



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 250 OF 2010

LEE MWATHI KIMANI..... PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....1ST DEFENDANT

ALIO IBRAHIM HASSAN2ND DEFENDANT

RULING

The 1st Defendant by a Notice of Motion dated 12th June 2013 expressed to be brought under sections 1A, 1B and 3A of the Civil Procedure Act, order 2 Rule 15 and order 5 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law seeks the following orders:-

- 1. That this suit be struck out with costs.**
- 2. That the plaintiff pay costs of this application.**

The application is premised on the grounds that the suit was filed on 25th May, 2010 and that summons to enter appearance have never been served on the 1st defendant and thus the suit has abated. The application is further supported on the grounds contained in the supporting affidavit sworn by **Austine Ouko**, the 1st Defendant's Legal Manager on 12th June 2013. The supporting affidavit reiterates that summons to enter appearance have never been served on the first Defendant since the suit was filed over 2 years ago. The 1st Defendant further contends that the plaintiff's application for temporary injunction filed simultaneously with the plaint was dismissed with costs on 14th March 2011 and the plaintiff has taken no further action in the matter. The 1st Defendant contends that the present suit against them has abated and that it is just and expedient that the suit be struck out.

The Plaintiff was served with the present application on 20th June 2013 and in spite of the court granting him leave to file a response on 21st November 2013 when the application was scheduled for hearing the plaintiff neither filed any response and/or any submissions as directed by the court and thus the 1st Defendant's application is technically unopposed by the plaintiff.

The 1st Defendant filed submissions in support of the application as per the court's directions and the 2nd Defendant also filed written submissions dated 4th February 2014 supporting the application by the 1st

Defendant. The 2nd Defendant in support of the 1st Defendant's application submits that where the plaintiff fails to take out and serve summons to enter appearance on the Defendant(s) the suit abates after the expiry of one year. The 2nd Defendant referred the court to the decisions in the cases of **DINAH NASIKE TULINGE & 2 OTHERS – VS- CO-OPERATIVE BANK OF KENYA LTD & 2 OTHERS (2012) eKLR** and **NATIONAL BANK OF KENYA LTD –VS- SYNTAX PRINTERS LIMITED & 2 OTHERS (2006) eKLR** where the courts faced with a similar situation as in the present case in unison held that the suits were unsustainable and proceeded to dismiss the suits on account of failure to take out the summons and to have them served within the prescribed period.

In the **Dinah Nasike Tulinge & 2 others case (supra) Hon. Justice Mohammed Ibrahim** (as he then was) held that failure to take out summons within the prescribed period was fatal and he proceeded to dismiss the suit. In the **National Bank of Kenya Ltd case (supra) Hon. Justice Gacheche** declined to extend the validity of summons where no summons had been taken out for over 2 years and in the case observed thus:-

“The guidelines in this country are very well laid down in the aforementioned Rule (referring to order 5 Rule 2 of the Civil Procedure Rules) and in my mind, our legal provisions are very clear in that unless summons are renewed within the first twelve months, they expire. A party who does not seek to have the validity of his summons extended within the first twelve months does so at his peril, and it is my humble opinion no court would have discretion to extend what is no longer alive”.

I would associate myself with this observation and to contextualize the matter I hereunder set out the relevant provisions of Order 5 Rule 1 of the Civil Procedure Rules:-

- 1. (1) when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**
- (3) Every summons shall be accompanied by a copy of the plaint.**
- (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be filed with the plaint to be signed in accordance with subrule (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 which the suit shall abate.**

Order 5 rule 2 (1) provides:-

- 2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the ...of its issue and a concurrent summons shall be valid in the first instance for the period of the validity of the original summons which is unexpired at the date of issue of the concurrent summons.**
- (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.**
- 2. (7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.**

The 1st Defendant states that summons to enter appearance have never been served on them to enable them to appear and file a defence. The 2nd Defendant upon being served with the chamber summons application for injunction filed a Notice of appointment on 2nd June 2010 and no doubt in order to protect their interest in the matter filed what was probably a holding defence on 26th July 2010.

The court has perused the file record and notes that the summons to enter appearance addressed to the 1st and 2nd Defendants are still held (**unsigned**) in the court file and there is no evidence that indeed any

summons were lifted or collected from the court for service on the defendants. I have not come across a return of service indicating that any summons were served on any of the Defendants.

Under order 5(1) subrules 3, 5 and 6 reproduced above it is evident that the plaintiff has an obligation to ensure the summons are prepared and signed by the court to facilitate service on the defendant. In the present case it is apparent the plaintiff did not follow up and/or collect the summons as envisaged under sub rule 6 of Rule 1 of Order 5. There is no indication that the plaintiff has applied for a re issue and/or extension of the original summons.

It is my view that where no summons have been issued in accordance with order 5 of the Civil Procedure rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborate and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons Order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended. Service of summons in my view is a vital step in initiating the litigation and thus until a summons is properly served the Defendant has no valid invitation to defend the suit. Besides the plaintiff in initiating and commencing the suit ought to be prepared and ready to abide with the rules of engagement and the service of summons on the Defendant is one of the primary requirements.

In the present suit neither the 1st Defendant or the 2nd Defendant has been served with summons and uptill the time the 1st Defendant filed the instant application a period of over 3 years had elapsed.

The 2nd Defendant, as observed had filed a defence notwithstanding that the summons had not been served on him. However considering that the plaintiff did not take any action to regularize his omissions and/or take any action towards the prosecution of the suit since March 2011 when his application for injunction was dismissed. I am not satisfied that the plaintiff deserves the discretion of the court to sustain the suit against the 2nd Defendant. The plaintiffs laxity and inaction are inexcusable.

In the premises I find and hold that the 1st Defendant's Notice of Motion application dated 12th June 2013 has merit and accordingly order the plaintiffs suit as against the defendants dismissed with costs to the Defendants.

Ruling dated signed and delivered this ...3rdday of...April....2014.

J.M. MUTUNGI

JUDGE

In presence of:

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant