



**Kubai v Mwingirwa & another (Environment & Land Case  
E009 of 2021) [2023] KEELC 357 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 357 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E009 OF 2021  
CK NZILI, J  
JANUARY 25, 2023**

**BETWEEN**

**REUBEN KIBURI KUBAI ..... PLAINTIFF**

**AND**

**TIMOTHY MWINGIRWA ..... 1<sup>ST</sup> DEFENDANT**

**STEPHEN KITHURE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court is the application dated May 12, 2022 in which the plaintiff seeks to be allowed to serve the suit by way of substituted service after failing to physically trace the 2<sup>nd</sup> defendant. The application is based on the supporting affidavit of Reuben Kiburi Kubai sworn on the even date. He prays he be allowed to serve the suit through the print media.
2. The application was opposed through the 1<sup>st</sup> defendant's replying affidavit sworn on October 13, 2022. The 1<sup>st</sup> ground is that the application is out to obstruct the cause of justice and steal a judicial match given that the affidavit of service on record stated that the 2<sup>nd</sup> defendant was served upon identification at his residence by the plaintiff. That the applicant was being dishonest, is changing goal posts and was out to derail the suit.
3. In a supplementary affidavit sworn on October 19, 2022 the plaintiff disowns the process server to the extent that he showed the process server the 2<sup>nd</sup> defendant. He pleaded with the court to find that the 2<sup>nd</sup> defendant was never served with summons.
4. The law grants the court power to allow a party to effect service upon the opposite party through substituted service, upon satisfying the court that personal service has been impossible after the exercise of due diligence in tracing such a party.



5. In this suit Koome B Kaithu, a process server swore an affidavit on February 15, 2021 stating that he had served the 2<sup>nd</sup> defendant with the originating summons and the hearing notice at Kithiiri village Tigania West, Meru County, in the presence of the plaintiff who had accompanied him and identified the 2<sup>nd</sup> defendant for him to effect service.
6. The applicant has disowned being the source of that information. The deponent to the affidavit has not clarified the position. The affidavit remains valid and it is only the maker who can withdraw it and or swear a supplementary affidavit. It is a grave infraction of the law to swear a false affidavit and or mislead the court especially from a process server who is authorized to effect service of court processes.
7. To countenance such a practice would amount to anarchy and obstruction of the cause of justice. The court has looked at the certificate of search dated October 15, 2020 for LR No Uringu II/1873. It indicates the registered owner of the land as at August 24, 2015, as Stephen Kithure Murimi Ambutas. It is not clear if the said person is also Stephen Kithure. The plaintiff has not seen it fit to regularize and or clarify the position.
8. It is the duty of advocates to assist their clients and the court to attain the overall objective of the court as provided under sections 1A & 1B of the Civil Procedure Act to expeditiously determine suits. Even though the plaintiff has misled the court I nevertheless allow the application. The service of summons to be affected within 45 days from the date hereof. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**In presence of:**

C/A: Kananu

Koech for defendant

**HON CK NZILI**

**ELC JUDGE**

