REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENT AND LAND COURT CASE NO. 1715 OF 2007

JOSEPH GITAHI GACHAU ……..……. 1ST PLAINTIFF

BEATRICE WANGECHI GITAHI …….……..... 2ND PLAINTIFF

VERSUS

PIONEER HOLDING (AFRICA) LIMITED …….…….....…..1ST DEFENDANT

PIONEER ASSURANCE COMPANY LIMITED …….....…... 2ND DEFENDANT

EVELYN WALEGHWA NG'ANG'A …….....…. 3RD DEFENDANT

RULING

1. The court on 20th January 2015 gave directions that the plaintiffs application dated 7th May 2014 seeking leave to amend the plaint and 3rd defendant's application dated 20th September 2014 for leave to amend her defence as well as the 1st defendant's preliminary objection to the plaintiffs suit dated 5th June 2014 be heard together. The court further directed the parties to exchange written submissions. This ruling therefore will dispose the two applications by the plaintiff and the 3rd defendant and the preliminary objection by the 1st defendant.
2. The Notice of Motion by the plaintiff is brought under order 8 rules 3 and 5 of the Civil Procedure rules, sections 1A, 1B and 3A of the Civil Procedure Act and seeks the following orders:-

1. **That the plaintiffs be granted leave to amend their plaint in terms of the draft amended plaint.**
2. **That costs of the application be in the cause.**

The plaintiffs' application is premised on the grounds set out on the body of the application and on the affidavit of Joseph Gitahi Gachau sworn on 7th May, 2014 in support of the application. The plaintiff avers that it has become necessary to plead more particulars in the plaint which particulars were not within the knowledge of the plaintiff at the time when the plaint was filed. The plaintiff further avers that the proposed amendments are necessary and will enable the court to fully and conclusively determine the matters in controversy between the parties. The plaintiffs contend that the amendments if allowed will not in any way prejudice the defendants and thus

aver it will be fair and just to allow the proposed amendments so that the real issues in controversy between the parties can be finally determined.

3. The 3rd defendant's application for leave to amend is brought under order 8 rules 3, 7 and 8 of the Civil Procedure Rules. The 3rd defendant seeks orders that:-

1. **That leave be granted to the defendant to amend her statement of defence dated 22nd December 2005 to include a counter claim therein.**
2. **That the amended statement of defence and counter claim attached to the affidavit hereof be deemed as filed and served.**
3. **That the costs of the application be provided for.**

The application is premised on the following grounds set out on the body of the application.

1. **That the amendments sought will reflect the correct position of the registered owner and the status of the premises.**
2. **That the amendment will not lead to any prejudice to the plaintiff.**
3. **That the inclusion of the counter-claim is necessary to enable the 3rd defendant get access to the suit premises and determine all the pertinent issues in the suit.**

4. On its part, the 1st defendant filed grounds of opposition dated 3rd June 2014 to the plaintiffs application dated 7th May 2014 and set out the following grounds:-

1. **The application is misconceived and not tenable in law.**
2. **No summons to enter appearance have been served upon the 1st defendant, this suit must be dismissed and/or struck out.**
3. **The amendments sought to be made are intended to aid a negligent pleader and cannot therefore be allowed;**
4. **The amendments sought to be made effectively introduce a new claim and cause of action which is hopelessly time-barred under the humiliation of Actions Act.**

The 1st defendant simultaneously with the grounds of opposition on the same date filed a Notice of Preliminary Objection to the effect that the plaintiffs' Notice of Motion dated 7th May 2014 and the entire suit by the plaintiff should be struck out with costs on the ground that no summons to enter appearance having been served upon the 1st defendant the suit must be dismissed and/or struck out.

