



Lion Beach Limited & another v Kwanza Estate Limited; Dubai Bank Kenya Limited (In Liquidation) & another (Interested Parties) (Environmental and Land Originating Summons 10 of 2022) [2024] KEELC 4654 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4654 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2022**

EK MAKORI & EK MAKORI, JJ

JUNE 12, 2024

BETWEEN

LION BEACH LIMITED 1ST PLAINTIFF

LION BEACH LIMITED 2ND PLAINTIFF

AND

KWANZA ESTATE LIMITED RESPONDENT

AND

DUBAI BANK KENYA LIMITED (IN LIQUIDATION) INTERESTED PARTY

KENYA DEPOSIT INSURANCE CORPORATION

(LIQUIDATOR) INTERESTED PARTY

RULING

1. The Applicant, in a Notice of Motion dated 24th January 2024, seeks to have proceedings and judgment (delivered by this Court on 6th December 2023, decree, and consequential orders arising therefrom stayed and consequently set aside and for the 1st and 2nd proposed intended Interested Parties to be joined in this suit, with attendant costs.
2. The significant issues then to be decided by this Court is whether to stay(spent) the proceedings and the judgment and decree arising therefrom, whether to set aside the said judgment and decree and consequential orders and join the interested parties in this suit and who should bear the costs.
3. This matter proceeded ex parte as an undefended Originating Summons (OS). The Respondent was allegedly served through the firm of Konosi & Co. Advocates but did not enter appearance nor place defence.



4. In its judgment dated 6th December 2023 this Court found for the Plaintiff in this manner:

“The testimony offered shows that the applicant has been in occupation of ½ an acre of Plot No. 49 Watamu since 2005, which is now over 12 years. It has been open and uninterrupted without secret and aims to dispossess the registered owner. The registered landowner has never set foot on the suit land. Service was effected but the respondent filed no defence to challenge the averments by the applicant.

“The Originating Summons will succeed with costs in the following manner:

- a. The applicant be and is hereby declared by the operations of the doctrine of adverse possession to have acquired a parcel of land described as ½ an acre of Plot No. 49 Watamu
- b. An order does and is hereby issued to the effect that the respondent’s title over ½ of an acre of plot No. 49 Watamu has been extinguished.
- c. An order does and is hereby issued directing the Land Register of Titles Mombasa to register ½ of an acre of Plot No. 49 Watamu in the names of the applicant herein.
- d. The applicant will also be entitled to the Costs of this suit.”

5. In the current application to set aside the said judgment, the Applicant in this application submits that the service of summons to enter appearance and pleadings were never effected on it, and it was never aware of the suit until it filed Malindi ELC No. E050 of 2023 seeking orders of eviction against the defendants, amongst other prayers. The director of the Applicant/Respondent herein and three others not before this Court are the defendants in the said suit. The Respondent/ Applicant’s director avers that upon perusing the Statement of Defence and Counterclaim filed by the director of the Applicant/ Respondent, it discovered the existence of this matter and judgment that had been delivered with adverse orders made against it.

6. The affidavit of service on record sworn by one Dismas O. Musana did not indicate that he effected service of summons to appear upon the first and second interested parties, nor were they joined in the suit, yet they have adverse interest in the suit property. The said process server also purports to have served the firm of Konosi & Co. Advocates on behalf of the Respondent/ Applicant, which service has been denied by the said firm who swore a supporting affidavit dated 24th January 2024 by Wilfred Konosi, the Managing Partner of the said Law Firm.

7. The Applicant cites the decision in Jason Mbugua Kuria v Kennedy Kuria and Another (2021), High Court Civil Appeal No. 2 of 2019, the Court stated as follows regarding the service of summons upon an Advocate who had no instructions to act:

“To also say that the judgment could not be set aside because an advocate who did not have instructions was served would be to punish the appellant when he was not aware of the suit against him given that he had not instructed the Advocate. In effect my finding is that from whatever angle we look at it there was no proper service in this case.”

8. The Applicant submits that the purported service by the said process server is against Order 5 Rule 8 (2) of the *Civil Procedure Rules* and is clear that service of summons may be served upon an Advocate who has instructions to accept service. The said law firm would not have received the summons to enter an appearance without the express instructions from the Respondent/Applicant, which in this case



was never given. Moreover, the process server has not indicated the name of the alleged receptionist or a secretary who received the said pleadings and summons to enter an appearance if, indeed, he served the firm of Konosi & Co. Advocates. Further, the said process server indicated to have called one Geoffrey Asanyo, one of the directors of the Respondent/Applicant, without indicating his contact details. The process server averred that it was not necessary to indicate the contact details that he used to reach the director of the Respondent/ Applicant as the same was not necessary. The Applicant submits that nothing prevented the Applicant/Respondent herein from effecting electronic service as the laws allow the electronic mode of service, - WhatsApp included.

