbled upon it in the cause list and immediately notified him. This prompted the said Defendant/Applicant's Advocate to photocopy all the documents contained in the Court File upon paying the requisite fees so as to know the contents and issues pertinent to the aforesaid suit
 - c. Then his Advocate advised him that as per the provision of Order 5 Rule 1 of the Civil Procedure Rules 2010, the Plaintiff ought to have personally served the Defendant/Applicant herein with the said summons to enter appearance and the Plaintiff/Respondent's pleadings so as to invite the Defendant/Applicant to the suit and defend his interests in the suit.
 - d. However, the Defendant/Respondent maintained that he was never served with any summons to enter appearance together with the Plaintiff/Respondent's pleadings and the averments made by one Timothy Mutinda Mui in his Affidavit of Service dated 24th July, 2023 were premised on falsehood. Annexed hereto and Marked as "CMM-1" was a copy of the Affidavit of Service dated 24th July, 2023.
 - e. The said Court Process Server never called the Defendant/Applicant via mobile phone and at all material times to this suit the said Defendant had been working for gain in the Republic of Tanzania. It was noteworthy that the aforesaid Court Process Server never quoted the telephone number that he used whilst living in Tanzania in the said affidavit of service.
 - f. The Defendant/Applicant never authorized the Summons to Enter Appearance and the Plaintiff/Respondent's pleadings to be tendered to Ludovick Mwamba Mwasi who actually provided security at the said Defendant/Applicant's farm on a daily basis except when he was on off day and he usually worked from 6 pm in the evening until 6 am in the morning.
 - g. On the day that the Court Process Server effected the alleged service, the said Ludovick Mwamba Mwamba was not present anywhere near the suit premises and on that particular day of 7th June, 2023 was his off day.
 - h. The Plaintiff/Respondent had filed a similar case at Wundanyi Law Courts being, PMELC No.E001 of 2022 - Cosmus Ropaki Kisomba – Versus - Caleb Munde Mcharo but the Plaintiff/Respondent herein withdrew the said case after the Defendant/Applicant had raised



a preliminary objection pertaining to the pecuniary jurisdiction of the Honourable Lower Court. Indeed, the Presiding Officer allowed the withdrawal of the suit with costs to the Defendant/Respondent herein, which the Plaintiff/Respondent herein had never settled. Annexed herein and Marked as "CMM - 2" was a copy of the Case. activities generated from Judiciary E-Filing Website.

- i. The Plaintiff/Respondent had clearly contravened the Equity Principles "He who comes to equity must come with clean hands" and "He who seeks equity must do equity" when he filed the Affidavit of Service dated 24th July, 2023 with the full knowledge that it contained perjury statements and assertions that were clearly meant to mislead this Honourable Court.
- j. That even the Affidavit of service dated 3rd August, 2023 deposed by the said Court Process Server Timothy Mutinda Mui whereby he alleged in Paragraph 3 that he duly served the Hearing Notice after discussion with the Defendant/Applicant and the Defendant/Applicant's brother "Kafusi Mcharo" who had never been informed whatsoever about the suit herein. Annexed herein and Marked as "CMM-3" was a copy of the Affidavit of Service dated 3rd August, 2023.
- k. It was imperative that the Licensed Court Process Server was summoned to court for purposes of cross-examination so that the truth could be ascertained before the suit proceeded any further.
- l. Besides the Defendant/Applicant had a meritorious defence duly attached to the application herein that raised triable issues which this Honourable Court ought to try. Annexed herein and Marked as "CMM - 4" was a copy of the Defence.
- m. Further, the Plaintiff/Respondent would not be occasioned to any prejudice for which an award of costs could not compensate, if at all, should the Defendant/Applicant's application herein be allowed; while on the other hand, the Defendant/Applicant would be occasioned great injustice, grave prejudice and his Constitutional Right to Fair Hearing as enshrined in Article 50(1) of *the Constitution* of Kenya 2010 would be grossly violated.
- n. This Honourable Court had unfettered discretion to summon the Court Process Server for purposes of ascertaining whether indeed the Defendant/Applicant was ever served with the Summons to Enter Appearance and Plaintiff's pleading. To him there was sufficient case for this application to be allowed.
- o. It was in the interest of justice that this honorable Court exercise untrammelled discretion in favour of the Defendant/Applicant by and the orders sought in the application herein.
- p. He made this affidavit in support of the Notice of Motion, filed seeking to summon the person who allegedly effected services of the Enter Appearance and the Plaintiff/Respondents Pleadings be ordered to attend co purposes of his cross-examination and that the Plaintiff/Respondent's suit be dismiss to the Defendant/Applicant.

