



**Mochoge v Letiye & 2 others (Environment & Land Case
E082 of 2022) [2024] KEELC 3904 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E082 OF 2022
LC KOMINGOI, J
APRIL 25, 2024**

BETWEEN

PIUS NYABUGA MOCHOGE PLAINTIFF

AND

LERERA LETIYE 1ST DEFENDANT

MOSES NENA 2ND DEFENDANT

ISAIAH KILEKISE KIPAITA 3RD DEFENDANT

RULING

1. The Notice of Motion application dated 12th June 2023, brought under: Article 50(1) of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10, Order 40 Rule 7, Order 51 of the Civil Procedure Rules and all other enabling provisions of Law seeks orders;
 - i. Spent
 - ii. Spent.
 - iii. That this Hon. Court be pleased to stay the orders issued against the Defendants on 31st day of 2022 and all other consequential orders thereto.
 - iv. That this Hon. Court be pleased to join Nangaso Ene Tiiyo Kupaika as a Defendant in this suit.
 - v. That the costs of this application be provided for.
2. The grounds are on the face of the application. It is supported by sworn Affidavit of Oltetia Ole Nena also known as Isaiah Kilekise Kipaita on behalf of the Defendants/Applicants. He avers that they were not granted right to fair hearing because they were never served with the application and pleadings dated 17th October 2022 to enable them file a response. They were only served with the order dated 31st October 2022. Additionally, the Applicants were not the registered proprietors of property Kajjado/



Loodariak/831 and the registered owner one Nangaso Ene Tiiyo Kapaika who was not party to the suit was in the process of disposing it off. As such, in the interests of justice the orders issued on 31st October 2022 should be set aside.

3. The Respondent contested the application on grounds that on 20th October 2022, the Applicants were served with the application and Plaint dated 17th October 2022 as per the Affidavit of Service dated 27th October 2022. And that is the same method used to serve them with the interim orders. Therefore, the application was frivolous and based on falsehoods. Additionally, the Applicants indicated that the owner intended to dispose off the suit property and setting aside the orders would be detrimental to the respondent who was claiming ownership over it. The orders should thus be maintained and the application dismissed with costs.
4. The Applicants in a rebuttal contended that service to the 2nd Defendant/ Applicant did not mean that all parties were served. Proper service ought to be effected as stipulated by Order 5 Rule 7 of the [Civil Procedure Rules](#).
5. This application was canvassed by way of written submissions.

The Defendants/Applicants Submissions

6. Counsel for the Defendants/Applicants submitted that as per Order 5 of the [Civil Procedure Rules](#), the Defendants were never properly served adding that each party ought to have been served independently. Counsel also questioned service to the 1st and 3rd Defendants' stating that there was no confirmation for this and the claim that they made notes on the process server's documents was not sufficient proof because anyone could have written on them. Counsel also submitted that the 3rd Defendant signed the Supporting Affidavit which was inconsistent with the claim that he used a thumb print to sign for the service.
7. That as per Order 40 Rule 7 and Order 51 Rule 15 of the [Civil Procedure Rules](#) the court should set aside the *ex parte* orders and give the Applicants an opportunity to defend the suit, as well as join the rightful owner of the property. Reference was made to *Patel v E.A. Cargo Handling Services Limited* [1974] E.A. 75 and *Patrick Omondi Opiyo T/A Dallas Pub v Shaban Keah & Another* [2018] eKLR. Since the Defendants were not duly served, the Respondent should bear costs of the application as held in *Cecilia Karuru Nguyu v Barclays Bank of Kenya & another* [2016] eKLR.

The Plaintiff's/ Respondent's Submissions.

