



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 249 OF 2014

ROLAND DENZ.....PLAINTIFF/APPLICANT

- V E R S U S -

KEWAL KRISHAN KHOSLA.....1ST RESPONDENT/DEFENDANT

KIRAN KHOSLA.....2ND RESPONDENT/DEFENDANT

SALMA KHOSLA.....3RD RESPONDENT/DEFENDANT

RULING

1. The subject matter of this ruling is the Notice of Preliminary objection dated 9th October 2014 taken out by the defendants.
2. In the preliminary objection, the defendants are seeking for the plaintiff's suit to be declared as having abated pursuant to the provisions of Order 5 rule 1(2) and (6) of the Civil Procedure Rules, 2010.
3. When the notice came up for interpartes hearing the court gave directions to have the preliminary objection to be disposed of by written submissions.
4. I have considered the grounds stated on the face of the motion together with rival written submissions.
5. The background of this case is short and straightforward. Roland Denz, the plaintiff is alleged to have entered into a lease agreement for 5 years 3 months with Kewal Krishna Khosla, the 1st defendant herein over the premises standing on L.R. no. 3734/791B Maji Mazuri Road Lavington (herein after referred to as the suit premises). The plaintiff was to pay monthly rent at the rate of ksh.250,000/= . The plaintiff avers that on 9.8.2014 the defendants in company of twelve (12) hired goons stormed the suit premises, attacked and evicted the plaintiff. This turn of events prompted the plaintiff to file this suit in which he seeks judgment against the defendants in the following terms *inter alia*:
 - i. Restitution of the goods carted away or in the alternative payment of ksh.5,005,000/= in lieu.
 - ii. Refund of deposit, cost of repairs and electricity bills.
 - iii. General damages for breach of lease agreement, trespass, detinue and loss of business.
6. It is the submission of the defendants that this suit was filed on 15.8.2014 and summons to enter appearance dated 14.10.2014 were served upon the defendants on 29.10.2014. The defendants pointed out that the summons to enter appearance were not signed by the court within 30 days from the date of

filing suit. It is also stated that the summons to enter appearance were not collected for service within 30 days from the date of filing suit in contravention of the provisions of Order 5 rule 1(2) of the Civil Procedure Rules. The defendants further stated that they were served with the plaint and an application filed under a certificate of urgency on 26.8.2014 without the summons to enter appearance. For these reasons, the defendants urged this court to declare this suit as having abated by the time the summons to enter appearance were served.

7. The plaintiff on the other hand is of the view that he is not to blame for the failure to obtain and serve summons to enter appearance within time as stipulated by the Civil Procedure Rules. The plaintiff pointed out that summons to enter appearance in this matter were signed and sealed by the Deputy Registrar of this court on 14.10.2014 after he made various attempts to obtain the same. The plaintiff gave a detailed explanation of what transpired leading to the delay. It is stated that the case was initially filed at the commercial and tax division where the duty judge declined to grant any orders and instead referred the file to Civil Division. It is argued that the final decision to have the suit heard and determined by judges sitting in the Civil Division was made on 26th August 2014. The plaintiff further argued that on 27.8.2014 he made an application for site visit to verify the goods present at the auction on 28.8.2014. When the suit came up for mention on 29.8.2014 for further directions, the motion dated 14.8.2014 was fixed for interpartes hearing on 3rd September 2014. On the foresaid date, it is said that parties begun to engage in negotiations to have the motion settled by consent therefore the matter was adjourned to 9.9.2014 to record a consent. On the aforesaid date, the 2nd defendant is said to have raised an objection to the recording of the consent order. The matter was then stood over to 18.9.2014 for further orders and directions. The plaintiff also pointed out that on 18.9.2014 the 2nd respondent applied for the recusal of Justice Onyancha and the ruling was reserved for 24.9.2014 and later rescheduled for 8th October 2014. Having given the chronology of events, the plaintiff further argued that during this period it was impossible for the deputy Registrar to sign or issue the summons as the file was in the honourable judge's chamber. This court was beseeched to exercise its discretion to enlarge time.

8. It is not in dispute that the summon to enter appearance were not obtained nor served within 30 days as envisaged under Order 5 rule 1(2) and (6) of the Civil Procedure Rules. This court has been asked by the defendants to declare the entire suit as having abated. The plaintiff on the other hand has beseeched this court to spare the suit because he is not to blame for the failure to obtain and serve the summonses to enter appearance within time.

9. I am satisfied by the explanation given by the plaintiff to exonerate himself from blame. The question is whether or not this court has the discretion to extend time in the circumstances. With respect, I agree with the plaintiff that the legislature under Section 95 of the Civil Procedure Act, granted this court the power to enlarge time. In the end I dismiss the notice of preliminary objection dated 9.10.2014 with no order as to costs. I hereby issue orders extending time to obtain and serve summonses to enter appearance for 30 days. Consequently, the summonses already obtained and served are deemed to have been obtained and served with leave of court.

Dated, Signed and Delivered in open court this 27th day of January, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Respondents