9. The Applicant asserts that the judgment sought to be set aside in this case was irregular, and the circumstances prevailing in this case point to the fact that the Respondent was never served with a summons to enter an appearance. The irregular default judgment should be set aside *ex debito justiae* (as a matter of right).
10. The Applicant avers that Mr. Geoffrey Asanyo, one of the Respondent/Applicant's directors, has demonstrated in his Supporting Affidavit and a Further Affidavit that he never received a telephone call regarding this matter and that he never gave any instructions to his co-director Tabitha Moraa Makana regarding the said pleadings. He stated that both directors were still in Kisii after they had laid their mother to rest at the time the said process server purported to have served one Tabitha Moraa Makana in Nakuru. As such, the Respondent/Applicant in the Supporting Affidavit has sought for the said process server to be subjected to cross-examination in regard to his sworn affidavit of service.
11. The Applicant states that the burden of proof of proper and regular service shifts to he who alleges, in this case, the Respondent in this application as deposited under Order Rule 16 of the Civil Procedure Rules; the Applicant also cites the decisions in *Development Bank of Kenya Limited v Riva Oils Co. Limited* [2015] eKLR, and *National Bank of Kenya v Puntland Agencies Limited & 2 Others* [2006] eKLR, as supporting that proposition. The Applicant concludes that that burden has not been discharged by the Respondent.
12. The Respondent/Applicant submits that it has a good defence which raises triable issues. It attached a draft replying affidavit as a response to the suit herein. The Respondent/Applicant's defence is that the suit property Land Registration Number Watamu 49 was purchased by the Respondent/Applicant from the National Bank of Kenya under the statutory power of sale Agreement dated 5th July 2010, together with 10 other parcels. Upon the said purchase, the Respondent/Applicant caused the subject property to be charged to Dubai Bank Limited, the 1st intended Interested Party herein, for Kshs. 160,000,000/=.
13. The Applicant proceeds to state that sometime in the year 2014, the Applicant/Respondent and others who are not parties to this suit encroached on the suit land without the Respondent/Applicant's authority and purported to set up dwellings and businesses. The Respondent/Applicant reported the trespass at Kilifi County DCI Headquarters facts which are within the knowledge of the Applicant/Respondent. Investigations were carried out, and the Applicant/Respondent was found to be illegally in possession of the suit property, and a demand letter was issued to the respondent and others who are not before this court. This is despite the verbal engagements the directors of Respondent/ Applicant have had with the director of the Applicant/ Respondent and others asking them to vacate the suit property. Without knowing that this suit existed, the Respondent/ Applicant filed Malindi ELC E050 of 2023 seeking eviction orders against the strangers occupying its property, including the director of the Applicant/ Respondent herein. Further, the search clearly indicates that the property is still registered in the Respondent/Applicant's name and charged to the 1st intended interested party, which is under liquidation of the 2nd intended interested party. The Applicant/Respondent, together with others not before this Court, are strangers to the suit land and have never had quiet possession. The



- Respondent/Applicant asked them to vacate the suit property verbally and through the DCI and its lawyers, but the same has been ignored, and it quietly approached this Court to seek adverse possession reliefs.
14. For the above reasons, the Applicant submits that its defence is good and raises triable issues. Hence, the judgment and proceedings should be set aside, and leave should be granted to the applicant to defend the suit.
 15. On the issue of joinder of the intended interested parties, the Applicant contends that Order 1 Rule (10) (2) of the *Civil Procedure Rules* empowers the Court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. The Respondent/ Applicant submits that the suit property is charged to the 1st interested party currently under a liquidator, the 2nd interested party. The Court of Appeal at Nairobi in *Pravin Bowry v John Ward & another* [2015] eKLR, highlighted the principles to be considered in an application for joinder of parties to a suit and referred to the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) as well as *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR in which the court observed such parties are those necessary stakeholders in the suit for purposes of fully and finally deciding the same and avoiding multiplicity of suits.
 16. The Respondent/Applicant emphasizes that the inclusion and active participation of the proposed interested party is crucial for the Court to comprehensively and effectively adjudicate and resolve all issues about the suit. The suit property is under the charge of the 1st interested party, currently in liquidation, and the 2nd interested party, acting as a liquidator. Therefore, these interested parties must be brought into this suit. The Applicant/Respondent will not face any disadvantage if the said interested party is included in these proceedings, as prayers 3 and 5 of the application, if approved, will be directed towards the intended interested party.
 17. The Respondent, the Applicant in the OS, asserts that carefully examining the process server's affidavit reveals a precise sequence of events. The process server initially contacted the respondent's director, Geoffrey Makana Asanyo, who directed the process server to his wife at Milimani estate in Nakuru. The process server then served the wife, Tabitha Makana Moraa, who confirmed she was also the Respondent's director. She further directed the process server to serve the firm of Konosi & Co Advocates. Therefore, it is unfounded for the Respondent to claim that the firm of Konosi Advocates did not have instructions. The person/director of the Respondent who was served and who directed that the summons be served on the firm of Konosi & Co Advocates has not sworn an affidavit to deny ever receiving the summons from the process server and has not sworn an affidavit to deny ever instructing the process server to take the documents to the firm of Konosi & co Advocates.
 18. Order 5 Rule 8 of the *Civil Procedure Rules* provides clear guidelines on how service should be carried out:
 - “(Order 5, Rule 8) service to be on defendant in person or on his agent.
 - 8(1) Whether it is practicable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.
 - (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons, and judgment in default of appearance may be entered after such service.”



