



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Rage & 15 others v Mohamed (Civil Case E011 of 2022)
[2023] KEELC 17945 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
CIVIL CASE E011 OF 2022
JM MUTUNGI, J
JUNE 15, 2023**

BETWEEN

MATAN HAJI RAGE 1ST PLAINTIFF
ALI ABDI MOHAMED 2ND PLAINTIFF
AHMED MOHAMUD ADEN 3RD PLAINTIFF
MOHAMED SALAT RAGE 4TH PLAINTIFF
YAKUB MATAN HAJI 5TH PLAINTIFF
HAKIMA SIYAD RAGE 6TH PLAINTIFF
SALATHO FAHIR RAGE 7TH PLAINTIFF
SAADIA MATAN HAJI 8TH PLAINTIFF
FATUMA MOHAMED SUGOW 9TH PLAINTIFF
IMAN KUNO HASSAN 10TH PLAINTIFF
MOHAMED GEDI RAGE 11TH PLAINTIFF
SAHARA MOHAMED ABDI 12TH PLAINTIFF
HUSSEIN AHMED 13TH PLAINTIFF
AMBIA ISSACK 14TH PLAINTIFF
RAHMA GEDI RAGE 15TH PLAINTIFF
MAHAT ABDULLAHI ABDI 16TH PLAINTIFF

AND

BASHIR MOHAMED DEFENDANT



RULING

1. I have before me two applications for determination. The first application dated December 19, 2022 was filed by the plaintiffs simultaneously with the Plaint of even date. By the Plaint the plaintiffs inter alia sought a declaration that they were the legal and rightful owners of plot No. CSA/2019 in Bulla Iqra Garissa County and injunctive Orders against the defendant restraining the defendant from in any manner dealing with or interfering with the said plot.
2. By the notice of motion application the plaintiffs sought the following substantive order:-

“That an injunction do issue restraining the defendant/respondent either by himself or through his employees or agents from entering onto, erecting structures, subdividing, offering for sale or otherwise interfering with the property known as plot No. GSA/2019 in Bulla Iqra pending hearing and determination of the suit.”
3. The application was premised on the grounds set out on the body of the application and on the Affidavit sworn in support by the 1st Plaintiff on behalf of all the plaintiffs. The plaintiffs averred that they were jointly allocated the plot by the defunct Municipal Council of Garissa in 2009 as members of Emrey Welfare Group and were the rightful owners of the plot.
4. The plaintiffs exhibited minutes of the Town Planning and plot Allocation Committee held on 13/1/2009 which under MIN 2/2009 & MIN 3/2009 indicated their application was considered and approved. A letter dated 13/1/2009 from the Municipal Clerk marked “MHR2” confirmed that Emrey Welfare Group had been allocated plot No. GSA/2019 located at Bulla Iqra Area measuring approximately 5.5 Ha. The plaintiffs averred that the defendant had invaded their plot with intent to subdivide and dispose the same by way of sale to members of the public necessitating the filing of the present suit and the application.
5. The defendant upon being served with the pleadings in the suit appointed the Firm of Nyipolo & Associates Advocates who filed a Notice of Appointment of Advocate dated January 12, 2023 on January 13, 2023.
6. The defendant on January 31, 2023 filed a notice of motion of even date seeking diverse orders as hereunder: -
 1. This application be certified urgent.
 2. The Plaint dated the 19th day of December 2022 be struck out as it may prejudice, embarrass or delay the fair trial of ELC Case No. E022 of 2022, Matan Haji Rage (suing as the Chairman of Emrey Welfare Group) –versus- Bashir Mohamed.
 3. The Plaint dated the 19th day of December 2022 be struck out for failure to comply with order 4 rule 1 (1) (f) of the Civil Procedure Rules 2010 and for misleading the Honourable Court as to the non-existence of a pending suit between the parties over the subject matter.
 4. The verifying affidavit dated the 19th day of December, 2022 be struck out for failure to comply with order 4 rule 1 (2) of the Civil Procedure Rules 2010 and for verifying a misleading plaint.
 5. The suit be struck out in its entirety for failure to comply with order 5 rule 1 and want of summons.



