



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 300 OF 2013

SAMMY MWANGI THIONGO & ANOTHERPLAINTIFFS

VERSUS

INDAR SINGH GILL & ANOTHERDEFENDANTS

RULING

1. The application before me is the Motion on Notice dated 7th November, 2014. The same is brought under Order 2 Rule 15(d), Order 5 Rules 1, 2 and 6 and Order 40 Rule 11 of the Civil Procedure Rules. The application seeks orders that the Plaintiff's suit be struck out and consequently the Plaintiff do deposit in court the sum of KShs.1,584,266/= or pays over the said sum to the Defendant. The costs of the suit is also sought.
2. The grounds for the application were set out in the body of the motion and in the Supporting Affidavit of Adrian Kibera sworn on 7th November, 2014. These were that; summons in the suit have never been served; that the court had ordered on 24/02/2014 that the Plaintiff do deposit in court rent amounting to KShs.792,133/= for the period 1/1/2013 and 30/5/2014 which amount had been admitted.
3. It was averred that failure to take out and serve summons was a fundamental irregularity that is fatal to the suit; that failure to serve the summons denies this court jurisdiction to entertain the matter; that in the premises the suit has abated. It was further contended that since the Plaintiffs had admitted on 25/2/2015 that they owed the Defendant rent total sum of KShs.1,584,266/= should be deposited in court or be paid over to the Defendant. There was also an allegation that the Plaintiffs were people of straw with no fixed abode. The application was argued ex parte as the Plaintiffs neither filed any documents in opposition to the application nor did their Advocate appear at the hearing.
4. I have perused the record and reviewed the documents therein. The Plaintiffs cause of action as pleaded in the plaint was that they were sub-tenants of Kamro Agrovot Ltd. in the Defendant's premises known as Plot No. 91185, Nairobi (Gill House). That on 26th July, 2013, the Defendant carted away the Plaintiffs' goods and their tools of trade and closed the premises. They contended that that was illegal. They therefore prayed for a permanent injunction to restrain the Defendant from carting away the Plaintiffs' goods and tools of trade. They also sought the return of the items taken away by way of a mandatory injunction.
5. Together with the Plaintiffs, the Plaintiffs' filed an injunction application in respect of which interim orders were granted. Those orders were discharged on 10/06/14. It is not clear from the record if any summons were ever served but on 7th August, 2013, the 1st Defendant entered appearance through the firm of Waiganjo Wachira & Co. No defence was ever filed. It is not clear why appearance was being filed yet no summons had been issued or served commanding the Defendant to enter appearance.

6. From the averments on oath in the Affidavit in support which were not controverted, it is clear that the summons were never served. I have seen on record summons in quadruplicate that are unissued. They seem to have been filed with the suit. Fast forward, there are two copies of summons dated 14th January, 2015. They seem to have been issued after the present application had been filed and served. I say so because the Affidavit of Service of Geoffrey Mburu sworn on 2nd March, 2015 shows that the motion was served upon the Plaintiff's Advocates on 11/12/2014.

7. Order 5(1) of the Civil Procedure Rules provides:-

“1.

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.
4.
5. ***Every summons shall be prepared by the Plaintiff or his Advocate and filed with the Plaintiff to be signed in accordance with sub rule 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 of which the suit shall abate.***”

8. It is clear from the foregoing that, summons are supposed to be prepared by the Plaintiff and are to be filed together with the Plaintiff. The summons should be collected by the Plaintiff for service within thirty days of issue failing of which the suit abates. In the present case, the suit was filed on 29th July, 2013. The summons that were filed together with the suit are still lying in the file. They have never been issued.

9. It may be argued that since those summons were never issued the suit has not abated. However, my view is that having lied in the file for now more than two (2) years, to construe Rule (1) sub rule 6 of Order 5 otherwise than that the summons have abated would be a travesty of justice. Suits are filed to be prosecuted. For a suit to remain in limbo for two (2) years is against the spirit and letter of Article 159 2 (b) of the Constitution. In my view and I so hold, the suit herein has abated. The summons were supposed to be issued within 30 days in terms of Order 5 Rule 1 sub-rule 2 of the Civil Procedure Rules.

10. If I am wrong on this, still the suit will remain abated because the summons issued on 14th January, 2015 are still on the file. At least there are two copies of the same lying in the file and there is no evidence to show that they have been collected for service. To that extent, the suit herein has abated and the court has no jurisdiction to prosecute a suit that has abated. Prayer No. 1 of the motion succeeds.

11. On the prayer that a sum of KShs.1,584,266/= be deposited in court or be paid to the Defendant, I doubt if that order can be granted. This is so because, once a suit has abated, there can be no jurisdiction to make any substantive orders. In any event, there is no counterclaim upon which the court can make positive orders as prayed in the Motion. Accordingly, I decline to allow prayer No. 2 of the motion. Let the Defendant collect that rent in the normal manner as provided for in law.

12. Accordingly, I allow the application in terms of prayer No. 1 of the motion with costs to the Defendants in terms of prayer 3 thereof.

DATED, SIGNED and DELIVERED at Nairobi this 13th day of March, 2015.

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A. MABEYA

JUDGE

