



Gichimu s/o Jimmy Wanjao v Kariuki & 3 others (Environment & Land Case E031 of 2022) [2024] KEELC 7354 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E031 OF 2022**

**JM MUTUNGI, J
NOVEMBER 7, 2024**

BETWEEN

JEFFITHA GICHIMU S/O JIMMY WANJAO PLAINTIFF

AND

FRANCIS N KARIUKI 1ST DEFENDANT

JOSEPH MWANIKI MUCHIRA 2ND DEFENDANT

FREDDIE JB KARUA 3RD DEFENDANT

COUNTY GOVERNMENT OF KIRINYAGA 4TH DEFENDANT

RULING

1. On 9th February 2024, the Plaintiff filed the Notice of Motion Application dated 9th February, 2024 praying for the following orders:-
 - a. Spent
 - b. That the Honourable court be pleased to grant leave to the Plaintiff/Applicant's Advocate on record, Igati Mwai & CO. Advocates to effect service of pleadings herein upon the 1st Defendant by means of substituted service being the publication of an advertisement in the Daily Nation Newspaper.
 - c. That costs of this application be in cause.
2. The application is supported on the annexed Supporting Affidavit of the Applicant sworn on 9th February, 2024. The Applicant depones that he was able to serve all Defendants except for the 1st Defendant, who remains untraceable as there is no available contact information or identity card number of the 1st Defendant to assist in tracing him. The Applicant thus seeks the leave of the Court to effect service on the 1st Defendant by way of substituted service.



3. On the 30th April 2024, the 2nd Respondent filed a Replying Affidavit, where he disputed the Applicant had sufficiently demonstrated he had made diligent attempts to locate the 1st Respondent. The 2nd Respondent averred that the Applicant had not demonstrated the efforts he had made to trace the 1st Respondent and maintained that the Applicant had not satisfied the requirement of Order 5 Rule 17 to warrant the Court to give leave for substituted service.
4. The instant application has been brought under Order 5 Rule 17 of the Civil Procedure Rules which provides as follows: -
 - “(1) Where the Court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.
 2. Substituted service under an order of the court shall be as effectual as if it had been made on the defendant personally.
 3. Where the court makes an order for substituted service it shall fix such time for the appearance of the defendant as the case may require.
 4. Unless otherwise directed, where substituted service of a summons is ordered under this rule to be by advertisement, the advertisement shall be in Form No. 5 of Appendix A with such variations as the circumstances require.”
5. The Court in the Case of Ephraim Njugu Njeru vs. Justin Bedan Njoka Muturi & 2 others [2006] eKLR held as follows:-

“Substituted service is normally ordered where the court is satisfied that there is reason to believe that the person to be served is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way. Service in the ordinary way is generally personal service.”
6. The 2nd Defendant averred that it was the Plaintiff’s duty before instituting the suit to verify the whereabouts and status of the persons he wished to sue. Such persons he stated had to be of age, of sound mind and had to be alive to be capable of being sued. The 2nd Defendant stated that he had since the Applicant’s application was served upon him established that the 1st Defendant had passed away in 2006 and annexed a death certificate in the name of “Francis Njeru Kariuki” who is stated to have died on 2nd January, 2006. The 2nd Defendant asserted a dead person could not be sued in his name.
7. The Plaintiff/Applicant in response filed a further Affidavit sworn on 10th June, 2024 and averred that the name of the 1st Respondent in the Green Card of the suit property appeared as Francis N. Kariuki and not Francis Njeru Kariuki and it was his position that there was no affirmation that the death certificate exhibited by the 2nd Defendant referred to the same person described as Francis N. Kariuki in the Green Card.
8. The 2nd Respondent in a Further Affidavit also sworn on 10th June, 2024 reiterated his earlier Affidavit sworn on 30th April, 2024 and maintained the Plaintiff had not satisfied the provisions of Order 5 Rule 17 of the Civil Procedure Rules to be granted leave to serve the 1st Respondent by way of substituted



service. He averred the Plaintiff had not demonstrated what attempts he had made to serve the 1st Respondent. The 2nd Respondent at any rate averred the 1st Respondent was deceased and could not be served as he had demonstrated by exhibiting his death certificate. As regards the names Francis Njeru Kariuki and Francis N. Kariuki, the 2nd Respondent annexed to his Further Affidavit an Affidavit alleged to have been sworn in 1995 by Francis Njeru Kariuki before a Judicial Officer at Kerugoya where he verified that the name Francis N. Njeru appearing in the Green Card of land parcel Mutithi/Strip/221 and the name Francis Njeru Kariuki ID/No. 352XXXX referred to one and the same person, the deponent of the Affidavit. The 2nd Respondent thus opposed the application for leave to effect service on 1st Respondent by way of substituted service.

9. The application was canvassed by way of written submissions. The Applicant filed submissions dated 16th July, 2024 and besides reiterating the contents of the Affidavit sworn in support, the Applicant placed reliance on the Cases of Silas Kithira –vs- Timothy Mugambi (2021)eKLR and Simon Gichangi Mugo –vs- Pierre Asabi Misambe & 2 Others (2013) eKLR where the Court considered and granted leave to effect service by way of substituted service. The 2nd Respondent filed written submissions dated 17th June, 2024 and Supplementary Submissions dated 7th August, 2014. The 2nd Respondent’s position was that the 1st Defendant was dead hence no suit could be instituted against him. He cited the Case of Japhet Nzila Muanga –vs- Hamisi Juma Malee (2022) eKLR to support his submission that a suit cannot be brought against a dead person and that a suit instituted against a dead person is nullity.
10. I have considered the application and the Affidavits in support and in opposition. I have also considered the submissions of the Plaintiff/Applicant and the 2nd Defendant/Respondent. The singular issue for determination is whether the Plaintiff has laid a basis to warrant the Court to grant leave for the 1st Respondent to be served by way of substituted service.
11. The 2nd Respondent has asserted that the 1st Respondent is infact deceased and has furnished a copy of death certificate said to relate to the 1st Respondent. The Plaintiff avers that the death certificate carries the name of “Francis Njeru Kariuki” while the Green Card of the suit land bears the name “Francis N. Kariuki” and states that it was not certain the death certificate related to the 1st Respondent. The 2nd Respondent in turn has furnished a copy of an Affidavit sworn in 1995 allegedly by the 1st Respondent confirming that the person described in the Green Card of the suit property and the death certificate and ID/No. 3523XXXX was one ad the same person. Clearly there are doubts whether or not the 1st Respondent is alive or he is dead.
12. A suit can only be instituted against a person who is alive and equally only a person who is alive can be served summons, either personally or through substituted service. The Court entertains doubt whether or not the 1st Defendant is alive given the copy of the death certificate and the copy of the Affidavit exhibited by the 2nd Respondent said to relate to the 1st Respondent.
13. In the circumstances of this matter, the Plaintiff/Applicant would be required to prove that the 1st Respondent was indeed alive and for some reason it was not possible to effect service upon him personally and thus it was necessary for the Court to grant leave for him to be served with summons by way of substituted service.
14. The Court therefore is not satisfied the Plaintiff/Applicant has provided a basis to grant leave for the 1st Respondent to be served by way of substituted service and accordingly declines to grant leave.
15. The Plaintiff/Applicant’s Notice of Motion application dated 9th February, 2024 is dismissed with no order as to costs.



**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 7TH DAY OF
NOVEMBER 2024.**

J. M. MUTUNGI

ELC- JUDGE