6. The Suit be struck out in its entirety or in the alternative the suit and all proceedings be stayed for failure to comply with order 25 rule 4 and for failure of the 1st plaintiff to pay costs after withdrawing the plaintiff's suit in ELC Case No. E022 of 2022, Matan Haji Rage (Suing as the Chairman of Emrey Welfare Group) –versus- Bashir Mohamed and being condemned to pay costs.
 7. The suit be struck out in its entirety for failure to comply with section 13 of the *Environment and Land Court Act*.
 8. Theplaint dated the 19th day of December 2022 be struck out as it is an abuse of the Court process.
 9. Costs of the application be provided for.
7. The defendant's application is premised on the grounds set out on the body of the application and the Affidavit sworn in support of the application dated 31st January, 2023. The gist of the defendant's application by the defendant is inter alia is that there is in existence another suit namely Garissa Magistrate's Court ELC No. E022 of 2022; Matan Haji Rage (suing as the Chairman of Emrey Welfare Group v Bashir Mohamed) on the same subject matter which rendered the present suit subjudice; that the verifying affidavit of the plaintiff falsified that there was no other suit pending between the parties yet there was the suit pending before the Magistrate's Court; that the Plaintiff had not taken out summons as required under order 5 rule (1) of the Civil Procedure Rules and that rendered the suit unmaintainable. The defendant thus urged the Court to strike out the Plaintiff's suit in its entirety on account of being subjudice; the verifying Affidavit being not compliant; and for failure by the Plaintiff to comply with order 5 rule (1) of the Civil Procedure Rules regarding the issue and service of summons.
 8. In response to the plaintiffs application for injunction the defendant filed a statement of grounds of opposition dated February 10, 2023 and a replying affidavit sworn on the same date. The defendant averred that the Court lacked the jurisdiction to hear and determine the matter; that the matter in issue was subjudice; that the Plaintiff and the Verifying Affidavit were fatally defective, that the suit was stillborn for failure to take out summons; and that the application was an abuse of the Court process.
 9. Zulfa A. Roble Advocate for the plaintiffs in response to the defendant's application swore a replying affidavit on March 7, 2023 where she admitted the Plaintiff had indeed filed the suit Garissa MC ELC No. E022 of 2022 which he withdrew vide a written Notice of Withdrawal dated December 16, 2022. She denied that as at the time the present suit was filed, there was a pending suit before any Court involving the same parties contending that the earlier suit involved only the 1st Plaintiff and the defendant and that the 2nd to 16th plaintiffs in the present suit were not parties in that suit. The Plaintiff asserted that disclosure was made that there was a previous suit MC ELC No. E022 of 2022 which had however been withdrawn on 16th December 2022. The Plaintiff stated that the withdrawal of the suit before the Magistrate's Court was formally endorsed by the Court on December 28, 2022 and that the defendant on 13/1/2023 lodged a Bill of Costs for the entire withdrawn suit including costs of the Counter Claim which in essence signified the defendant had acceded to the withdrawal of the suit in its entirety subject to payment of costs. The plaintiff maintained that it was only the issue, of quantum of costs that remained to be determined in the earlier suit before the Magistrate's Court. The Plaintiff averred that the defendant's costs had not been ascertained to become payable by the Plaintiff.
 10. The defendant though not granted any leave filed a further affidavit dated March 10, 2023 ostensibly to respond to Ms. Roble's Replying Affidavit that there was no suit between the parties pending before the Lower Court. In the further affidavit the defendant annexed a copy of a Notice of Motion



application filed in the suit before the Lower Court seeking to have the order/ruling of December 28, 2022 reviewed to the effect that it was only the Plaintiff's suit that was marked withdrawn with costs implying that the defendant's counter claim remained to be prosecuted. Indeed, from the bar Mr. Nyipolo Advocate for the defendant on April 24, 2023 informed the Court that the suit before the Lower Court had a hearing date on 31/5/2023.

