



REPUBLIC OF KENYA

IN THE ENVIROMENT AND LAND COURT AT MAKUENI

ELC CASE NO E035 OF 2021

SAMUEL MWANGANGI NYETE.....PLAINTIFF/APPLICANT

VERSUS

ESTHER MUTHEE NDAMBURI.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion application dated 20th of January 2022 brought under Order 5 Rule 12 of the Civil Procedure Code, the Applicant is seeking for the following orders: -

1) That the Court grants leave to the Plaintiff to effect service upon Esther Muthike Ndamburi the Defendant by way of substituted service namely advertisement in one of the daily newspapers with a wide circulation.

2) That the cost of the application be provided for.

2. The application is premised on the grounds of the face of the application. These grounds are;

a) That the Defendant's whereabouts or residence is unknown hence the summons to enter appearance cannot be served upon her.

b) That the Plaintiff has fenced off the suit land and no one has laid claim to it.

c) That the Defendant fraudulently transferred the suit land to her name as her identification number does not appear in the lands office.

d) That the Land Registrar has advised the Plaintiff to file a suit.

e) That the granting of the orders will not prejudice the Defendant in any way.

f) That it is in the interest of justice that the application is granted.

3. The application is supported by the affidavit of Judah Kioko Advocate, sworn on the 20th of January 2022. The Applicant averred that the Defendant, who is a stranger to the Plaintiff fraudulently transferred the suit property in her name. The Applicant further averred that the Land Registrar advised them to file a suit so as to cancel the Defendant's title. He argued that the Plaintiff stood to suffer irreparable injury if the orders sought were not granted.

ANALYSIS AND DETERMINATION

4. Having considered the application and the supporting affidavit of the Applicant I find that the only issue for determination is whether the Applicant is entitled to the orders sought.

5. The law that governs the grant of leave to effect substituted service is set out in Order 5 Rule 17(1) of the Civil Procedure Rules of 2010. According to the provisions of that Order, substituted service may be ordered by the court in the following circumstances: -

17(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 be.

(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 the Appendix with such variations as the circumstances require.

6. The rules provide for the court to be satisfied for any reason that the summons cannot be served. The Applicant stated on oath that the whereabouts and the residence of the Defendant are not known to the Plaintiff. I am satisfied that personal service may not be possible in the circumstances raised in the affidavit.

7. In the end I find that the application dated 20th of January 2022 is merited and I allow the same in the following terms: -

- a) **Leave is granted to the Plaintiff/Applicant to effect service of the pleadings herein upon the Defendant by means of substituted service in the Daily Nation newspaper on a working day within 21 days from today.**
- b) **The Defendant will be expected to enter appearance within 21 days of the said advertisement.**
- c) **Costs in the cause.**

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS THIS TERMS THIS 20TH DAY OF APRIL, 2022.

IN THE PRECENCE OF: -

COURT ASSISTANT – MR. MOHAMMED

KIOKO FOR THE APPLICANT



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