



REPUBLIC OF KENYA



Karani v Eskafam Ventures Limited & 8 others (Environment & Land Case 105 of 2023) [2023] KEELC 21655 (KLR) (16 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 105 OF 2023**

YM ANGIMA, J

NOVEMBER 16, 2023

BETWEEN

GRACE WANJIKU KARANI PLAINTIFF

AND

ESKAFAM VENTURES LIMITED 1ST DEFENDANT

SIMON NJOGU KARANI 2ND DEFENDANT

FLORENCE WANJIRU NGOTHO 3RD DEFENDANT

ANASTACIA WAIGUMO KARANI 4TH DEFENDANT

CLEOPATRA WAHUKA KARANI 5TH DEFENDANT

GLADYS NYAMBURA KARANI 6TH DEFENDANT

JANNETTE MUGURE KARANI 7TH DEFENDANT

LUCY WANGUI KARANI 8TH DEFENDANT

CHARLES NDIRANGU KARANI 9TH DEFENDANT

RULING

A. Defendants' Application

1. *Vide* a notice of motion dated May 12, 2023 grounded upon sections 1A, 1B, 3A & 63(e) of the [Civil Procedure Act](#) (cap.21) and order 5 rule 1(6) of the [Civil Procedure Rules, 2010](#) (the Rules) and all other enabling provisions of the law, the defendants sought an order to the effect that the Plaintiff's suit had abated for failure to serve summons to enter appearance. They also sought costs of the application.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 2nd Defendant, Simon Njogu Karani, on May 12, 2023.



The Defendants contended that although the Plaintiff had served them with a copy of the plaint and application for interim orders dated December 19, 2022 she had failed to extract and serve the summons to enter appearance to the suit. It was further contended that the Plaintiff's suit ought to be declared as having abated in accordance with the provisions of order 5 rule 1(6) of the Rules.

B. Plaintiff's Replying Affidavit

3. The Plaintiff filed a replying affidavit sworn on June 23, 2023 in opposition to the application. The Plaintiff stated that the application was made in bad faith and was merely intended to delay the expeditious resolution of the dispute. It was contended that when the Plaintiff's application for interim orders was listed for inter partes hearing on January 30, 2023 the Defendants' advocate requested for referral of the dispute to court annexed mediation since it involved members of the same family.
4. It was stated that upon referral of the matter to Nakuru for mediation the court fixed the same for mention on May 15, 2023 for further orders. It was further stated that when mediation efforts failed the file was referred back to Nyahururu for hearing. It was contended that it was only upon return of the file that the Plaintiff was able to extract summons to enter appearance and serve the same. The Plaintiff further contended that the instant application was hurriedly filed by the Defendants on May 12, 2023 without even waiting for the mention of May 15, 2023.
5. The Plaintiff was further of the view that the Defendants were merely relying on technicalities of procedure by filing the instant application. The court was consequently urged to dispense substantive justice without undue regard to technicalities of procedure as stipulated in article 159(2)(d) of the Constitution of Kenya.

C. Directions on Submissions

6. When the application was listed for directions on 13.06.2023 it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their respective submissions. The record shows that the Defendants' submissions were filed on July 10, 2023 whereas the Plaintiff's submissions were filed on July 25, 2023.

D. Issues for Determination

7. The court has perused the Defendants' notice of motion dated May 12, 2023, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Plaintiff's suit should be declared as having abated under order 5 of the Rules.
 - b. Who shall bear costs of the application.

E. Analysis and Determination

a.

Whether the Plaintiff's suit should be declared as having abated order 5 of the Rules

8. The court has considered the material and submissions on record on this issue. The Defendants submitted that the Plaintiff had failed to extract and serve summons to enter appearance upon them for several months in violation of clear provisions of order 5 rule 1(6) of the Rules. It was also submitted that the summons were never collected within 30 days from the date of issue. The Defendants relied upon several authorities in support of their application such as Equatorial Commercial Bank Limited v Mohansons (K) Limited [2012] eKLR; Skeeter Kwamboka -v- Water Social Resources Management



Authority & 2 others; Lee Mwathi Kimani v National Security Fund & another [2014] eKLR and *Grace Wairimu Mungai v Catherine Njambi Muya* [2014] eKLR.