III. The Responses by the Plaintiff/Respondent

6. While opposing the application by the Defendant/Applicant dated 7th September, 2023, the Plaintiff/Respondent filed a 16 Paragraphed Replying Affidavit sworn by Cosmus Rapoki Kisomba dated 3rd October, 2023. He averred as follows:-
 - a. He was a resident of Mwachabo location within Mwatate Sub-County in Taita-Taveta County.



- b. He was the Plaintiff/Respondent herein and hence well conversant with the matters herein and thus competent to swear this Affidavit.
- c. He had read and understood the Defendant/Applicant's application and all the technical matters herein had been explained to him by his Advocates on record and as such, wish to respond as below.
- d. First and foremost and in response to the contents of Paragraph 2 of the Supporting Affidavit, it was not clearly indicated when the Defendant/Applicant's Counsel stumbled upon the matter in the cause list bearing in mind that this matter was transferred from Mombasa ELC to Voi ELC on 15th August, 2023.
- e. From a closer reading of the Affidavits of Service annexed as "CMM -1" and "CMM – 3", it was clear that the Summons to Enter Appearance plus the pleadings thereto were duly served upon the Defendant/Applicant through the persons he himself authorized to receive the documents on his behalf and as such, he could not now turn back and challenge the service.
- f. Additionally, by his defence annexed as "CMM – 4", the Defendant/Applicant had raised pertinent issues entirely opposing the Plaintiff/Respondent's suit and as such, the application as brought was merely a waste of courts time in adjudicating non-issues rather than going into the substance of the dispute herein.
- g. The Plaintiff/Respondent had by all means come to this honourable court with clean hands in that, the Summons to Enter appearance were delivered to a duly licensed Process Server who effected service upon the Defendant/Applicant. As such, the service effected was proper in strict terms.
- h. Although it was true that the Plaintiff/Respondent had commenced another matter at Wundanyi Law Courts being "PMELC No. E001of 2022, that matter as rightly pointed out by the Defendant/Applicant, was withdrawn but to date, the Defendant/Applicant had never assessed his costs and as such, the Plaintiff/Respondent could not pay that which had not been quantified owing to the Defendant/Applicant's indolence.
- i. There was no justification whatsoever shown in the Defendant/Applicant's application to warrant the grant of the orders sought therein as the arguments made in that application was not in any way supported by any evidence.
- j. Evidently, the application was just a waste of this honourable court's precious time made in the guise of seeking leave to file a defence and defend the suit out of time.
- k. Going by the rules of natural justice, the Plaintiff/Respondent would have no objection or opposition to the Defendant/Applicant defending the suit albeit out of time as that would be the only way that the issues raised in his suit would be conclusively and fully determined upon hearing both parties.
- l. To this end, the Defendant/Applicant's application was baseless, frivolous, vexatious, and made in bad faith and intended to mislead this honourable court as to the correct state of affairs but instead, meant to sneak in a defence in the proceedings out of time without a cogent explanation as to the delay.
- m. He swore this affidavit in opposing the Defendant/Applicant's notice of motion application dated 7th September, 2023 and prayed that the same be dismissed with costs.



- n. Further, should this honourable court be pleased to do substantive justice to the Defendant/Applicant all for the sake of fairness and in the greater interests of justice, he prayed that in allowing the Defendant to defend the suit out of time, make an order for payment of throw away costs as the court may deem fit and just.

VI. The further affidavit by the Defendant/Applicant.

7. On 23rd October, 2023, the Defendant/Applicant filed a 10 Paragraphed Further Affidavit sworn by Caleb Munde Mcharo and stated as follows:-
- a. He was the Defendant/Applicant herein hence conversant with the matters deponed to herein wherefore I am competent and duly authorized to swear this Affidavit.
 - b. He was advised by his Advocate that in response to the averments made in paragraph 3 of the Plaintiff/Respondent's Replying Affidavit that pursuant to the provision of Articles 48 and 35 of *the Constitution* of Kenya 2010 and the Judiciary's timely response in embracing technology, the Defendant's Learned Counsel stumbled upon Mombasa ELC Cause List dated 6th June, 2023 when this matter was listed before Honourable Lady Justice Matheka updated at the Kenya Law Reports Website. The same was affirmed when the handwritten court proceedings were obtained upon payment of the requisite fees. Annexed herein and Marked as "CMM - 1" was a copy of the handwritten court proceedings dated 6th June, 2023.
 - c. In response to the allegations made in under the contents of Paragraph 4 of the Plaintiff's Replying Affidavit, the Defendant/Applicant vehemently denied that he authorized another person to receive the summons to enter appearance and the Plaintiff's pleadings and puts the said Plaintiff/Respondent to strict proof thereof. The said Plaintiff/Respondent had not demonstrated how he got in touch with the Defendant/Applicant considering that he was working for gain in Tanzania.
 - d. In response to the averments made in under Paragraph 5 of the Plaintiff's Replying Affidavit, the Defendant herein strongly opposed the same and asserted that the aforesaid Defendant/Applicant had a constitutional right to defend the suit. This Honourable Court recognizes that Land was an emotive and sensitive matter and parties were never locked out in defending their proprietary interests. The aforementioned Defendant/Applicant reiterated that service of summons to enter appearance and the Plaintiff/Respondent's pleadings upon a Defendant/Applicant was crucial as it invited the Defendant/Applicant to the suit so as to defend his interests in the suit.
 - e. In response to the assertions made in the contents of Paragraph 6 of the Plaintiff/Respondent's Replying Affidavit the Defendant/Applicant denied the same and put the Plaintiff/Respondent to strict proof thereof.
 - f. In response to the averments contained in Paragraph 7 of the Plaintiff's Replying Affidavit, the Defendant/Applicant vehemently opposed the said averments and put the Plaintiff/Respondent to strict proof thereof. Further, the said Plaintiff/Respondent's Advocates were served with a demand notice but never responded to it. Annexed herein and Marked as "CMM - 2" and "CMM - 3" were copies of the Letter and email correspondence.
 - g. He was advised by his Advocate that in response to the allegations made in Paragraph 8 of the Plaintiff/Respondent's Replying Affidavit, the Defendant/Applicant referred to the provision of Order 5 Rule 16 of the Civil Procedure Rules 2010 which stipulates that:-On any allegation that a summons had not been properly served, the court may examine the serving officer



on oath, or cause him to be so examined by another court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons had been duly served or order such service as it thinks fit.

- h. In response to the assertions made in Paragraphs 9 to 13 of the Plaintiff/Respondent's Replying Affidavit, the Defendant/Applicant vehemently opposed the notion that there was a Request for Judgment that was endorsed and put the Plaintiff/Respondent to strict proof thereof. Further, the Learned Judge, Lady Justice Matheka stated in court that the Defendant/Applicant was to be served with a Hearing Notice.
- i. The prayer by the Plaintiff/Respondent of being paid throw away costs was tantamount to infringement of the Defendant/Applicant's Constitutional Right to Fair Hearing as envisaged in the provision of Article 50 of *the Constitution* of Kenya 2010. Annexed herein and Marked as "CMM - 4" was a copy of the Court Proceedings on 25th July, 2023.
- j. He made this Affidavit in support of the Notice of Motion dated 7th September, 2023 seeking to summon the person who allegedly effected services of the Summons to Enter Appearance and the Plaintiff/Respondent's Pleadings be ordered to attend court for purposes of his cross-examination and the Plaintiff/Respondent's suit be dismissed with costs to the Defendant/Applicant.

V. Submission

- 8. On 24th October, 2023 while all parties were present in Court, directions were granted that the application be disposed off by way of written submissions within a stipulated stringent timeframe. Despite of this. Only the Defendant/Applicant complied whatsoever.
- 9. In the given circumstances the Ruling will be delivered on merit as scheduled on 24th January, 2024 by this Court.