11. The parties argued the applications by way of written submissions. The defendant filed his submissions on March 14, 2023 while the plaintiffs filed theirs on April 17, 2023. I have carefully considered the twin applications the affidavits in support and in opposition and I have equally considered the submissions made by the parties. The issues that stand out to be determined are as follows:-
 - i. Whether there is another pending suit on the same subject matter and between the same parties namely Garissa CM ELC Case No. EO22 of 2022.
 - ii. Whether the present suit ought to be struck out for being an abuse of the Court process and/or stayed on account of being subjudice owing to the earlier suit before the Magistrate's Court.
 - iii. Whether failure to take on summons in compliance with order 5 rule (1) of the Civil Procedure Rules rendered the suit fatally defective.
12. It is not disputed that indeed there was an earlier suit filed before the Chief Magistrate's Court Garissa where the current Plaintiff describing himself as the Chairman of Emrey Welfare Group and apparently suing on their behalf sued the defendant over the same suit plot. The Welfare Group through their Chairman claimed ownership of Plot No. GSA/2019 Bulla Iqra measuring 5.5 Ha approximately. The plaintiffs sought a permanent injunction against the defendant.
13. The defendant in the suit before the Magistrate's Court denied the Plaintiff's claim and filed a Counter Claim claiming ownership of plot No. GSA/B/20332 measuring Approximately 10 Ha situated at Bulla Iqra which apparently included the portion claimed by the plaintiffs. The defendant sought a declaration that he was the owner of the property and a permanent injunction against the Plaintiff and his Dependants and agents. The defendant's defence and Counter Claim dated December 14, 2022 was filed in Court on December 15, 2022.
14. The plaintiff vide a Notice of Withdrawal dated December 15, 2022 filed in Court on December 15, 2022 wholly withdrew the suit against the defendant. The trial Court on December 28, 2022 marked the suit as withdrawn with costs. Under order 25 rule 1 of the Civil Procedure Rules, a Plaintiff may at any time before the suit is set down for hearing by notice in writing withdraw or discontinue a suit against a defendant. The provision provides as follows:-

25(1) At any time before the settling down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.
15. The defendant has argued that the withdrawal of the suit by the plaintiff against the defendant did not dispose of the Counterclaim filed by defendant against the plaintiff and the Counter claim which involves the same subject matter is therefore pending which rendered the present suit subjudice in terms of Section 6 of the Civil Procedure Act. The Learned Trial Magistrate in endorsing the withdrawal of the Plaintiff's suit against the defendant did not revert to the Counterclaim, filed against the Plaintiff by the defendant. The withdrawal of the Plaintiff's suit against the defendant could not dispose of the Counterclaim unless the defendant at the same time agreed to have the same withdrawn as against the plaintiff. The Ruling given by the trial Magistrate on December 28, 2022



gave the impression that the suit had been withdrawn in its entirety to the extent that the Learned Magistrate made no mention of the Counterclaim. No application was made before him touching on the Counterclaim. That perhaps may explain the defendant's application dated February 15, 2023 filed before the Chief Magistrate's Court on February 16, 2023, annexed to the defendant's further Affidavit. I do not know the fate of that application and will say no more about it save to observe that the suit before the Lower Court in some form appears to be alive and yet to be finally disposed of.

