



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 103 OF 2015**

**NELSON RUTO KORIR.....PLAINTIFF**

**=VERSUS=**

**1. EUGINA NJOKI**

**2. REGISTRAR OF TITLES.....DEFENDANTS**

**R U L I N G**

1. On 7<sup>th</sup> July, 2015, this court allowed the Plaintiff's Application dated 27<sup>th</sup> June, 2015 after being satisfied that service had been effected on the Defendants.
2. The 1<sup>st</sup> Defendant has now filed an Application dated 23<sup>rd</sup> July, 2015 in which she is seeking for the following orders:-
  - (a) **THAT the Hon. Court be pleased to review/vary or set-aside the orders issued on the 7<sup>th</sup> July, 2015.**
  - (b) **THAT the Hon. Court do make such further or other orders as it deems appropriate in all circumstance.**
  - (c) **THAT cost of this application be provided for.**
3. The Application is premised on the grounds that the court granted to the Plaintiff a mandatory injunction without hearing the 1<sup>st</sup> Defendant; that the 1<sup>st</sup> Defendant was not served with the Application and that the orders were obtained without sufficient material disclosure.
4. In the Affidavit, the Defendant's Attorney deponed that it is the Defendant who is the registered proprietor of the suit property.
5. According to the Affidavit of Mr. Abdillahi Kibwana Khamis, he is a beneficiary of the Estate of Kibwana bin Khamis (deceased); that after getting his share as a beneficiary of title number 34/III/MN which was subdivided, he sold subdivision number 2679 to the Defendant and that he later on realised that the same land had been acquired by the Plaintiff.
6. It is the deposition of Mr. Khamis that the Registrar rectified the irregularity by registering the Transfer and issued to the Defendant a title document.
7. In his Replying Affidavit, the Plaintiff deponed that the 1<sup>st</sup> Defendant was properly served with all the pleadings and that in any event, the 1<sup>st</sup> Defendant is residing abroad and the orders that were issued by the Court do not affect her.
8. In his submissions, counsel submitted that the 1<sup>st</sup> Defendant was not in the country and does not

- reside in the country at the time the suit was filed; that personal service would not have arisen in the circumstance and that the affidavit of service is defective.
9. The Plaintiff's advocate submitted that it was the 1<sup>st</sup> Defendant's property manager who was served; that it was the Defendant's Manager, Masha Wanje and her sister who were interfering with the suit property and that the issues raised by the 1<sup>st</sup> Defendant are technicalities.
  10. The only issue that I am supposed to determine is whether I should set aside the order of this court of 7<sup>th</sup> July, 2015.
  11. It is not in dispute that on 7<sup>th</sup>, July 2015, this court proceeded to hear the Plaintiff's Application dated 27<sup>th</sup> June, 2015 ex parte.
  12. The said Application proceeded for hearing after the Plaintiff's Advocate informed the court that the Defendants had been served with the Application. It is imperative that the court re-visits the affidavit of service that was filed in this court on 7<sup>th</sup> July, 2015.
  13. In his Affidavit, the process-server deponed that while tracing the Defendant, he discovered that the Defendant stays in German and that it is the Defendant's brother-in-law, Masha Wanje, together with the Defendant's sister, Farida Njoki Njau, who were managing the Defendant's property.
  14. According to the process server, he served the Defendant with the Application and the Summons to Enter Appearance through her Manager, Mr. Masha Wanje.
  15. Order 5 Rule 8(1) of the Civil Procedure Rules provides that where it is practicable, service shall be made on the Defendant in person, unless he has an agent empowered to accept service.
  16. The process server has deponed that he served Mr. Masha with the Summons and the Application because he was the one Managing the Defendant's property in Kenya.
  17. Order 9 Rule 2 of the Civil Procedure Rules has defined the recognised agents who may appear or act in court on behalf of a party as: persons holding powers of attorney authorising them to make such appearance; a person carrying on trade or business for and in the name of parties not residents within the local limits of the jurisdiction of the court in matters connected with such trade or business and for a corporation, an officer of the corporation duly authorized under the corporate seal.
  18. Order 5 Rule 3 of the Civil Procedure Rules provides that process served on recognised agent of a party shall be as effectual as if the same had been served on the party in person.
  19. The Plaintiff has not placed evidence before me to show that Mr. Masha Wanje fell in the category of recognised agent as defined by the law.
  20. In the circumstances, the service of the Summons and the Application on Mr. Wanje was irregular and the orders that were granted by this court on the basis of the irregular service cannot stand.
  21. In the circumstances, I allow the 1<sup>st</sup> Defendant's Application dated 23<sup>rd</sup> July, 2015 in the following terms:

- (a) **The Ruling and orders of this Court dated 7<sup>th</sup> July, 2015 be and are hereby set aside**
- (b) **The Plaintiff to pay the costs of the Application dated 23<sup>rd</sup> July, 2015.**

Dated, signed and delivered in Malindi this 13<sup>th</sup> day of May, 2016.

**O. A. Angote**

**Judge**