19. Having been directed by the Respondent director, Tabitha Moraa Makana, to serve the firm of Konosi & Co. Advocates, it is deemed that the said firm had instructions from the Respondent to receive the summons. Mr. Wifred Konosi from the firm of Konosi & Co. Advocate has sworn an affidavit dated 24th January 2024 saying his firm never received instructions to receive summons and act for the Respondent. He says that his office has a register for the period of service in question and that any person in his office who receives documents must sign and indicate his or her name. Mr. Konosi does not question the authenticity of the receiving stamp on the documents served and attached to the affidavit of service by the process server. He does not deny the physical location of his office or the office phone numbers on the stamped documents. He has not alleged that the stamp was a forgery. In the case of *Evans Tuma Kalume v Moses Masivai Barasa* [2021] eKLR, the Court held as follows:

“On the face of the copy of the application served upon the Respondent/applicant’s advocates, there is an official stamp of the firm of Nyamwange & Company Advocates with the word “received” and the date received thereon. The authenticity of this stamp was not challenged. In the absence of concrete evidence that the stamp was a forgery, the official stamp would be sufficient proof of evidence of service.”

20. The Respondent also criticizes the service because the phone number of the director of the respondent is not indicated in the affidavit of service, and the process server did not indicate the contact details of the persons served. This is not a valid argument as the process server has clearly explained how he was directed to the home of the respondent’s director in Milimani Estate Nakuru, and from there, he was directed to serve the firm of Konosi & Co. Advocates. The director of the Respondent has admitted in his further affidavit that he lives in Milimani Estate Nakuru. The contact details were unnecessary because the service was not through electronic mail or Mobile-enabled messaging Applications. There is no provision under the Civil Procedure Rules that mandates a process server to indicate the contact details of the persons being served even when the service is not electronic, thereby ensuring adherence to legal procedures.

21. The Respondent’s claim that the process server did not indicate the secretary’s name who received the summons at the Konosi & Co Advocates law firm is also unfounded. Order 5 Rule 15 of the [Civil Procedure Rules](#) clearly states:

“Affidavit of service [Order 5, rule 15]

(1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No. 4 of Appendix A with such variations as circumstances may require.”

22. The Respondent states that the rule requires the process server to state how service was done/manner of service. The rule also requires that if, at the time of service, there was another person/ 3rd party who helped the process server identify the person being served and witnessed the summons being served, then the name of the 3rd party must be named. The affidavit of service has complied and explained in detail how the summons was effected on the firm of Konosi & Co. Advocates, and this has not been challenged. There was no third party identifying the director of the respondent at Milimani estate and none at the office of Konosi & Co. Advocates, so there was no need to give the name of a third party.



- The documents were received by the office secretary and stamped. No office secretary from the said firm has sworn an affidavit denying receiving the documents. Further, the draft replying affidavit by the Respondent does not raise any triable issue. It admits it has never been in occupation of the suit land.
23. The Respondent believes the application should be dismissed on that account. Should the Court find that the judgment was regular and wants to give the respondent a chance to defend the suit, then this should be conditional on paying the Applicant thrown away costs of Kshs. 100.000/= given the delay in bringing the application. The case of *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR is cited where the Court held that:
- “If the court sets aside a default judgment, it may do so on terms. In most cases, the defaulting defendant will be ordered to pay the claimant’s costs thrown away. In addition, the Court may consider imposing a condition that the defendant must pay a specified sum of money into court to await the final disposal of the claim.”
24. On whether to join the intended interested parties, the Respondent is of the view that this prayer depends on the Court’s finding on the other issues raised in the application above, such as whether there was proper service and whether the respondent should be allowed to reopen the case and file its defence. If the court finds that the respondent is not entitled to reopen the case and file a defence, this prayer will also automatically fail.
25. Central in this application is whether there was proper service on the Applicant. The alleged service on the Konosi & Company Advocates law firm was irregular since no instructions had been given to that law firm to act for the Applicant. The process server has enumerated the sequence of events on how he came to serve the said law firm and explained how he was directed to the home of the Respondent’s director in Milimani Estate Nakuru, and from there, he was directed to serve the firm of Konosi & Co. Advocates, by one of the directors Tabitha Makana Moraa. Mr Asanyo, one of the directors of the Respondent, has admitted in his further affidavit that he lives in Milimani Estate Nakuru. I agree with Mr. Nyongesa for the Respondent herein that the contact details were unnecessary because the service was unavailable through electronic mail or mobile-enabled messaging applications. There is nowhere under the Civil Procedure Rules where it is provided that a process server must indicate the contact details of the persons being served even when the service is not electronic.
26. The Respondent also says that the process server did not indicate the secretary’s name who received the summons at the Konosi & Co Advocates law firm. The Respondent states that the rule requires the process server to state how service was done/manner of service. The rule also requires that if, at the time of service, there was another person/ 3rd party who helped the process server identify the person being served and witnessed the summons being served, then the name of the 3rd party must be indicated. The affidavit of service has complied and explained in detail how the summons was effected on the firm of Konosi and Co. Advocates, and this has not been challenged. There was no third party identifying the director of the respondent at Milimani estate and none at the office of Konosi & Co. Advocates, so there was no need to give the name of a third party. The documents were received by the office secretary and stamped. Mr. Wlilfred Konosi, Advocate, has not disputed that the receiving stamp endorsed on the documents served is not from his law firm or that the same was a forgery. The process server need not be blamed or called for examination. In my view, it is a lesser issue in this application.
27. The Applicant has given a sequence of events of how he acquired the suit property by way of purchase and subsequently charged it to the intended 1st interested party under receivership of the 2nd intended



interested party. Section 38 of the Limitation of Actions Act requires the registered land proprietor to be named a Respondent when filing a suit for adverse possession. The section provides that:

“Where a person claims to have become entitled by adverse possession to land... he may apply to the High Court for an order that he is registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

28. Judicial decisions have affirmed this position. For example, the Court of Appeal in *Chevron (K) Ltd v Harrison Charo Wa Sbutu* [2016] eKLR held that:

“a claim for adverse possession can only be maintained against the registered owner of the subject land.”

In *Abdirashid Adan Hassan v Estate of WHE Edgley* [2022], eKLR, the Court similarly held that:

“a claim for adverse possession must be brought against the registered proprietor of the subject land.”

In *Essolly Enterprises Limited v Benjob Amalgamated Limited* [2019] eKLR, the Court also held that:

“an order of adverse possession can only be made against a Respondent who is registered as an owner of land, and that the person sued must be the registered owner.”

29. Hand in hand with the attachment of the title showing ownership, in case of any entry on the register that runs contra to the claim in adverse possession, as demonstrated in this case where it is shown by the postal search as of 27th February 2020 that an encumbrance exists, in favour of the 1st intended interested party:

“Charge dated 11th April 2012 to Dubai Bank Kenya Limited for Kshs. 160,000,000/-(with other Lands)”

30. This information was not brought to the attention of the Court. It was relevant in an adverse possession claim because the 1st intended Interested party has a claim over the suit property just like the registered owner in case the Respondent defaulted in the repayment of the said loan, then the 1st intended interested party and, by extension, the 2nd intended interested party, in this case, has a statutory right in law to sale the property. The decree herein cannot be enforced without dealing with the charge recorded as an encumbrance in the register.

31. That is where the problem lies in this matter. It was imperative to join the 1st intended interested party, and now, by extension, the 2nd intended interested party who have a stake in the suit property, so as for the Court to fully and finally resolve the issues raised in this OS. The decision in *Pravin Bowry v John Ward & another* [2015] eKLR is relevant, citing the Ugandan case of *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) as well as *Civicon Limited v Kivuwatt Limited and 2 others* [2015] eKLR in which the Court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party and should be enjoined...from the foregoing, it may be concluded that being



a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit if the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit, and the interest need not be the kind that must succeed at the end of the trial.”

32. A significant issue has also been raised that the Applicant has a pending suit—Malindi ELC E050 of 2023—to eject the Respondent and other parties who have trespassed on the suit property. It is pending for determination before this Court. The issues raised in that suit cannot be dealt with in isolation. It will lead to conflicting decisions emanating from this Court.
33. Therefore, I find that the Applicant's defence raises triable issues and that the joinder of the interested parties will be imperative.
34. The application dated 24th January 2024 is hereby allowed. Given the Respondent's explanation in this application that the service of summons was regular, the Applicant will bear the costs of this application.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 12TH DAY OF JUNE 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Rotich for the Applicant

Mr. Nyongesa for the Respondent

Happy: Court Assistant

