



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO.24 OF 2017**

**THOMAS KITI NYALE.....PLAINTIFF**

**VERSUS**

**JOHN ROKI WAITHAKA..... DEFENDANT**

**JOEL MUTARARURA KARAJA.....DEFENDANT**

**RULING**

1. By an ex-parte Notice of Motion dated 23<sup>rd</sup> March, 2017, the plaintiff seeks an order granting him leave to serve the defendants herein with summons to enter appearance and a copy of the plaint and all other documents and/or pleading by substituted service by way of posting the summons to enter appearance through their last known address of P. O. 21788-00505, Nairobi and that the defendants do enter appearance within fifteen (15) days from the date of posting the summons. It is brought under Order 5 Rule 17 (1) and (3) of the Civil procedure Rules and Sections 3 and 3A of the Civil Procedure Act.

2. The application is supported by the affidavit of Christine K. Nthiga sworn on 5<sup>th</sup> April 2017 and a supplementary affidavit sworn on 11<sup>th</sup> May 2017.

The application is made on the ground that various attempts have been made to effect service on the defendants which attempts have all been in vain.

3. In her said affidavits counsel for the applicant deposes that several attempts to trace the physical whereabouts of the defendants to effect service upon them have been unsuccessful and has attached a copy of the court Process Server's affidavit of service showing the attempts made to effect service upon the defendants. In the affidavit of service, John Kombe, the Process Server depones that on 8<sup>th</sup> March, 2017 at about 9.00 a.m. he visited the defendants offices located at NSSF Building, 11<sup>th</sup> Floor and found a young lady at the front desk who declined to give her name but told him that the defendants were in Nairobi and that he should check on them some other day. The Process Server further deposes that on 13<sup>th</sup> March 2017 he went back to the said office but found that they had relocated to an unknown location.

4. In the affidavit in support of the motion, it is deponed that since the defendants cannot be traced, the only manner is by substituted service by posting the summons and a copy of the plaint to their last known address. A copy of the instrument of lease dated 11<sup>th</sup> March 2016 showing the defendant's address as P. O Box 21788-00505, Adams Arcade, Nairobi was attached. It is the said instrument of lease that has given rise to the cause of action herein.

5. I have considered the application and affidavits in support. Order 5 Rule 17 (1) of the Civil Procedure Rules provides that : *“where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this order, the court may on application order the summons to be served 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”*

6. The plaintiff has demonstrated that attempts have been made to effect service upon the defendants but without success. The instrument of lease that was signed by both the defendants and the plaintiff has been attached and it contains the defendants’ postal address. I am satisfied that personal service cannot be effected, for the reasons given. I am however not convinced that service by way of registered post would constitute proper service. In my view, the only reasonable and proper service mode would be by advertisement in a newspaper.

7. As a result of the foregoing, the application is allowed but amended to the effect that service shall be by advertisement in one of the newspapers with nationwide circulation.

8. Costs of the application to abide by the outcome of the main suit.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF JUNE 2017.**

**C. YANO**

**JUDGE**