5. For the record the 3rd defendant stated that she did not oppose the plaintiffs' application for leave to amend their plaint in the manner proposed and equally the plaintiffs stated that they do not oppose the 3rd defendant's application to amend her defence to include a counter-claim. The contest therefore is between the plaintiffs and the 1st defendant. In consequence therefore only the plaintiffs and the 1st defendant filed submissions to ventilate the issues in contention.
6. The 1st defendant/applicant submits that the plaintiffs' suit was filed on 18th November 2005 and that according to Order IV Rule 3 (5) of the then applicable Civil Procedure Rules, the plaintiffs were mandatorily required to have prepared the summons to enter appearance and filed the same with the plaint. The subrule (5) was in the following terms:-

> **"Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule."**

Order V Rule 1 (1) of the previous Civil Procedure Rules provided that a summons was valid for 12 months from the date of its issue. It is the 1st defendant's position that in the instant case no summons have yet been served on the defendant for nearly 10 years and any summons which may

have been issued have long expired without being served and hence the suit ought to be dismissed with costs.

7. The 1st defendant referred the court to the Court of Appeal decision in the case of **Uday Kumar Chandulal Rajani & 3 Others –vs- Charles Thaithi (1991) eKLR** where the Court of Appeal held that summons which have expired cannot be extended and/or reissued. The Court of Appeal stated:-

> **"Order V rule 1 provides a comprehensive code for the duration and renewal of summons from the date of its reissue. The court, before 1996, could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However in this case neither the plaintiff nor his advocate did exhaust the provisions of Order V Rule 1 (5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence…".**

8. In the case of **Mae properties Ltd –vs- Davidson Ngini (Nairobi HCCC No. 313 of 2004, Lady Justice Kasango** cited and followed the decision in the case of **Uday Kumar Rajani (Supra)** and struck out a plaint in the suit where the summons served on the defendant had expired. In the case of **Elegant Colour Labs Nairobi Limited –vs- Housing Finance Company (K) Limited & 2 Others (2010) eKLR Hon. Justice Onyacha** cited with approval the ruling in **Uday Kumar Rajani** case (Supra) and proceeded to strike out a suit with costs where the summons had not been served before expiry. **Onyacha, J** stated that under order V rule 1 (5) of the previous Civil Procedure Rules the validity of the summons including any period allowed for extension was 24 months from the time the original summons was originally issued. On the basis of the authorities cited the 1st defendant argues that as the plaintiffs have not served summons upon them for 10 years, the suit against the 1st defendant is unsustainable and for striking out.
9. The plaintiff substantively responded to the 1st defendant's submissions dated 28th April 2015 vide their further submissions dated 14th May 2015 filed in court on the same date. The plaintiffs submit that failure by the plaintiffs to serve summons on the 1st defendant cannot invalidate the suit so as to result in its dismissal and/or striking out. The plaintiffs state that the 1st defendant was all the time aware of the suit against itself and the purpose for the summons was to notify the 1st defendant of the suit and that this had been achieved without formal service. The plaintiffs asserted that failure to serve the summons does not render a suit a nullity and further that the 1st defendant has not demonstrated they stand to be prejudiced in any manner if the suit against them is sustained and they are called upon to defend.
10. The plaintiffs cited and relied on the case of **Republic –vs- Senior Principal Magistrate Limuru Law Court & Another (2015) eKLR, Central Bank of Kenya –vs- Uhuru Highway Development Ltd & 3 Others CA No. 75 of 1998 and Satakam Industries Ltd –vs- Barclays Bank of Kenya Ltd & Another [Kisumu HCCC No. 17 of 2003]** where the courts variously considered the issue of service of summons. In **Republic -vs- Senior Principal Magistrate Case** (Supra) **Odunga, J**. stated that: **"although summons are supposed to be accompanied by a copy of the plaint and that one cannot file summons contemplated under Order 5 without a plaint, nonetheless a suit is not commenced by the summons to enter appearance."**
11. In the case of **Satakam Industries Ltd –vs- Barclays Bank of Kenya Ltd & Another (Supra)** the court while citing **Boyes –vs- Gathure [1969] E.A 385** with approval stated thus:-

> **"Where summons to enter appearance though not filed with the plaint was subsequently filed and served and the defendant has not demonstrated any prejudice save for the non compliance with the rule, it cannot be said that the suit is invalid as courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon itself is a nullity unless the incorrect act is of a fundamental nature and matters of procedure are not normally of a fundamental**

nature – Order 4 rule 3 (3) and (5) of the Civil Procedure Rules are directory in nature and failure to comply with it should not result into invalidation of the proceedings especially when there has been no prejudice as the court should do justice to all parties."

12. **Odunga, J.** in the case of **Republic –vs- Senior Principal Magistrate Limuru Law Courts** (Supra) while relying on the cases of **Microsoft Corporation –vs- Mitsumi Garage Ltd & Another [2001] 2 E.A 460** and **Oduor –vs- Afro Freight Forwarders [2002] 2 KLR 652** stated thus:-

> **"…Where a legal provision requires that a process be taken but does not provide for consequences of the failure to take such an action, the court would be reluctant to interpret such an omission to be fatal to the suit if the same can be cured. It has been held before that rules of procedure are the handmaids and not the mistresses of justice and should not be elevated to a fetish since theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not to fetter or choke it. Where it is evident that a party has attempted to comply with the rule but has fallen short of the prescribed standards, it would be to elevate form and procedure to fetish to strike out the suit. Deviations from, or lapses in form and procedure which do not go to the jurisdiction of the court or prejudice the adverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected. In those circumstances the court should rise to its calling to do justice by saving the proceedings in issue."**

The plaintiffs' further place reliance on Article 159 (2) (d) of the Constitution which enjoins the courts' when exercising judicial authority to be guided by the principle that justice shall be administered without undue regard to procedural technicalities. They urge the court to exercise its discretion in favour of sustaining the suit to enable the suit to be heard and determined on merits in the interest of justice.

13. I have considered the application by the plaintiffs and the grounds of opposition and the preliminary objection filed by the 1st defendant and the submissions by the parties and the issues for determination is firstly, whether the plaintiffs suit should be struck out as against the 1st defendant on the basis that no summons to enter appearance were not served on the 1st defendant as pleaded in the preliminary objection. Secondly, whether the plaintiffs should be granted leave to amend their plaint in the manner proposed by the plaintiff.
14. The 1st defendant's position in this matter is that failure by the plaintiff to lift and effect service of the summons to enter appearance on the 1st defendant was fatal and that the suit against the 1st defendant ought to be ordered struck out. The plaintiffs for their part take the position that the 1st defendant was always aware of the plaintiffs' suit and had participated in the proceedings all along and therefore no prejudice has been occasioned by reason of non service of the summons on the 1st defendant. The plaintiffs contend non service of the summons to the 1st defendant constitutes a procedural technicality which should not be used by the court to drive the plaintiffs from the seat of justice as to do so would occasion injustice to the plaintiffs.
15. Having considered the rival arguments by the plaintiff and the 1st defendant my view is that the essence of issuing and serving summons to enter appearance on the defendant is to bring to the notice of the defendant the filing of an action and to require the defendant to make appearance in the suit and to defend the suit within set time lines under the Civil Procedure Rules Cap 21 of the Laws of Kenya. The procedure provides the parties a fair and orderly system to deal with the processing of pleadings. In the present case there is no evidence that indeed any summons to enter appearance were ever issued as contemplated under the previous Order IV Rule 3 (1) of the Civil Procedure Rules. Technically if no summons were issued then they could not be served and neither would there have been summons which can be stated to have expired. The validity or otherwise of the summons thus do not come into play as there was no summons issued or at least there is no evidence that any were ever issued.

16. Order IV Rule (3) of the previous Civil Procedure Rules was in the following terms:-

> **3(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**
>
> **(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.**
>
> **(3) Every summons shall be accompanied by a copy of the plaint.**
>
> **(4) ……..**
>
> **(5) Every summons shall be prepared by the plaintiff or his advocates and filed with the plaint to be signed in accordance with sub rule (2) of this rule.**