A. The Written Submissions by the Defendant/Applicant

- 10. On 21st November, 2023 the Learned Counsel for the Defendant/Applicant being the Law firm of Messrs. Amuma Dulu & Company Advocates filed their written submissions in relation to the application dated 7th September, 2023. Mr. Kamau Advocate commenced his submissions by stating that the application sought the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That the person who allegedly effected services of the Summons to Enter Appearance and the Plaintiff's pleadings be ordered to attend court for purposes of his cross-examination.
 - d. That the Plaintiff's suit be struck out with costs to the Defendant/Applicant.
- 11. The Learned Counsel informed Court that the Plaintiff/Respondent filed his Replying Affidavit dated 3rd October, 2020 opposing the Application. In response, the Applicant filed a Further Affidavit in response to the allegation the Counsel provided allegations that raised the Plaintiff's Replying Affidavit. He gave the background of the matter. According to him, the Defendant/Applicant maintained that he was never served with' summons to enter appearance and the Plaintiff/Respondent's pleadings. At all material times, he was working for gain in Tanzania. The suit had been mentioned on two occasions before Lady Justice Hon. Matheka whereby Counsel for the Plaintiff/Respondent informed the court he was yet to serve the Defendant/Applicant with summons and



Plaintiff/Respondent's pleadings. At no point was the Defendant/Applicant ever notified of the suit herein and was appalled that he delegated another person to receive the said court documents as deponed by Timothy Mutinda in his Affidavit of service. This prompted the Defendant/Applicant herein to file the application. It was imperative that the Court Process Server was summoned and be cross-examined since the Defendant has challenged the contents of the Affidavit of Service.

12. In support of his submissions, he raised two issues. Firstly whether the person who allegedly effected services of the Summons to Enter Appearance and the Plaintiffs pleadings ought to be ordered to attend court for purposes of his cross-examination. To back up his point, the Learned Counsel relied on the case of: "David Koome Matugi – Versus - APA Insurance Limited [2021]eKLR Honourable Justice Francis Gikonyo whilst sitting at High Court of Kenya at Narok opined the following:-

“Quite illuminating eminent work by Chitaley and Annaji Rao; The Code of Civil Procedure Volume II page 1670 that:

There is a presumption of service as stated in the process server report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service. [Underlining mine for emphasis See also Shadrack arap Baiywo vs. Bodi Bach KSM CA Civil Appeal No. 122 of rg86[1987] eKLR, where the Court of Appeal quoted with approval the foregoing eminent writing. MB Automobile vs. Kampala Bus Service, [1966] EA 480 at page 484 is also pointedly relevant on this subject.....”

13. He further cited the case “INM – Versus - AJMN [2022] eKLR Honourable Lady Justice Lydia Awino Achode whilst sitting at the High Court at Nairobi (Milimani Law Courts) stated the following:-

“Be that as it may, an avenue lies as for the rectification of mischief on the part of a process server as provided under Order 5 Rule 16 Civil Procedure Rules. If indeed there is doubt as to the authenticity of the contents of the affidavit of service, there was need to cross-examine the process server on the contents.....”

On this issue, he submitted that the Defendant/Applicant be granted leave to summon the court process server and cross-examine him to ascertain the veracity of the Affidavit of Service.

14. Secondly, whether the suit should be struck out if it was ascertained that no service was conducted and the summons issued on 18th October, 2022 had expired. He cited the case of:- “Brenda Karanja – Versus - Mweki Dominic [2021]eKLR, Honourable Justice David Kipyegomen Kemei whilst sitting at the High Court of Kenya at Machakos observed the following:-

“The standard of proof is on a balance of probabilities as per the provisions of Section 107 of the Evidence Act Cap 80 Laws of Kenya that states;

16. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. The courts are duty bound to determine matters on a balance of probability whilst taking into consideration the facts and evidence that has been placed before them. In the case of “Arbuthnot Express Services Limited – Versus - Manchester



Outfitters Suiting Division Limited & Another [1989] LLR 5515 (HCK) the court observed as follows:-

“The general principle of law is that as far as possible, the courts should lean in favour of the trial and determination of proceedings on merits. There are yet other principles viz that delay defeats equities and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts.”

17. To buttress his point, the Learned Counsel referred Court to the celebrated case of “Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others – Versus - Charles Thaithi [1997] eKLR which is binding on this court, the Court of Appeal held as follows:-

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspect cause by failure to renew the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the court under Section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons...the court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence.....”

18. He cited the case of:- “Tropical Foods International & another – Versus - Eastern and Southern African Trade and Development Bank & another [2017] eKLR relied on the case of Udaykumar(supra),and highlighted the facts of that case, that; briefly, were that in the main suit, Summons to Enter appearance to the suit were issued by the Superior Court on 2nd April, 1987. Those Summons were served upon some unnamed Manager of the Defendant firm on 3rd February 1988. That service was found to be irregular and upon request by the Plaintiff’s Lawyers summons were reissued on 27th August 1992 and served upon the Defendants on 28th August 1992. The Defendants Entered Appearance through Counsel on 9th September 1992.

