



REPUBLIC OF KENYA



**Kamau v Kamau & 2 others; Family Bank Limited (Interested Party) (Environment & Land Case E014 of 2020) [2022] KEELC 2273 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 2273 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E014 OF 2020**

**LN MBUGUA, J**

**APRIL 27, 2022**

**BETWEEN**

**SAMUEL MUGI KAMAU ..... RESPONDENT**

**AND**

**JANET WAMAITHA KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**NAHASHON KARIITHI MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**THOME FARMERS CO. (NO.1) LTD ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**FAMILY BANK LIMITED ..... INTERESTED PARTY**

**RULING**

1. Coming up for determination is a Notice of Motion application dated December 2, 2021 by the 2<sup>nd</sup> Defendant/Applicant seeking orders that the Plaintiff's suit be declared as having abated due to failure to take out/serve summons to enter appearance upon the Defendants and the suit to be consequently struck out. The application premised on the grounds set out in the application and in the Applicant's sworn affidavit dated December 2, 2021 details that the Plaintiff/ Respondent has failed to comply with mandatory provisions of the law by not taking out, filing and serving summons to enter appearance upon the Defendants from the time the suit was filed, which is over twenty months ago. As such none of the Defendants had filed a defence.
2. It was submitted for the 2<sup>nd</sup> defendant that the essence of summons to enter appearance was to make the Defendant file a defence and it was not enough for the Plaintiff/ Respondent to say that the Defendants were aware of the matter. Stating that a suit ought to be filed with summons to enter appearance and if that was not done, then a court cannot give orders to extend time for summons which were never



extracted and the suit should be struck out. Reference was made to *Pecker Wood Ltd v Bank of Africa Kenya Ltd* [2021] eKLR and Order 5 of the *Civil Procedure (amendment) Rules*.

3. The Plaintiff contends that failure to extract summons to enter appearance by his Advocate was an inadvertent mistake which was occasioned by the numerous court appearances, hence this was an oversight. He stated that the essence of Summons to enter appearance was to notify Defendants of the suit and afford them time to prepare, but that notwithstanding, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Interested Party had nonetheless participated in the proceedings and even appeared in court on different occasions. As such, they were well aware of the suit and dismissing it would not serve the interests of justice. The plaintiff contends that the failure to serve the summons is a procedural technicality that should not cause miscarriage of justice.
4. It was submitted for the Plaintiff that the suit could not abate if the Defendant had participated in the proceedings. Reference was made to the case of *Equatorial Commercial Bank Ltd v Mobansons (K) Ltd* [2012] eKLR, *Tropical Foods International and another v Eastern & Southern Africa Trade and Development Bank & another* [2017] eKLR, *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR, *Ochola Kamili Holdings Limited v Guardian Bank Limited* [2018] eKLR, *Fredrick Kibet Chesire v Raymond W. Bomett & 3 others* [2006] eKLR and *Margaret Wangari Njeri v Grace Wambui & another* [2020] eKLR.
5. This court has considered the application, affidavits, rival submissions together with the relevant legal framework. The issue falling for determination is; Whether the Plaintiff's suit abated for failure to extract, file and serve the parties with Summons to Enter Appearance.
6. Order 5, Rule 1(1) of the *Civil Procedure Rules 2010* provides:

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

Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.”
7. While acknowledging failure to extract, file and serve Summons to Enter appearance, the Plaintiff stated that the suit should not be struck out because the 2<sup>nd</sup> Defendant and the other parties had participated in the proceedings. This court notes that the 2<sup>nd</sup> Defendant was present in court on several occasions; see the dates of May 17, 2021, July 29, 2021 and July 30, 2021 when the ruling ordering maintenance of status quo was delivered and hearing of this suit set down for December 8, 2021.
8. In the Court of Appeal case of *Equatorial Commercial Bank Limited v Mobansons (K) Limited* [2012] eKLR (also cited by the Plaintiff/ Respondent), it was held that:

“...The respondent not only did not challenge it but kept quiet on the defect and participated in the legal process by unconditional appearance, filing of defence and then recorded consent judgment...

... Can a litigant after having fully participated in the legal process on service of such summons, renege on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to find so. We shall find that the respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties...



... We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter...

... Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent...”

9. And in the Court of Appeal case of *748 Air Services Limited v Theuri Munyi* [2017] eKLR it was stated that:

“... This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

“The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person...”

10. This court finds that the 2<sup>nd</sup> defendant has actively been involved in the proceedings before this court and the doctrine of estoppel and acquiescence comes into play. The failure by the Plaintiff to extract, file and serve Summons to Enter Appearance should not eject the parties from the seat of justice.

11. This court also takes cognisance that the suit title is the subject of ongoing criminal proceedings in a criminal case see-paragraph 12 of the Ruling dated 30<sup>th</sup> July 2021, and it is on this premise that the court deemed it fit to preserve the suit property for a limited period of time and fast track the trial, see paragraph 13 of the said Ruling. I therefore find that striking out the suit will not attain the ends of justice as envisaged and enshrined in *the Constitution*. The court will give orders geared towards the hearing of the dispute on its merits.

### **Disposal Orders**

1. The application dated December 2, 2021 is dismissed with no orders as to costs.
2. The plaintiff is granted leave to extract, file and serve summons to enter appearance out of time within a period of 30 days from the date of delivery of this ruling.
3. In the event of none compliance on the part of the plaintiff, this suit shall stand as struck out.
4. The application dated January 17, 2022 is marked as spent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Kimando 2nd Defendant/Applicant

M/S Mwangi for the Plaintiff/Respondent

Olunga for the Interested Party