9. The Plaintiff, on the other hand, submitted that the timelines for collection and service of summons to enter appearance could only start running once the court has signed and issued the summons. It was submitted that the summons in this suit were signed by the court on 16.05.2023 because of the intervening mediation events and that the summons were collected and duly served upon the Defendants on May 22, 2023. It was pointed out that the request for referral of the dispute for mediation was made by the Defendants hence the Deputy Registrar of the Court could not sign and issue the summons within 30 days of filing suit.
10. The Plaintiff further submitted that since summons are signed and issued by the court the Plaintiff had no role to play in that process hence she could only collect the summons upon issuance and notification by the court that they were ready for collection. The Plaintiff relied on several authorities in opposition to the application including *Tejprakash Shem v Petroafrica Company Ltd & 2 others* [2014] eKLR and *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR.
11. Order 5 rule 1 of the *Rules* on summons to enter appearance states 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.
 2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 3. Every summons shall be accompanied by a copy of the plaint.
 4. The time for appearance shall be fixed with reference to the place of residence of the Defendant so as to allow him sufficient time to appear.
Provided that the time for appearance shall not be less than ten days.
 5. Every summons shall be prepared by the Plaintiff or his advocate and filed with the plaint 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.
12. The court is of the opinion that a Plaintiff who has filed a plaint together with copies of the summons has no role to play under order 5 rule 1 (2) of the *Rules*. The duty bearer in so far as signing and sealing the summons within 30 days lies with the court and there would be no legal basis for transferring that duty to a Plaintiff. The court is further of the opinion that the duty of collecting summons within 30 days in order 5 rule 1(6) can only arise after the date of issue or notification. That is the plain language of the rule. It is a matter of common logic that summons cannot issue before being signed and sealed by the court.
13. The material on record shows that the summons to enter appearance were signed and sealed by the Deputy Registrar on May 16, 2023. They were collected on a date which is not clear from the record but they were served on May 22, 2023. The Plaintiff swore in her replying affidavit that the summons were served on May 22, 2023. The Defendants did not file any further affidavit disputing service of summons on the said date. The court is thus of the view that if the summons were signed and sealed on May 16, 2023 and served on May 22, 2023 then they must have been collected within 30 days from



- the date of issue. As a consequence, the court finds no violation of order 5 rule 1(6) of the Rules as alleged by the Defendants.
14. The court has taken note of the authorities in which the High Court and the Environment and Land Court declared some suits as having abated for failure to collect and serve summons to enter appearance within the stipulated timelines. The court is of the view that those cases were decided on the basis of the particular facts of each case where the concerned Plaintiffs were found to be at fault. Moreover, those decisions are not binding upon this court since they were rendered by courts of co-ordinate jurisdiction.
15. The court is persuaded that the correct interpretation of order 5 rule 1 was rendered in the case of Tejprakash Shem v Petroafrica Company Ltd & 2 others (*supra*) where it was held, *inter alia*, that:
- “This court therefore has to determine the effect of the issue of summons after one year of filing of suit, which delay in the issue of summons is not disputed. I note that the only effect provided for in order 5 rules 1(6) of the Civil Procedure Rules is that a suit will abate if the summons are not collected within 30 days of their issue or notification thereof. Under Order 5 rule 1 of the Civil Procedure Rules summons cannot be issued unless signed and sealed by the court. Such issue therefore occurred on 4th July, 2013, when they were signed and sealed by the Deputy Registrar of this court and were served on the 1st Defendant on July 8, 2013. This suit therefore cannot have abated as the summons were served within 30 days of their issue, albeit the delay in the said issue.”
16. The court is further persuaded by the interpretation given in the case of Pauline Wanza Maingi v Diamond Trust Bank Ltd & another (*supra*) where it was held, *inter alia*, that:
- “30. From the provisions of order 5 of the Civil Procedure Rules that I have reproduced above, it is understood clearly that whereas it is the duty of the Plaintiff to file summons together with the plaint while instituting suit, the issuance/signing of summons is the duty of the court, which also directs the Defendant to appear within the time specified therein.
31. On the other hand, sub rule 6 is clear that every summons except where the court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate. In my understanding, the summons can only be collected for service if they are issued or a notification made to the Plaintiff. In this case, there was no issue/notification of the summons which was fled together with the plaint. In my view, therefore, this suit could not have abated since the summons has not been issued for collection for service. A summons only becomes valid for service when it is signed or issued.”
17. In the premises, the court is not satisfied that the Plaintiff’s suit has abated and should be declared as such under the provisions of order 5 rule 1(6) of the Rules. The court is far from satisfied that the Defendants have demonstrated any violation of Order 5 of the Rules as alleged or at all. Consequently, the court is not inclined to allow the prayer sought by the Defendants.

b. Who shall bear costs of the application

18. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21).



A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of costs of the application. As a result, the Plaintiff shall be awarded costs of the application.

F. Conclusion and Disposal Order

19. The upshot of the foregoing is that the court finds no merit whatsoever in the Defendant's instant application. As a result, the court makes the following orders for disposal thereof:
- a. The Defendants' notice of motion dated May 12, 2023 be and is hereby dismissed with costs to the Plaintiff.
 - b. Since the suit property is located in Marmanet within Laikipia County, the suit is hereby transferred to the ELC at Nyahururu for trial and disposal.
 - c. An interim order of inhibition is hereby made under section 68 of the [Land Registration Act 2012](#), for preservation of Title Nos. Marmanet/Melwa Block 1/3229 (Muhotetu) and Titles Nos. Laikipia/Marmanet/North Rumuruti Block 2/6657 (Ndurumo) pending inter partes hearing of the Plaintiff's notice of motion dated December 19, 2022 or until further orders of the court.
 - d. The suit shall be mentioned on December 11, 2023 before the Deputy Registrar at Nyahururu for directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 16TH DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mutua for the Plaintiff

Mr. Mogire holding brief for Mr. Konosi for the Defendants

C/A - Carol

.....

Y. M. ANGIMA

JUDGE

