IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, J.A (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 62 OF 2008

BETWEEN

EVA WANGUI MURUA.....……..... APPELLANT

AND

KIGERUA MOTORS.....….....1ST RESPONDENT

JOHN GATHU MUKURIA.....2ND RESPONDENT

TANGO AUCTIONEERS.....3RD RESPONDENT

YUNIS MALIK.....4TH RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nakuru (Kimaru, J.) dated 1st March, 2007

in

H. C. C. Misc. Appl. No. 536 of 2004)

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RULING OF NAMBUYE JA

Before me is a Notice of Motion dated the 30th day of October, 2014 and lodged in this Court's registry on the 29th day of November 2014. It is expressed to be brought under **Rule 17** of the Rules of this Court, **Order 5 Rule 17** and **Order 50 Rule 1** of the Civil Procedure Rules. It substantively seeks an order of this Court to grant leave to the applicant to serve a hearing notice upon the 1st and 2nd respondents by way of substituted service by advertising in a newspaper;

The application is grounded on the grounds on its body and the content of the applicant's supporting affidavit. It has been opposed by replying affidavits of John Muthee Ngunjiri on behalf of Tango Auctioneers, the 3rd respondent deposed and filed on the 30th day of March 2015, grounds of opposition and a replying affidavit of Yunis Malik the 4th respondent both dated, deposed and filed on the 10th day of March 2015.

On the date of the hearing of the application, Mr. Gatonye holding brief for Mr. Karanja, Karanja

Mbugua and Mr. D. M. Kimatta learned counsel appeared for the applicant, the 3rd and the 4th respondents respectively.

In his submissions before me, Mr. Gatonye urged me to allow the application on the grounds that the applicant is properly before me seeking my intervention to protect her proprietary rights over parcel number Kampi ya Moto/Menengai Block2/267 as her efforts to do so at the High Court level were thwarted on grounds of technicalities. It was not until the filing of Misc. Application No. 536/04 that the applicant successfully obtained leave of court to file the appeal, now pending determination and in respect of which she seeks leave of this Court to serve a hearing notice on the named respondents by way of substituted service.

Mr. Gatonye continued to urge further that the applicant had faced similar challenges in the High Court when she attempted to effect service on the named respondents. The High Court appreciated her predicament and granted her a reprieve by granting her an order to serve the named respondents by way of substituted service to which no opposition was raised. She is now before me with a similar predicament and seeks the same indulgence.

It is further Mr. Gatonye's argument that the delay in disposing off issues in controversy as between the parties herein has been occasioned not by the applicant but by the numerous times the applicant's quest for justice has been thwarted on account of technicalities. The applicant therefore has a genuine grievance which should be heard on merit; matters now raised by the respondents as negativing the request for substituted service were never raised before the High Court and no prejudice will be suffered by the respondents as they will have an opportunity to be heard on the merits of the appeal once the named respondents are served.

He also maintained that they are properly before me as Rule 17 of this Court's Rules, which has been cited as an access Rule imports into this Court's procedures, the provisions of the Civil Procedure Rules on substituted service. Lastly that substituted service sought if granted will pave the way for the disposal of the pending appeal.

Mr. Karanja Mbugua on the other hand while reiterating the contents of the 3rd respondents replying affidavit urged me to dismiss the applicant's application on three major grounds. First, that the applicant's application is premature as the applicant has never sought extension of time to allow him serve the primary documents on the named respondents that is the Notice of Appeal and the Record of Appeal before seeking leave to serve them with a hearing notice for the substantive appeal. Second, the application has no merit as the applicant has not brought herself within the ambit of the prerequisites set out in Rules 77, 101 and 104 of the Rules of this Court. Third, the Court has been left to speculate on the appropriate mode of substituted service outside the jurisdiction as the applicant has not sufficiently described this mode to the court.

To buttress his arguments Mr. Karanja Mbugua has invited me to be guided by the case of **Muzito versus Njuki [2005] 2EA 232** for the proposition that service outside the jurisdiction cannot be by way of an advertisement in a national newspaper.

Mr. Kimatta for the 4th respondent associated himself fully with the submissions of Mr. Karanja Mbugua and also urged me to dismiss the applicant's application. In his view, the applicant has not been candid in her depositions as she has failed to demonstrate to the court that the 1st respondent is still in existence and also that the 2nd respondent who is alleged to have relocated to the United States of America was still alive. It was Mr. Kimatta's argument that the applicant cannot allege lack of knowledge of the current status of these two parties as the 2nd respondent was her father who was the proprietor of the 1st respondent.

Mr. Kimatta concurred with Mr. Mbugua Karanja's submissions that the application is premature as the applicant ought to have sought leave of Court to serve the named respondents with primary documents first before seeking leave of court to serve them with a hearing notice for the main appeal.

Lastly that the 4th respondent who is an innocent purchaser for value stands to suffer prejudice by any further delay in the disposal of the appeal over a matter that has been pending determination for the last eight (8) years.

In reply to the submissions of both Mr. Karanja Mbugua and Mr. Kimatta, Mr. Gatonye admitted that they have not served the primary documents on the named respondents but nothing stops them from serving the said documents even now; they as counsel are not to blame for any delay in the disposal of the pending appeal as they have just come on record for the applicant and are now desirous of progressing the hearing of the said appeal. That is why they have now applied for substituted service. Also maintains that the status of the 1st and 2nd respondents then prevailing at the High Court which necessitated the applicant to seek to serve them by way of substituted service still obtains to the present. It is the same status that has compelled the applicant to move this Court for substituted service.

