



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT KERUGOYA

E.L.C CASE NO. 21 OF 2017

GRACE WAIRIMU NJOGU (Suing as Administrator of the

Estate of the late WAIGANJO MURIITHI)PLAINTIFF

VERSUS

ANTHONY MURAGE MUTOGI alias KANYAGO1ST DEFENDANT

AGOSTINE MUNGERE MUTOGU 2ND DEFENDANT

ESTHER WARUI MUGO (Sued as the Administrator of the

late JOHN MUGO KATHIERE) 3RD DEFENDANT

CATHERINE WAWIRA MURAGE (Sued on her own behalf

and as the next Friend of STEPHEN MURAGE) 4TH DEFENDANT

FRASIAR NYAWIRA NGACHA5TH DEFENDANT

PETER MURIITHI KINYUA 6TH DEFENDANT

JANE WANJIKU MURIITHI 7TH DEFENDANT

RULING

1. The Plaintiff, vide a Notice of Motion dated 2nd June, 2021 and filed on 9th June, 2021 seeks the following orders: -

a. That this Court do grant the applicant leave to serve the 4th Defendant Catherine Wawira Murage sued on her own behalf and as next friend of Stephen Murage a person of unsound mind with all pleadings in this case by way of substituted service by affixing the same in all the Court Notice Boards within Kirinyaga County and Embu County.

b. Costs be provided for.

2. The application is premised on the grounds set out on the face of the application and supported by the affidavit of the Applicant.

3. The application was not opposed in any of the ways prescribed under *Order 51 of the Civil Procedure Rules*.

APPLICANT'S CASE

4. The Applicant's case is that the 4th Defendant was married to her step cousin who was of unsound mind.
5. She stated that after they sold the suit land, she deserted the home long time ago and returned to her mother's home and the said Stephen Murage later died.
6. She stated that after she instituted the suit herein, she directed the process server to investigate the whereabouts of the 4th Defendant but she was informed that her last place of abode was Ivanguari Village.
7. She stated that every time the process server went to effect service, she only found her mother who informed him that the 4th defendant left the homestead several years ago.
8. She stated that she did not know the whereabouts of the said 4th defendant and didn't know her telephone number or address.
9. She stated that it is in the interest of justice and fairness that she be granted the orders sought and that no prejudice will be suffered.

ANALYSIS

10. I have considered the Application and the relevant law.
11. This 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.

12. From the above provision of the law, it is clear that the Court can allow substituted service of summons after it has been satisfied that the summons cannot be served in the manner prescribed in the rules of procedure.
13. The applicant has explained that she does not know the whereabouts of the 4th Defendant and every time the Process Server went to her last place of abode, he only found the mother who informed him that the 4th defendant left the homestead several years ago.
14. The applicant has attached affidavits of service to prove this. They were sworn on 6th June, 2019 and 30th October, 2017 respectively.
15. In the both affidavits of service, the process server indicated that the 4th Defendant's mother had received the summons but failed to sign.
16. In the supporting affidavit, the applicant claims that the process server stated that he was informed by the 4th Defendant's mother that she had left the homestead a long time ago to an unknown place. This is contradictory as in the Affidavit of service sworn on 6th June, 2019, the process server at paragraph 5 stated that the 4th Defendant's mother got in touch with her through her cell phone and told her to accept service.
17. I therefore find that the applicant is not being candid sincere and truthful and that she has not explained to the satisfaction of the Court why the summons cannot be served in the manner prescribed under the rules of procedure.

18. Having said that, I also note that the summons in question were issued on 23rd February, 2017 while this application was filed on 9th June, 2021.

19. By the time the instant application was filed which is approximately four years later, the summons had already expired and no order was issued extending the validity of the same.

20. In view of the matters aforesaid, I find the orders being sought, even assuming that the applicant had satisfied the provisions of *Order 5 rule 17* abovementioned, the orders sought would still not have been available to her since substituted service is only meant for valid summons.

CONCLUSION

21. From the foregoing, I find that the Notice of Motion dated 2nd June, 2021 is without merit and the same is hereby dismissed with no orders as to costs. It is so ordered.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 11TH DAY OF MARCH, 2022.

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HON. E.C. CHERONO

ELC JUDGE

IN THE PRESENCE OF:-

- 1. MS NDUNGU HOLDING BRIEF FOR ANN THUNGU FOR APPLICANT/PLAINTIFF**
- 2. MR. NDANA HOLDING BRIEF FOR MAINA KAGIO FOR 5TH AND 6TH DEFENDANTS/RESPONDENTS**
- 3. MS HAMBA HOLDING BRIEF FOR MWANGI KINYUA FOR 1ST DEFENDANT**
- 4. KABUTA – COURT CLERK.**



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