



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 137B OF 2007

JOHN WALTER & 92 OTHERS.....PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION.....DEFENDANT

RULING

Introduction

1. What is before court for determination is the application by the plaintiff dated 12.2.2014 supported by an affidavit sworn by John A. Walter and a further affidavit sworn by the same deponent. In opposition to the application the Defendant/Respondent filed a replying affidavit sworn by KENNEDY NYARIKI NYABARE as well as a Notice of Preliminary Objection dated 24.2.2014.
2. On 14.10.2015, the court issued directions, with consent of the parties, to the effect that the Preliminary Objection and the Notice of Motion dated 12.2.2014 be heard together and that the determination thereon shall apply to File Nos. HCC NO. 227/2005 AND CMCC NO.1605/1999.
3. Based on those directions I shall consider the application and objection together and render one decision on both.

Facts of the application:

4. The Notice of Motion seeks order of temporary injunction directed at the defendant either by itself, servant or agents from levying distress in respect of arrears of disputed increased rent with regard to premises situate at Changamwe Mombasa pending the hearing and determination of the suit. The grounds set forward to ground the application are that there are arrears of rent occasioned by what the plaintiff call unauthorised, arbitrary and unrealistic increment; that unless restrained, the plaintiff stands to suffer irreparable loss as the defendant is determined to levy distress/recover the said increased rent and that it is only fair that the injunction sought be granted.
5. The affidavit in support of the application says little about what makes the rent increment unrealistic, arbitrary unauthorised, unlawful or unjustified. It is however contended that on the advise of counsel they have a *prima facie* case to warrant grant of a temporary injunction. On its part the further affidavit filed on the 24.3.2014 merely annexes the correspondence and the draft/lease sought by the Defendant to be executed, demand notices and notices seeking to terminate the tenancies after the plaintiff declined to

execute the leases.

The defendants opposition:

6. In the Replying affidavit filed, the defendant accuses and faults the plaintiffs of filling a plethora of suits a fact it contends amount to an abuse of the court process; that the plaintiffs have failed to take out and serve summons to enter appearance and that they have totally failed to comply with the *ex parte* court order granted on the 4.4.2007 which required the plaintiff to service the applications dated 28.3.2007 and 2.4.2007 which application remain pending on the court file unprosecuted. Together with that affidavit the Defendant also filed a Notice of Preliminary Objection in which the faults attributed the plaintiff are echoed and it is added that by dint of sections 6 & 7 Civil Procedure Act and the fact that the plaintiff has since filling the suit in 2007 failed to take out of serve summons to enter appearance.

7. I have perused both the application and the notice of preliminary objection and it is clear to me that in considering the same I start with the notice of preliminary objection which challenges the propriety and competence of the suit before court. I have opted to so proceed noting that should I uphold the objection then there would be no meaningful purpose to be served by considering the application for injunction. If however I decline it then I would continue to consider the application on the merit.

Analysis and determination:

8. I have read the entire file in order to establish whether or not the summons to enter appearance have been taken. I have failed to trace any copy, of such summons or indeed an affidavit of service. Indeed the plaintiff has kept a studious silence on the issue of whether or not summons were taken out or served.

9. The law under the then order IV Rule 3(5) Civil Procedure Rules (1996), enjoined the plaintiff to prepare and file summons with the plaintiff to be signed in accordance with sub rule 2 of the same Rule.

10. My reading of the file having revealed no copy of the Summons to Enter Appearance not evidence of service, the question the court must ask and answer is what is the effect of failure by a plaintiff to comply with that requirement of the law.

11. I note that the rule is purposely couched in mandatory terms. Infact, the Civil Procedure Rules [2010], not only retained the plaintiff obligations to prepare and lodge summons but further set timelines within which the summons must be signed and collected for service. In my view this was informed by the needs of active case management itself geared towards meeting the overriding objectives of the court.

12. In the present case where the summons were never lodged and have remained unlodged some ten years after the suit was filed, with the consequence that the defendant has never entered an appearance not filed a statement of defence, the court shall interrogate and decide whether or not that is in consonance with the overriding objectives of the court to which litigants and their advocates are enjoined to uphold.

13. I hold the view that the requirement that a defendant be served with summons to enter appearance and file defence to the suit has underpinning in the rules of natural justice now enshrined in the Kenya Constitution 2010.

14. It follows that a plaintiff who files a suit and fails to prepare and take out summons to enter and appearance is *ab initio* not intent on the matter being heard with the participation of the defendant. That to me affronts the right to a fair hearing and runs contrary to the dictates of our legal theory and cannot be countenanced.

15. Additionally, it is now settled law that it is the summons that grounds a suit and without summons to enter appearance being taken out and served there is no suit upon which the court can render itself.

16. The Court of appeal **SAXENA -VS- MIWANI SUGAR NULL LTD** had this to say on the point.

“For our part, we must consider the issue that every court is entitled to ensure that its processes are not abused in a sence that those who seek the assistance of the court must do so in conformity with the existing law”

17. I am bound to follow that decision and position taken by the court of appeal, and I therefore hold and find that the plaintiff having failed to prepare, have signed and serve summons to enter appearance, there is not a valid suit pending before court and meriting the courts consideration on the remedies sought on the plaint and the interlocutory application for injunction.

18. The consequence is that the suit being a nullity has no justification to be sustained in the court. I therefore hold the preliminary objection and order that the plaint dated 30.3.2007 having not been accompanied by the summons to enter appearance and such default having not been remedied todate is a nullity and I therefore struck out the same with costs to the Defendants.

Dated, signed and delivered at Mombasa this 19th day of February 2016.

In the presence of:-

Wabenje for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

P. J. O. OTIENO

JUDGE