8. Counsel submitted that for the interim orders to be set aside, there must be proof that the Defendants were not properly served and the Defendant failed to appear in court due to sufficient cause as was held in *Shah v Mbogo* [1967] EA 1966 and established by Order 10 of the [Civil Procedure Rules](#). In this case, the 1st and 3rd Defendants were physically served with the help of the Area Chief and the 2nd Defendant served via WhatsApp pursuant to Order 5 Rule 22C of the [Civil Procedure \(Amendment\) Rules, 2020](#) and as evidenced by the Affidavit of Service filed in Court. They however failed to respond as per Order 51 rule 14 of the [Civil Procedure Rules](#).
9. Counsel went on to submit that the temporary injunction was granted to prevent wasting away of the suit property as stipulated by Order 40 Rule 1 of the [Civil procedure Rules](#) since the Plaintiff had established the threshold for grant of temporary injunctions as set by *Giella v Cassman Brown, Mrao Limited v First American Bank of Kenya Limited & 2 others* [2023] eKLR and *Nguruman Limited v Jan Bonde Nielsen & 2others* [2014] eKLR.
10. The application should therefore be dismissed with costs to the Respondent.



Analysis and determination

11. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited. The issues for determination are:
 - i. Whether the ex parte interim injunctive orders issued of 31st October 2022 ought be set aside;
 - ii. Whether Nangaso Ene Tiiyo Kekaika ought to be enjoined in the suit as a Defendant;
 - iii. Who should bear the costs of this application?
12. The Defendants/Applicants seeks to set aside of the *ex parte* orders dated 31st October 2022 on grounds that the pleadings were never properly served to them and were thus not given right to a fair hearing as articulated by Article 50(1) of the *Constitution*.
13. The Plaintiff/Respondent contested this claim on grounds that the 1st and 3rd Defendants/Applicants were properly physically served as per the Affidavit of Service and the 2nd Defendant/Applicant was served via a WhatsApp message service and there was evidence of service from the two blue ticks.
14. Order 40 Rule 7 of the *Civil Procedure Rules* grants courts the discretion to vary, discharge or set aside injunctive orders. However, this option should be used sparingly especially in circumstances where the injunction was obtained by concealment of material facts.
15. On 19th October 2022 when the Application filed on 18th October 2022 came up for hearing, the court directed that the pleadings and the application be served on the Defendant/Applicant's. On 31st October 2022, the application came up for hearing and counsel for the Plaintiff/Respondent stated that the Defendants had been served as confirmed in the Affidavit of Service dated 27th October 2022. I reviewed the Affidavit of Service which detailed how the Defendants were served including seeking support from the Assistant area Chief to physically serve the 1st and 3rd Defendants who were positively identified by the Plaintiff. The 2nd Defendant was served via the WhatsApp message service and process server confirmed that the telephone number was indeed registered to the 2nd Defendant by sending him money on M-Pesa.
16. Upon being satisfied that the Defendants were duly served as articulated in Order 5 Rule 7, Rule 8 and Rule 22C of the *Civil Procedure Rules*, which provides that service should be made on each Defendant in person and also recognizes service by mobile enabled messaging applications, I granted the interim orders as sought. I still hold the position that the Defendants/Applicants were duly served and no new evidence has been tendered to show that the Plaintiff/Respondent obtained the injunctive reliefs by concealment of material facts. I associate with the holding of Munyao J. in *Filista Chemaiyo Sosten v Samson Mutai* [2012] eKLR where the Judge stated:

“... the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if



the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction...”

17. Order 40 rule 1 of the *Civil procedure Rules* provides that: “a court may order a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.” The Defendants/Applicants in their Affidavit clearly indicated that the owner of the suit property intends to dispose it off. This therefore buttresses the need of the injunctive orders to be in place to restrain any action on the suit property until the matter is duly heard and determined.
18. On the issue of joinder of one Nangaso Ene Tiiyo Kapaika on grounds that he is the registered proprietor of the suit property, this court supported by Order 1, rule 10 of the *Civil Procedure Rules* finds no reason not to grant the prayer for joinder.
19. I find no merit in the application and I grant the orders:
 - i. That the orders dated 31st October 2022 are upheld.
 - ii. That leave is granted to the parties to amend their pleadings and join Nangaso Ene Tiiyo Kapaika as a Defendant.
 - iii. That costs to abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Kerio for Mrs. Wenene for Plaintiff.

Ms. Wairimu for the Defendants.

Court Assistant – Mutisya.

