



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 162 OF 2015

MARY THUNGURI GITONGA.....1ST PLAINTIFF/APPLICANT

ZACHARY MACHARI GITONGA..... 2ND PLAINTIFF/APPLICANT

-VERSUS-

GEORGE WILLIAM MABINZI.....DEFENDANT/RESPONDENT

RULING

1. Vide the notice of motion dated **27th day of May, 2015** the plaintiffs/applicants seek to restrain George William Mabinzi (hereinafter referred to as the defendant/ respondent) from collecting rent and/or trespassing or in any other way or manner interfering with their quiet possession and use of the property known as **Thika Municipality Block 27/744** (hereinafter referred to as the suit property) pending the hearing and determination of the application and the suit. The applicants also seek to recover Kshs. 64,000/= from the defendant/respondent being rent that the respondent is said to have unlawfully/illegally collected from tenants in the suit property from January to April, 2015.
2. The application is premised on the grounds that the defendant has continued to collect rent from the suit property hence depriving the plaintiffs/applicants of their livelihood. The defendant/respondent is also said to have threatened to kill the plaintiffs/applicants and their families and to burn the suit property.
3. In support of the application, the 1st plaintiff/applicant, Mary Thunguri Gitonga, filed the affidavit she swore on 27th May, 2015 in which she has deposed that they (plaintiffs/applicants) are the registered proprietors of the suit property; that in the month of January 2015, the defendant/respondent, who is her step son, invaded the suit property and menacingly ordered the tenants occupying the residential premises in the suit property to be paying the monthly rent amounting to Kshs. 16,000/= to him and that the respondent has threatened her with dire consequences if she dares collect rent from the tenants in the suit property.
4. Lamenting that the defendant/respondent has been collecting rent from the suit property ever since, the 1st plaintiff/applicant explains that her plea for help from the local administration and the police have been in vain.
5. Terming the defendant/respondent's action of forcibly collecting rent from the suit property unjustified and illegal, the 1st plaintiff urges the court to grant the orders sought.

6. The following documents are annexed to the affidavit sworn in support of the application:-

- a) A copy of the certificate of confirmation of grant issued to the plaintiffs/applicants in Nyeri High Court Succession Cause No.423 of 2003; marked **MTG-1**;
- b) A Copy of the title deed issued to the plaintiffs/applicants in respect of the suit property, marked **MTG-2**.

7. On 11th June, 2015 counsel for the applicant sought and obtained leave to amend the description of the suit property from 27/744 to 24/744.

8. On 3rd November, 2015, when the matter came up for hearing, counsel for the applicant, informed the court that despite having been served with the application and the other pleadings, the respondent neither entered appearance nor filed any response to the application and urged the court to allow the application as it is unopposed.

Analysis and determination

9. Since the plaintiffs' application is unopposed, the sole issue for determination is whether the plaintiffs have made up a case for being granted the orders sought. In this regard, from the documents annexed to the affidavit sworn by the 1st plaintiff/applicant in support of the application, I have no doubt that the plaintiffs' are *prima facie* the owners of the suit property.

10. However, upon review of the return of service filed in this suit and the documents in the court file, I am not sure whether the defendant/respondent was served with summons to enter appearance in this suit. I say this because the court file contains three sets of signed summons to enter appearance, none of which bears the seal of the court or an indication as to when they were issued. Besides, the affidavit of service of James Ndegwa Muthiga, sworn on 3rd November, 2015 suggests that no summons to enter appearance was served on the defendant/respondent. In this regard see the said affidavit of service which provides as follows:-

“...on 9/9/2015 I received instructions from the firm of M/S Mwaniki Warima & Company Advocates to serve the defendant herein copies of plaint, verifying affidavit both dated 27/5/2015, certificate of urgency, notice of motion and its supporting affidavit all dated 27/5/2015 and hearing notice dated 8/9/2015...”

11. Failure to obtain and serve summons on a defendant has serious ramifications on a suit. In this regard see the case of **Grace Wairimu Mungai v. Catherine Njambi Muya (2014) eKLR**, where **J.M Mutungi J.** observed:-

“Pursuant to the provisions of order 5 rule 1 sub rules 3, 5 and 6 which I have reproduced herein above it is clear and evident that an obligation is placed on the plaintiff to ensure the summons are prepared and signed by the court and thereafter to effect service of the summons on the Defendant. The record of the court in the present case shows that the summons to enter appearance addressed to the Defendant are still held (unsigned) in the court file which means the plaintiff did not follow up and/or collect the summons for service as envisaged under order 5 rule 1 (6). The summons on the court file carries a date of 2011 and there is no indication that the plaintiff has applied for a re-issue and/or extension of the original summons.

The significance of service of summons to enter appearance on a defendant is clear on review of order 6 rule (1) and order 7 rule 1.

Order 6 (1) provides:-

Where a Defendant has been served with summons to appear he shall unless some order be made by the

court file his appearance within the time prescribed in the summons.

Order 7 (1) provides:-

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service”.

My understanding of orders 5 Rules 1 and 2 and order 6 Rule 1 and order 7 Rule 1 is that until the Defendant is served with the summons to enter appearance there is no basis for him to answer to the suit...Having regard to the applicable provisions which I have highlighted above it is my view that order 5 Rules 1 and 2 set out a very elaborate procedure of how summons are to be processed issued and served and where there are difficulties of serving within the prescribed time frames an equally elaborate procedure for extending the validity of the summons is outlined. I am unable to accept that order 5 Rule 1 would, fall to be considered as providing a mere procedural technicality as suggested by the plaintiff. It does in my view substantively provide the procedure under which a Defendant is called to answer to a suit and is thus core to the initiation of a suit as far as a defendant is concerned and it would be my holding that where no summons have been issued in accordance with order 5 and appropriately served on the Defendant there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit...” (Emphasis supplied).

12. Also see the case of **Tana Trading Ltd v. National Cereal & Produce Board (2014) e KLR** where **Mabeya J.** stated:-

“I agree with the Defendant's submission that the failure by the Plaintiff to issue summons made it impossible for the Defendant to respond to the suit through a Defence. Order 5 of the Civil Procedure Rules has set procedures which parties must adhere to including the Plaintiff. Those procedural rules are not of a technical nature. They are the very essence of commencement of lawful proceedings. Without summons being issued to command a Defendant to appear and defend a Plaintiff's claim, a suit remains still born. The delay in complying with Order 5 in this case is unacceptably inordinate. Consequently, I decline to issue the orders sought” (Emphasis supplied).

13. Being of the view that the authorities cited herein above capture the right legal position concerning the effect of failure to serve summons and there being no evidence that the defendant/respondent was served with summons to enter appearance in this suit, I decline to issue the orders sought.

Dated, signed and delivered at Nyeri this 25th day of January, 2016.

L N WAITHAKA

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

Court assistant - Lydia