Further that no prejudice will be suffered by the 4th respondent as the issue of an innocent purchaser will be canvassed at the hearing of the main appeal and lastly that justice should not be sacrificed at the altar of technicalities.

I have given due consideration to above set out rival pleadings as well as submissions. My simple task is to determine whether on the facts before me the applicant has met the threshold for the granting of the relief she now seeks from me, that is to serve the 1st and 2nd respondents by way of substituted service.

Rule 17(1) of the Rules of this Court cited as an access rule donates power to the Court to direct the manner in which service of any document maybe effected on any other person. Such service is required to be personal in the absence of any special directions from the court. Any other mode of service other than personal has to be that which has been sanctioned under **Order 5 Rule 22 (3)** of the **Civil Procedure Rules.** It reads:

> ***"O. 5 Rule 22 (3) Nothing in this Rule shall affect any practice or power of the court under which, when lands, funds, choses in action, rights or property within the jurisdiction are sought to be dealt with or affected, the court may (without affecting the exercise jurisdiction over any person out of the jurisdiction) cause such person to be informed of the nature or existence of the proceedings with a view to such person having an opportunity of claiming, opposing, or otherwise intervening."***

Upon consideration of the rival arguments herein; it is my finding that it is not in dispute that both the 1st and 2nd respondents were parties to the litigation in the High Court that gave rise to the appeal whose hearing notice is sought to be effected on them by way of substituted service. They therefore qualify as necessary parties whose rights are likely to be affected by the outcome of the pending appeal process, parties who should be given an opportunity to intervene and be heard. The applicant is therefore right in seeking to notify them of the existence of the appeal.

From the submissions of both sides, the current status or the exact location of both the 1st and 2nd respondents is unknown. According to Mr. Karanja Mbugua and Mr. Kimatta, the existence of these two parties in the form in which service of any process can be effected on them is either in doubt or unknown as the first respondent is said to have been dissolved while the 2nd respondent might be deceased.

The applicant on the other hand contended that the situation that prevailed during the disposal of their application before the High Court when the two were in a condition to be served by way of substituted service still obtains to the present hence their application for substituted service in the form presented without first ascertaining their current status. So the applicant, there is therefore no justification for the 3rd and 4th respondents contention that the current status of the 1st and 2nd respondents should be ascertained first before any attempt is made to serve them by way of substituted service.

Neither side has provided concrete evidence to prove the existence or otherwise of the 1st and 2nd

respondents. Sending them to provide proof of this before the issue of whether or not substituted service should be employed will cause further delay. I therefore have no alternative but to bear in mind the totality of the circumstances surrounding the rival arguments above and make an order that will serve the best interests to both sides. An order that will assist parties at least move from their current state of stalemate to a position they can progress the pending appeal to hearing so as to crystalize the competing rights over the subject matter of the pending appeal with or without the participation of the 1st and 2nd respondents depending on their status as at the time the intended service of the processes will be effected on them.

Order 5 Rule 22 generally deals with substituted service of processes applicable to High Court procedures. However Rule 22 (3) (Supra) is general enough to cover substituted service processes applicable on this Court's appellate process such as the service of the Notice of Appeal, Appeal itself and a hearing notice. I note that the applicant herein just sought the service of a hearing notice only. I also note that when Mr. Karanja Mbugua and Mr. Kimatta raised the issue of the none service of the main Appeal as well as the Notice of Appeal, (primary documents) Mr. Gatonye simply stated that these could be served at any time. He did not however even informally apply for these to be factored in the resultant order should I be inclined to grant the same.

The foregoing not withstanding, I am of the view that I am not devoid of any drop of justice from my fountain of justice on the basis of which the applicant's failure to factor in the service of the primary documents on the named respondents in her application can be cured and have these factored in the relief sought so as to give to both sides a meaningful remedy. Such an action on my part will save on both judicial time and further inconvenience to the parties who have been waiting for the determination of their rights in the pending Appeal for quite some time now. But before I do that, I wish to first of all examine Rules 77, 101 and 104 of the Rules of this Court which Mr. Karanja Mbugua and Mr. Kimatta have contended that they operate to dis entitle the applicant to the relief sought.

Rule 77 makes it mandatory for all parties to an appeal to be served with the notice of appeal unless if the Court has directed otherwise. There was no such direction from the court. It is therefore mandatory that the named respondents be served with a notice of appeal, the record of appeal and a hearing notice for the hearing of the main appeal. Rule 101 also makes it mandatory that a hearing notice be served on all participating parties. It is therefore in order for the applicant to seek leave of court to serve the named respondents with a hearing notice together with the other mentioned documents. Rule 104 on the other hand deals with arguments at the hearing of the appeal, it therefore has no application as all that I am dealing with is an application.

As for the mode of advertisement it is clear that this has to be something other than advertisement in the local dailies circulating in this jurisdiction, see **Muzito versus Njuki** (supra) and **Raytheon Aircraft Credit Corporation & another vs. Air al-Faraj Limited [2005] eKLR.**

In the result and in view of the totality of all that I have stated above, I am inclined to grant prayer 1 of the application but with a variation to the effect that in addition to the hearing notice the applicant shall also include the service of the Notice of Appeal and the Record of Appeal.

Such service should be effected by way of approved forms of courier, Registered Post as well as advertisement in the local dailies of the place where the 1st respondent's registered office or place of business is located; and where the 2nd respondent's residence or place of business is also located. A return of service to that effect is to be filed in court within sixty (60) days of today, and served on all parties to the Appeal.

Thereafter the main Appeal to be listed for hearing and disposal on priority basis.

Dated and delivered this 25th day of February, 2016.

R. N. NAMBUYE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR