



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC NO. 120 OF 2015

SAMSON MUTHAMI NDUNGU.....PLAINTIFF

-VERSUS-

MURAGE KARUGU MURAGE.....1ST DEFENDANT

THE NANYUKI LAND REGISTRAR.....2ND DEFENDANT

MIRIAM WANJIKU MURAGE.....APPLICANT

RULING

1. This suit was filed on 20th April, 2015 by the plaintiff against Murage Karugu Murage by way of plaint. He amended his plaint on 12th May, 2015 to include the Nanyuki Land Registrar as the 2nd defendant. He filed a notice of motion dated 27th April, 2015 on even date and amended it on 2nd June, 2015.

2. When the motion came for interparties hearing on 7th July, 2015 there was no appearance by the defendants. To prove that service had been effected upon the defendants, the plaintiff filed two affidavits of service on 26th May, 2015 and 7th July, 2015 both deponed by a process server, **Simon Ndirangu Ndumia**. In paragraph 4 of the affidavit of service dated 25th May, 2015 the process server depones:

4.“That on the same day 13th May, 2015 accompanied by the Applicant/Plaintiff boarded another vehicle to Matanya estate and alighted and the applicant pointed to me from a close distance the residential home of the 1st Respondent Murage Karugu Murage and upon entering the gate I found the respondent's wife who told me her husband had just left but would be back later in the day and I served her with a copy of Notice of Motion under certificate of urgency, summons to enter appearance and amended plaint with its verifying affidavit at 1.00 p.m. by tendering the same upon her and requiring her to sign on reverse of my copy but she refused to do so but promised to deliver the same to her husband”.

3. In paragraph 4 of the affidavit of service dated 7th July, 2015 the process server depones;

4. “That on 22nd June, 2015 I went to the Nyahururu – Nanyuki stage and boarded a public service vehicle and upon reaching Nanyuki stage I took another vehicle to Matanya shopping centre where I found the plaintiff/applicant waiting for me who afterwards directed to the portion of land in dispute and found the respondent Murage Karugu Murage present and upon being pointed to

me I served him with a copy of Amended Notice of Motion together with its Amended Supporting Affidavit at 9.20 a.m. by tendering the same upon him and requiring him to sign on reverse of my copy”.

4. The court satisfied that both parties had been duly served and the motion being unopposed, granted prayer 2 in the amended notice of motion restraining the defendant/respondent and his agents, employees, surveyors, assigns from carrying on with any action on the suit property which may be detrimental of the outcome of the suit.

5. On **2nd February, 2016** the applicant filed a notice of motion dated **29th January, 2016** brought under **Order 1 Rule 10(2)** and **Order 40 Rule (7)** of the Civil Procedure Rules, 2010 seeking to add the applicant, **Miriam Wanjiku Murage** as a defendant in the suit to enable her defend the suit on behalf of the estate of the 1st defendant, (her late husband) and that the prohibitory orders issued over **L.R. LAIKIPIA/TIGITHI/MATANYA/BLOCK 3/596** on 2nd June, 2015 be discharged.

6. The application is premised on the grounds on its face and is supported by the affidavit of Miriam Wanjiku Murage sworn on **29th January, 2016**. In support of her application, the applicant has attached among other documents, a death certificate marked “MWW 1”, that the 1st defendant Murage Karugu died on 24th August, 2005 and letters of administration for the estate of Murage Karugu issued to her on 15th January, 2007 marked “MWW 2(a)”.

7. In response to the application, the plaintiff filed a replying affidavit on **28th February, 2016** sworn on **26th February, 2016**.

8. When the application came for hearing on 8th March, 2016, the respondent did not oppose the prayer to add the applicant as a defendant in the suit but opposed the discharge of the prohibitory orders issued on 2nd June, 2015.

9. The documents attached to the supporting affidavit of Miriam Wanjiku Murage show that the 1st defendant died in 2005 and that the applicant was issued with letters of administration in 2007. It therefore follows, that the applicant could not have been served with the pleadings on behalf of her deceased husband as stated in paragraph 4 of the affidavit sworn on 25th May, 2015 and neither could her late husband be served personally as deposed in the affidavit of service sworn on 7th July, 2015.

10. After considering the two affidavits, this court has formed an opinion that the process server and the plaintiff clearly misled the court that service had been effected upon the 1st defendant. This court finds that the plaintiff has approached the court with unclean hands and therefore does not deserve the prohibitory orders granted on 2nd June, 2015 or further discretionary orders from this court.

11. As for the process server, his punishment is clearly spelt out in **Order 5 Rule 15(2)** of the Civil Procedure Rules 2010 which provides:

(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both”.

This court finds the process server Simon Ndirangu Ndumia guilty of the offence of making a false affidavit of service and fines him Kshs.5,000/-. In default, Simon Ndirangu Ndumia to be imprisoned for one month.

12. The upshot of the foregoing is that the orders issued on 2nd June, 2015 are discharged. Under **Order 1 Rule 10(2)** of the Civil Procedure Rules, I order that the name of the 1st defendant be struck out of the plaint and the name of the applicant be added as a defendant in the suit.

13. Warrants of arrests to issue for Simon Ndirangu Ndumia.

14. Costs of the application are awarded to the applicant.

Dated, signed and delivered at Nyeri this 9th day of March, 2016.

L. N. Waithaka

JUDGE

In the presence of:

Mr. Samson Muthomi Ndungu – plaintiff

Mr. Kihara h/b for M/S Mwai

Court assistant - Lydia