19. Against that backdrop and in considering the purport of Order V Rule I of the Pre-Legal Notice 5 of 1996 Civil Procedure Rules the Court of Appeal rendered itself as follows:-

“Order V rule 1 provides a comprehensive code of the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under Section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the Defendants revive the summons which had expired. The original summons in an auction is only valid for the purposes of service for 12 months from the date of its re - issue. The court, before 1996, could only by order extend its validity from time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the plaintiff nor his advocate did exhaust the provisions of Order V rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows, therefore, that the alleged service upon



the Defendants was ineffective and invalid and so were the summons issued on 28th August, 1992.....the Appellant in her application has equated the failure to take out fresh summons and to effect service to lack of knowledge on the whereabouts of the Respondent and has sought refuge under 3A of the *Civil Procedure Act*. The purpose of that Act is to facilitate the just, expeditious proportionate, and affordable resolution of civil disputes efficiently in order to achieve substantive justice to all litigants without undue regard to technicalities. The Appellant had other modes of service to resort to in the event of failure to trace the respondent as she was not expected to just sit there and wait for Godot.

A perusal of the lower court file showed that the summons to enter appearance were issued on 29th June, 2016 and collected on 2nd August, 2016. The application for extension of summons was filed on 26th November, 2018 following a suo motto notice to show cause why the suit should not be dismissed for want of prosecution issued by the court that was to come up on 27th November, 2018 and served upon the Appellant on 23rd November, 2018. It seemed upon being served with the said notice to show cause, the appellant woke up from slumber and sought for the extension of summons to enter appearance.

Under order 5 Rule 2, sub rule 7 of the Civil Procedure Rules, 2010 the court has power to dismiss a suit 24 months from issuance of the original summons. The trial court decided to issue a notice to show cause within this provision and it is at this point that the Appellant realised that the summons had expired and that she could not trace the Respondent. The summons had already expired and the Appellant attempted to seek extension thereof but the trial court rejected the application”.

20. He submitted that the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010 are couched in mandatory terms and cannot be taken casually and/or lightly. It was not couched to provide for procedural technicalities. This was reiterated in the case of “Lee Mwathi Kimani – Versus - National Social Security Fund & another [2014] eKLR where the 1st Defendant had sought to have the suit struck out as summons to enter appearance were never served upon them to enable them to appear and file a defence. The Judge held that:-

“Under Order 5(1) Sub - Rules 3, 5, and 6 the Plaintiff had an obligation to ensure that summons are prepared and signed by the court to facilitate service on the Defendant. The provisions of Order 5 Rule 1 are elaborate and comprehensive and couched in mandatory terms and where for some reason the Plaintiff has experienced difficulty in service Order 5 Rule 2 provides reprieve in that the plaintiff can apply for the validity of summons to be extended. Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the Defendant, the Defendant has no valid invitation to defend the suit.....”

21. Based on the provisions of the quoted authority, it was apparent that if it will be ascertained that the Defendant/Applicant had not been served with the summons to enter appearance and Plaintiff/Respondent's pleadings, the summons issued 18th October, 2022 stand expired and the suit a nullity. The Learned Counsel prayed that the suit should be struck out against the Defendant/Applicant.

V. Analysis & Determination

22. I have keenly considered the filed pleadings being the application dated 7th September, 2023 by the Defendant/Applicant herein, the responses by the Plaintiff/Respondent herein, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes herein.



23. For the Honourable Court to arrive at an informed, fair and reasonable decision, it has framed the following three (3) issues for its determination. These are:-
- a. Whether the Notice of Motion application dated 7th September, 2023 by the Defendant/ Applicant has any merit?
 - b. Whether the parties herein are entitled to the orders sought.
 - c. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion application dated 7th September, 2023 by the Defendant/ Applicant has any merit?

24. Under this Sub – heading the main substratum are that to have the Honourable Court arrests the Hearing scheduled on 20th November, 2023 pending hearing and determination of this Application; the person who allegedly effected services of the Summons to Enter Appearance and the Plaintiff's pleadings be ordered to attend court for purposes of his cross-examination and to have the Plaintiff's suit be struck out with costs to the Defendant/Applicant.
25. The Law that governs service of Summons and other court pleadings is found under the Provisions of Order 5 of Rule 5 (1) (a), (b), (c) and (d) (2) and (3) of the Civil Procedure Rules 2010. Thus, the main issue that was before the trial court was in regard to the validity of summons and the expiry thereof which is provided under Order 5 Rule 2 of the Civil Procedure Rules, 2010 which reads:-
2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.(Emphasis mine)
 - (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.
 - (3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.
 - (4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.
 - (5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.
 - (6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.
 - (7) Where no application has been made under sub rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.
26. In interpreting the above provisions of the law, I note that in the first instance, the summons shall be valid for twelve months. Where a concurrent summons has been issued, it shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of the issue of the concurrent summons. Where the validity of the summons is extended, it shall be until the period



specified in the order. As many attempts may be made to serve the summons during the period of the validity of the summons care must be exercised lest the same is relied upon when they are already expired.

27. The Law envisages that the other party has to be served personally or upon an agent or other persons on his/her behalf who is duly authorized by law. In the instant case, while I fully concur and agree with most of the cases cited by the Learned Counsel for the Defendant/Applicants in as far as the validity and service of Summons to enter Appearance is concerned. However, the only departure on when it comes to the application of the said principles to the facts of this case. To begin with, the Plaintiff/Respondent holds that the Defendant/Applicant was served properly by a High Court process server by the name Timothy Mutinda Mui and who filed a Six (6) Paragraphed Affidavit of service dated 24th July, 2023 and filed in court on 11th September, 2023. From the averments made out under Paragraphs 3 and 4 of the Affidavit of Service holds as follows:-

Paragraph 3 – that on the same day with the help of the area Assistant Chief Mwachambo Sub-Location one Venard Mwikambai proceeded to the Defendants farm at Mamoia Village and found his workers who informed me that the Defendant works at Tanzania and after calling him he informed (sic) that I leave the documents with his caretaker he would organize on how they get to him Paragraph 4. I then tendered copies of the documents referred in Paragraph 2 above of his worker by the names Ludovick Mwamba Mwasi who is the caretaker at the Defendants farm”.

28. According to the Plaintiff/Respondent, the service was properly effected. On the contrary the Defendant/Applicant has vehemently refuted this fact to wit that he was working for gain in Tanzania and the process server never indicated the mobile number he used to call him. He further held that he never authorized the Summons to Enter Appearance and the Plaintiff’s pleadings to be tendered to Ludovick Mwamba Mwasi whom he admits actually provides security at the said Defendant’s farm on a daily basis except when he was on off duty and he usually worked from 6 p.m. in the evening until 6 a.m. in the morning. The Defendant claimed that on the date 7th June, 2023 when the Process Server effected service the said Mr. Mwamba was off duty.
29. Based on the facts adduced herein it is a matter of conjuncture whether there was proper service. The Process Server seem to have gotten his facts so clearly in terms of the exact farm belonging to the Defendant and the names of the person – Caretaker workers – whether the Defendant worked for gain in Tanzania and that he never authorized Mr. Mwasi to be served with pleadings and that he was off duty on the material date has not demonstrated by the Defendant. Hence for the benefit of doubt and in preponderance of probability this court concludes that there is no doubt at all that the Defendant/Applicant was properly served in accordance with the provisions of the law. Therefore, to summon the process server for cross examination is not only irrelevant, immaterial but also a waste of judicial time. Nonetheless, in the interest of Justice and this being a land matter its fair that the Defendant be allowed to file Defence out of time under Order 50 Rule 6 and 7 of the Civil Procedure Rules, 2010. To the extent of whether there was proper service, the application by the Defendant/Applicant has no merit and should not succeeded at all.

Issue No. b). Whether the parties herein are entitled to the orders sought.

28. Under tis sub heading and as stated above, apart from the issue of service of the pleading by the Plaintiff/Respondent which the Court has already concluded there was proper service, there are other issues emanating from the application by the Defendant/Applicant. Firstly, on whether to cause the proceedings to be stayed awaiting the outcome of this Ruling. I believe this is an important factor and



particularly to sustain the interest of the principles of natural justice taking that it's a land matter which ordinarily has a lot of emotive feelings and affiliation. Indeed, I have taken cognizance to the fact that even the Plaintiff/Respondent from his replies encourages that this matter be heard on merit. For this singular reason, the application by the Defendant/Applicant may survive.

29. Secondly, on whether the court should proceed to strike out the pleadings and the entire suit by the Plaintiff. Critically speaking, there has been no substantial nor tangible reason adduced for seeking this relief. The Defendant/Applicant seem to be raising two grounds. Firstly, on a thin membrane he holds that the Plaintiff/Respondent had instituted a Civil Suit before the Magistrate Court at Wundanyi but which as they all admit was withdrawn for lack of pecuniary jurisdiction. Secondly, the Summons to Enter Appearance were not properly served and hence they expired with the effusion of time making the suit null and void. These reasons are so mundane, frivolous, vexatious and weak reason for seeking such a relief. That cannot be a reason to strike out a suit. In the case of: "Kenya Airways Case (Supra)", the said Learned Judge Emukule J. on defining what frivolous means observed as follows:-

"...Cases which are clearly unsustainable fall within this category (Day v. William Hill (Park Lane) Ltd 1949 All ER 219 CA). An action is frivolous when it is without substance or unarguable. A proceeding may be said to be frivolous when a party is trifling with the court (Chaffners v. Goldsmid(1894)1QB 186..., when to put it to forward would be wasting the time of the court (Dawkins v. Prince Edward of Saxe-Weimar (1876) QBD 499 per Mellor J, when it is not capable of reasoned argument or is unarguable; or it is without foundation; or where it cannot possibly succeed; or where the action is brought or the defense is raised only for annoyance; or to gain some fanciful advantage; or when it can really lead to no possible good; or when it can really lead to no possible good;-(Wills – Versus - Earl of Beanchamp 1886 11 PD 59 per Bowen LJ at 65 described the action as hopeless...and would lead to no good result..."

28. Be that as it may, over and again it has been held that jurisdiction to strike out suit must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. While here, I cannot avoid citing the famous case of "DT Dobbie & Company (Kenya) Limited - Versus – Joseph Mbaria Muchina & Another C.A 37 of 1980" eKLR where Justice Madan held:-

"No suit ought to be summarily dismissed unless it appears so hapless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for the Court of Justice not to act in darkness without the full facts of case before it".

28. For these reasons, I find the application by the Defendant/Applicant to lack merit and hence cannot be allowed to succeed.

Issue No. c). Who will bear the costs of the application.

28. It is trite law that the issue of costs is at the Discretion of the Court. Costs mean the award which a party is granted at the conclusion of a legal action or proceedings in any litigation. The Provisions of Section 27 (1) of the *Civil Procedure Act* Cap 21 Holds that costs follow the events. By following the event means the outcome or result of any legal action.



29. In the instant case, although the application by the Defendant has been partially successful, taking that this matter is still to proceed on for further hearing of the suit it is fair and reasonable that each party bear their own costs.

V. Conclusion & Findings.

28. Consequently, upon conducting an indepth analysis of the framed issues herein, the Honorable Court on the principles of Preponderance of probabilities and the balance of convenience arrives at the following orders. These are:-

- a. That the Notice of Motion application dated 7th September, 2023 be allowed partially only to the extent that:-
 - i. This Honourable Court be pleased to arrest the Hearing scheduled on 20th November, 2023 or any other date pending hearing and determination of this Application.
 - ii. Court declines to summon the Court process Server who allegedly effected services of the Summons to Enter Appearance and the Plaintiff's pleadings be ordered to attend court for purposes of his cross-examination.
 - iii. Court declines to strike out the Plaintiff's suit with costs to the Defendant/Applicant.
- b. That an order be and is hereby made granting the Defendant 14 days leave to file and serve Defence out of time and to fully comply with the provisions of Orders 6, 7 and 11 of the Civil Procedure Rules, 2010.
- c. That thereafter the Plaintiff be and is granted leave of 14 days to file and serve Replies to the filed Defence and any other documents and/or statements they may deem relevant to the case as per the provision of Order 11 of the Civil Procedure Rules, 2010.
- d. That for expediency sake, this matter to be heard and disposed off within the next 180 days from the date of the delivery of this Ruling. There be a mention of the matter on 14th March, 2024 for purposes of conducting a Pre Trial Conference under Order 11 of the Civil Procedure Rules, 2010 and taking a hearing date thereof.
- e. THAT each party to bear their own costs.

It is so ordered accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF JANUARY, 2024

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**HON. MR. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT VOI**

Ruling delivered in the presence of:

- a. M/s. Mary Ngoira the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. No appearance for the Defendant/Applicant

