



**King'ori & another v Muturi (Environment & Land Case
91 of 2014) [2024] KEELC 162 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 91 OF 2014
JO OLOLA, J
JANUARY 25, 2024**

BETWEEN

FRANCIS KAMAU KING'ORI 1ST PLAINTIFF

MONICA WANJIRA NDANU 2ND PLAINTIFF

AND

JOHN NDIRITU MUTURI DEFENDANT

RULING

1. By the Notice of Motion dated 6th December 2022, John Ndiritu Muturi (The Defendant/Applicant) prays for leave to file a defence to the Plaintiff's claim out of time. The application which is supported by an Affidavit sworn by the Defendant is premised on the grounds inter alia, that:-
 - i). The Plaintiff instituted the instant suit vide a Plaint dated 2nd May 2014;
 - ii). That no summons to enter appearance or the pleadings were properly served upon the Defendant;
 - iii). The first time the Defendant became aware of this matter is when the court contacted him and informed him of the Notice to Show Cause dated 12th October 2017;
 - iv). The Defendant then contacted his Advocate to check on the status of the matter after which he was informed that the matter had been dismissed on 22nd November 2018 and that as such he was not required to file any documents;
 - v). Subsequently, the Defendant was served with a Mention Notice dated 11th November 2022 via whatsapp and upon his Advocate checking again on the status, he came to learn that the suit was reinstated on 28th July 2022;



- vi). Upon further perusal of the court file, it was discovered that there was a purported Notice of Appointment of Advocates filed on behalf of the Defendant on 29th September 2022 by Kebuka Wachira & Company Advocates. The Defendant has never appointed the said firm to represent him;
 - vii). The Applicant has a bona fide defence against the Plaintiff's claim which raises triable issues that warrant the court's audience;
 - viii). No prejudice shall befall the Plaintiff if the application is granted. On the other hand, the Defendant stands to suffer prejudice if the application is not granted as he will be denied an opportunity to defend himself; and
 - ix). It is in the interest of justice and fairness that the Defendant be granted leave to file his Defence and all the necessary pleadings.
3. The Plaintiffs are opposed to the application. In a Replying Affidavit sworn by the 1st Plaintiff- Francis Kamau King'ori, the Plaintiffs aver that the Defendant has been aware of this suit since 12th May 2014 when he instructed his manager to receive the summons on his behalf.
 4. The Plaintiffs further aver that it is in the public domain that the Defendant is the proprietor of Golden Gate Hotel where service of summons was effected upon his Manager after he directed the said Manager to receive the same. The Plaintiffs further aver that the Defendant is aware of all that transpired between the parties before the suit was filed and he knows he has no defence to this claim.
 5. I have carefully perused and considered the application and the response thereto. I have similarly perused the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
 6. By his application before the court, the Defendant urges the court to grant him leave to file a defence and other pleadings in opposition to the Plaintiffs' claim out of time. It is the Defendant's case that no summons to enter appearance or any pleadings were served upon him and that he only came to learn of this case when this court served him with a Notice to Show Cause why the suit should not be dismissed dated 12th October 2017.
 7. On their Part, the Plaintiffs assert that the Defendant has always known about this case since 12th May 2014 when the Defendant instructed his Manager to receive the Summons to Enter Appearance on his behalf.
 8. In regard to the issue of Summons, Order 5 Rule 1 of the Civil Procedure Rules, 2010, provides as follows:-

“(1). When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”
 9. As to the manner of service of the Summons to Enter Appearance, Order 5 Rule 8 of the said Rules provides thus:-

“8 (1). Whenever 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.”



10. In the matter before me, the Defendant has denied that he was served with Summons to Enter Appearance herein. In support of his case, the Defendant has annexed an Affidavit of Service sworn by one Christopher Wanjohi Wamatu upon which the Plaintiffs relied to assert that the Defendant was duly served. Paragraph 2 to 5 of the Affidavit sworn on 13th May 2014 reads as follows:-

- “2. That on the 12/5/2014 I received an order, summons to enter appearance, Plaint, Verifying Affidavit, witnesses statement, List of Documents and Chamber Summons under certificate of urgent (Sic) slated for hearing on the 19/5/2014 from the Applicant/Plaintiff for service upon the Respondent/Defendant;
3. That on the same day on directions of the Applicant I proceeded to Embassy/Mweiga where the Defendant operated a Hotel T/A Golden Gate along Nyeri-Mweiga Road where I introduced myself (to) the gatekeeper who called the manager;
4. That upon introduction and the purpose of my visit to the said manager called the Defendant who (was) said to be at Nairobi and was allowed to accept service thereof; and
5. That I effected service at 4:47Pm to the Defendant through his manager who accepted the documents and promised to hand over the same to the Defendant but declined to sign on the return copies.”

11. As was stated in *Equatorial Commercial Bank Ltd v Mohan Sons (K) Ltd* [2012] eKLR:-

“.....the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.”

12. In the matter before me, it is apparent that service was not effected upon the Defendant in person. The process server purports to have served a Manager at a hotel said to be belonging to the Defendant in Embassy/Mweiga area. The process server does not indicate how he came to the knowledge that the hotel belongs to the Defendant. Nor does he indicate the name of the purported Manager or how he came to know that he was the Manager of the said hotel.

13. As can be seen from the provisions of Order 5 Rule 8 of the *Civil Procedure Rules* cited herein above, the law requires that in such an event, the person to be served must be an empowered agent of the Defendant whom the Defendant has empowered to accept service of process on his behalf. In the circumstances herein, the Affidavit does not indicate that the unnamed Manager was the Defendant's empowered agent. The said Affidavit also fails to indicate what difficulty the Plaintiff had faced in trying to locate the Defendant before the purported service on the Manager.

14. At any rate, I have perused the draft Statement of Defence attached to the Applicant's Supporting Affidavit. It is the Defendant's case that the 1st Plaintiff was to transfer title of the parcel of land known as Mweiga/Kamatongu Block 8/7 to him for use as a collateral to obtain a loan from a Bank and thereafter pay the purchase price of Kshs. 10,000,000/= . From a reading of the draft pleadings, it would appear that title to the said property was not in the name of the 1st Plaintiff but that of a third party from whom the Plaintiffs themselves were trying to purchase the land.

15. In my considered view, the draft Statement of Defence raises triable issues as the court would need to be told the real proprietor of the land and the resultant transactions before a decision is made on the



Plaintiffs' claim. As at now the Plaintiffs are yet to give evidence and there was no suggestion that they would suffer any prejudice in the event the Defendant is allowed to articulate his position in the case.

16. In the premises, I am persuaded that there is merit in the Notice of Motion dated 6th December 2022. Accordingly, I allow the same. The Defendant is hereby granted leave to file his defence and counterclaim within 21 days from the date hereof.
17. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25TH DAY OF JANUARY, 2024.

J. O. OLOLA

JUDGE

In the presence of:

Mr. Okoth for the Defendants/Applicants.

No appearance for the Plaintiff/Respondent.