16. As I am persuaded that the suit before the Lower Court is alive and ongoing and that it involves the same subject as in the present suit, I do not think it would be desirable to have two Courts deal with a similar matter where the parties are similar or the same and the subject matter is the same. Such a scenario could result in embarrassment and/or confusion should the two Courts reach differing decisions. The suit before the Chief Magistrate's Court was earlier in time and that Court should be permitted to hear and conclude the matter. For that reason, I hereby order the present suit to be stayed pending the determination of Garissa CM ELC Case No. 022 of 2022.
17. I am alive to the fact that the defendant had additionally sought to have the plaintiff's suit struck out on the basis that the verifying Affidavit was defective as it falsified that there was no pending suit between the parties. Given the discussion and analysis respecting the ruling the Trial Magistrate made following the notice of the withdrawal of the suit, an impression was created that the suit had been withdrawn in its entirety. The defendant himself actually, filed a bill of costs itemising costs in respect of the plaintiff's claim and the Counterclaim. Indeed, the defendant filed an application dated February 15, 2023 in which he sought review and/or variation of the ruling and order given on December 28, 2022 for clarity on the withdrawal of the plaintiff's suit and the Counterclaim. In those circumstances I cannot hold that the plaintiff deliberately intended to mislead the Court through the verifying affidavit and at any rate the plaintiff had disclosed the existence of the suit before the Magistrate's Court which he stated had been withdrawn and that was factual.
18. The defendant further sought to have the plaintiff's suit struck out as summons to enter appearance had not been served and/or taken out in compliance with order 5 rule 1 of the Civil Procedure Rules. The defendant in his submissions relied on the decision of this Court sitting at Nairobi in the Case of *Grace Wairimu Mungai v Catherine Njambi Muya* [2014] eKLR. In that suit no summons to enter appearance had been issued and/or served on the defendant for nearly 2 years since the filing of the suit. Order 5 rule 1(5) & (6) of the Civil Procedure Rules provide as follows:-

5.1(5) Every summons shall be prepared by the plaintiff or his Advocate and filed with the Plaintiff to be signed in accordance with Subrule (2) of this rule;

- (6) Every summons except where the Court is to effect service shall be collected for service, within Thirty days of issue or notification, whichever is later, failing which the suit shall abate.

The essence of summons to enter appearance is to notify the defendant of the suit and to invite the defendant to appear and file a defence. Striking out a suit for failure by a party to take a procedural step or take some specific action is no doubt a drastic step and should only be taken where it is evident a party had been deliberate in not taking the action, perhaps with a view of dragging the matter or taking advantage of may be a situation that had occurred and/or had arisen.

In the Case of *ICDC v Sam Model Industries Ltd* [2007] eKLR the Court of Appeal commenting on service of summons stated as follows:-

“-----service of the summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void.



It will depend largely on circumstances of each case. On the facts and circumstances of this case, we do not think anything turns on the issue”.

19. Hon Tuiyot (as he then was) in the Case of *Tropical Foods International & Another v Eastern and Southern African Trade & Development Bank & Another* [2017] eKLR observed as follows concerning service and essence of summons:-

“The purpose of summons is for the defendant to appear within the time specified. It also serves to give notice of the existence of a suit against a defendant. If therefore the defendant gets notice of the suit by other means other than the summons and participates in subsequent proceedings, then the defendant should not complain of the non-service of summons unless it can be demonstrated that non service has caused some prejudice on the defendant”.

20. Parties come to court in search of Justice and they ought to be facilitated and enabled to access justice. I agree with Tuiyot, J (as he then was) that where a defendant gets notice of the suit in some other way other than service of summons, the defendant ought not to complain that he was not served with summons to enter appearance while he or she has appeared in the suit and even filed pleadings and participated somehow in the proceedings. Such a party has notice of the suit and where the suit has not advanced to hearing such a defendant ought to unconditionally be allowed to file his/her defence to enable the suit to progress to trial. In the present suit, I see no prejudice that has been occasioned to the defendant owing to non-service of summons.
21. In the present matter the defendant quite evidently became aware of the suit as early as January 12, 2023 when he appointed his Advocates on record to act for him and they duly filed a notice of appointment of Advocate in court on January 13, 2022. The application by the defendant to strike out the Plaintiff’s suit on the ground of failure to take out summons and service of the same therefore fails.
22. I have determined the defendant’s application which was in the nature of preliminary objection to the suit and I have agreed with the defendant on one of the limbs of his application that the suit is subjudice owing to the pendency of the earlier suit before the Chief Magistrates Court. It therefore follows that I cannot determine the plaintiffs application dated December 19, 2022 seeking injunctive orders as that is a plea that ought to be considered and determined by the Chief Magistrate’s Court who are now seized of the matter. Once the suit before the Chief Magistrates Court is determined, the parties will be at liberty to move this Court appropriately.

The costs of the applications shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA ON 15TH JUNE, 2023.

J. M. MUTUNGI

E.L.C - JUDGE

