



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 47 OF 2020**

**PETRO CHACHA NYAMOHANGA (Suing as a Personal Representative of the estate of  
NYAMOHANGA MWITA MARWA alias NYAMOHANGA MWITA).....1<sup>ST</sup> PLAINTIFF  
MUNIKO MWITA MARWA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**WILLIAM GESAMBA MWITA.....1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR KURIA.....2<sup>ND</sup> DEFENDANT  
HON. ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

**A. INTRODUCTION**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Applicants herein filed a Notice of Preliminary Objection dated 10<sup>th</sup> June, 2021 in response to the Plaintiff's claim institute vide a Plaint dated 17<sup>th</sup> August, 2020, on the following ground: -

a. The suit herein offends the provisions of Order 5, Rule 1 of the Civil Procedure Rules, 2010.

2. On 06/10/2021, this Court issued directions on the disposal of the Preliminary Objection dated 10.06.2021 by way of written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/ Applicants filed their submissions dated 10.10.2021 while the Plaintiffs/Respondents filed their submissions dated 05.11.2021.

3. It is the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/ Applicants submissions that Order 5 Rule 1 is to the effect that when a suit has been filed, Summons shall issue to the defendant ordering him to appear within the time specified and shall be accompanied by a copy of the plaint. Further, Order 5 Rule 1(5) stipulates that summons should be prepared and filed together with the Plaint. Thus the rules make it an obligation for the Plaintiff to ensure that summons are prepared, signed by the court and served upon the defendants while sub-rule (6) provides for the collection and service of the summons within 30days.

4. They also submitted that the Plaintiff only served them with the Plaint without the Summons. Further, upon perusal of the court record, there was no evidence that a copy of the served original summons was returned to the court or a return of service duly filed by the process server.

5. They maintained that it mattered not whether they had filed their Statement of Defense or not; until the defendant is served with summons to enter appearance there is no basis for him to answer to the suit. They also submitted that Order 8 rules 1 and 2 states that defence can only be filed after a defendant has been served with summons to appear and made such appearance. It is their position that Summons is the primary document in a suit since the plaint simply sets out the claim against the defendants but it does not invite the defendant to do anything in respect of the claim. Summons on the other hand informs the defendant that a claim has been filed against him and requires him to enter appearance within a stipulated timeline. The rules of procedure regarding summons are very fundamental to the orderly procedure of bringing suits into courts thus, the failure by the plaintiff to serve summons to the defendants is not a procedural technicality and urged the court to strike out the plaint with costs to the defendants.

6. The Plaintiffs/Respondents on the other hand submitted that the suit was filed on 20.08.2020, there are copies of summons on record dated

21.08.2020 and an Affidavit of service showing that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants were served with the summons; a copy of the summons has been annexed to the Affidavit of Service.

7. They further submitted that the purpose of summons to enter appearance is primarily to notify the defendant and/or invite them to defend the suit. According to them, the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants their memorandum of appearance and statement of defence, it would be a travesty of justice to dismiss the suit for want of summons when the 2<sup>nd</sup> Defendant has actively been participating in the suit.

8. They maintained that the aim of the summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons. They also urged the court to be guided by the provisions in section 120 of the Evidence Act on the principle of estoppel. They thus submitted that they had served the pleadings properly and since all parties to the suit had filed their requisite pleadings, no prejudice would be suffered by any of the defendants and urged the court to dismiss the preliminary objection.

9. The sole issue for determination before me is whether the Notice of Preliminary Objection dated 10/06/2021 is merited and I will proceed to discuss it as hereunder;

10. The law on preliminary objection is now well settled. In the celebrated case of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696**; the Court defined Preliminary Objection as follows;

**“...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.**

11. The position on what constitutes a preliminary objection was reiterated by the Supreme Court in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** and stated as follows:

**“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”**

12. The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/Applicants have sought the dismissal of the Plaintiff’s suit instituted vide a Plaint dated 17/08/2020 on the basis that the same offends the provision of Order 5 Rule 1 of the Civil Procedure Rules, 2010; which states as follows: -

**1. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**

(2) .....

**(3) Every summons shall be accompanied by a copy of the plaint.**

(4) .....

(5) .....

**(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.**

13. The Black’s Law Dictionary defines ‘**summons**’ as a writ or process commencing the plaintiff’s action and requiring the defendant to appear and answer or a notice requiring a person to appear in court.

14. I am fortified and guided by the Court of Appeal decision in the case **Nanjibhai Prabhudas & Company Ltd V Standard Bank Ltd [1968] EA (K) 670** where the court stated as follows; -

**“...we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.”**

The court went further to state that;

**“In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MACDUFF J, in the Jethalal case (supra) is an incorrect statement of the law and should not be followed.”**

15. It is the summons which calls upon the defendant or defendants to enter appearance and not the plaint. The plaint simply states a party’s case. The summons calls upon the cited party to enter appearance within the period stated in the summons. If summons are not served within thirty (30) days of issue or notification, the suit stands abated.

16. It is the Applicants assertion that they were only served with a copy of the Plaintiff, contrary to the clear provisions of the law. Further, it is their position that failure to be served with the Summons; even though they have already filed their memorandum of appearance and their statement of defence, amounts to a fundamental breach that warrants the plaintiff's suit to be struck out.

17. The Plaintiffs on the other hand maintains that Summons to enter appearance were issued on the 21<sup>st</sup> August, 2020. His advocate on record maintains that they served the pleadings properly including the Summons and thereafter filed a Return of Service. However, on a perusal of the court record, there is no such return of service at all, the claims by the plaintiff are therefore mere unsubstantiated claims with no proof.

18. However, summons to enter appearance is intended to give notice to the parties sued of the existence of the suit and requires them, if they wish to defend themselves to, first of all enter appearance. The provisions relating to summons to enter appearance are based on a general principle that, as far as possible, no proceedings in a court of law should be conducted to the detriment of any party in his absence. Entry of appearance by a party therefore signifies the party's intention to defend.

19. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants herein filed their Memorandum of Appearance dated 10<sup>th</sup> June, 2021 and filed on 14<sup>th</sup> June, 2021 together with their joint Statement of Defence dated on the even date and have been fully participating in the proceedings herein. The 1<sup>st</sup> Defendant on the other hand filed his Memorandum of Appearance dated 25<sup>th</sup> August, 2020 and filed a Statement of Defence dated 12<sup>th</sup> January, 2021 together with the accompanying documents.

20. Applying the foregoing to the present case, I find that the filing of the unconditional Memorandum of Appearance, Statement of Defence and participation in the proceedings herein is sufficient proof that the Defendants have knowledge of the existence of the suit; no proceedings in the matter were conducted in the absence of the Defendants nor adverse orders have been made against the Defendants and I therefore find no prejudice will be caused should Defendants herein should the Application be denied. In the circumstances, I find that the aim and purpose of the summons has been achieved by the Defendants herein.

21. The upshot of the foregoing analysis is that the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants/ Applicants' **Preliminary Objection** dated **10<sup>th</sup> June, 2021** is **not merited** and the same is dismissed with no orders as to costs. Parties are hereby directed to fully comply with Order 11 within 30days from the date of this Ruling. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MIGORI ON 28<sup>TH</sup> DAY OF JANUARY, 2022**

**MOHAMMED N. KULLOW**

**JUDGE**

**Ruling delivered in the presence of:-**

Non appearance for the Plaintiffs

Non appearance for the 1<sup>st</sup> Defendant

Non appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

Tom Maurice - Court Assistant