17. Order V of the previous Civil Procedure Rules dealt with service of summons and provided for the duration of the summons following issuance and provided for application for extension of the validity of the summons. The previous Order IV and V of the Civil Procedure Rules did not provide the period within which summons had to be issued and collected for service. Recognizing the lacuna the Civil Procedure Rules 2010 which replaced the previous Civil Procedure Rules under Order 5 Rule 1 (2) provided that the summons **"…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 the suit"**. Order 5 rule 1 (6) of the Civil Procedure Rules, 2010 further provided that the summons **"…shall be collected for service within thirty days of issue or notification, whichever is later failing which suit shall abate".** Under the new Civil Procedure Rules 2010 a mechanism was put in place to ensure the summons were infact issued and collected for service and provision made for default unlike in the previous Civil Procedure Rules.
18. The record of the file does not show that any summons were infact issued and hence there was no summons to be collected and served on the 1st defendant. The parties as is evident engaged in the prosecution of the several interlocutory applications that were filed including before the Court of Appeal and the plaintiff, it seems has come to the realization that they need to put their pleadings before this court in order to enable them prosecute the same.
19. I accept that the 1st defendant has been a participant in the various applications that the parties have prosecuted before this court and has been aware of the plaintiffs' claim all the time having been served with the initial injunction application which was the offshoot of the various subsequent applications. My view is that the non-issue and non service of the summons was but a technical procedural omission which does not go to the jurisdiction of the court and which in my view does not occasion any prejudice to the 1st defendant who will have the opportunity to file a defence to the claim by the plaintiff.
20. In exercising my discretion not to strike out the suit against the 1st defendant, I am guided by the overriding objective as outlined in the Civil Procedure Act (Cap 21 Laws of Kenya) and the Rules made thereunder as set out under sections 1A and 1B of the Act. I am also fortified in the exercise of my discretion by Article 159 2 (d) of the Constitution which enjoins the court while exercising its judicial authority to render substantive justice without placing undue reliance on technicalities of procedure. The overriding objective of the court in discharging its mandate as codified under section 1A of the Civil Procedure Act was reenacted under section 3 (1) of the Environment and Land Court Act, 2011 while section 19 (1) of the Environment and Land Court Act further enjoins the court to act expeditiously, without undue regard to technicalities of procedure in all proceedings to which the Act applies. In the premises I disallow the preliminary objection and decline to strike out the suit as against the 1st defendant.
21. As relates to the application for leave by the plaintiff to amend his plaint I take the view that a party ought to be allowed to amend his pleadings at any stage of the proceedings as long as that can be done without occasioning any prejudice to the opposite party that cannot be compensated for in costs. There is ample judicial authority that amendment of pleadings ought to be freely permitted particularly where hearing has not started as in the present case. See the cases of

Eastern Bakery –vs- Castelino [1958] E. A 46, Christopher Lebo & Others –vs- The Kenya Power & Lighting Co. Ltd [2014] eKLR.

22. The 1st defendant has contended that the amendments proposed are prejudicial to them as they deprive them of a defence of limitation and are introducing new causes of action. I have perused the proposed amendment and I do not consider that the proposed amendments introduce any new cause of action. The alleged causes of action arise from the same transaction of the contested sale to the 3rd defendant of the suit property. My view is that the proposed amendments are necessary to place the plaintiffs' entire case before the court for determination. The 1st defendant will not suffer any prejudice as they will have an opportunity to file their defence and cross-examine the plaintiffs on their claim during the trial. Any prejudice the 1st defendant may suffer can be compensated for in damages/costs.
23. The net result is that I grant the plaintiffs application dated 7th May 2014 and make the following orders:-

1. **That the plaintiffs are granted leave of 10 days from the date of this ruling to file and serve the amended plaint on the respondents.**
2. **The 1st defendant/respondent is granted leave of 14 days from the date the amended plaint is served on them to file their defence.**
3. **The 3rd defendant is granted leave of 14 days from date of service of the amended plaint on her to file her amended defence and counter claim.**
4. **The 1st defendant is awarded costs of the application assessed at kshs. 10,000/= payable within 60 days from the date of the ruling.**

Ruling dated and signed at Kisii this 6th day of October 2015.

J. M MUTUNGI

JUDGE

Ruling delivered at Nairobi this 23rd day of October 2015.

L.GACHERU

JUDGE

In the presence of:

M/s Ogonyo h/b for Mr. Ibrahim for the plaintiffs

N/A for the 1st defendant

N/A for the 3rd defendant

L.GACHERU

JUDGE