REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 40 OF 2005

KENYA PORTS AUTHORITY ……...…….…….. PLAINTIFF

VERSUS

SUPERNOVA PROPERTIES LIMITED ……...……..……. 1ST DEFENDANT

COMMISSIONER OF LANDS ……...……. 2ND DEFENDANT

THE CHIEF LAND REGISTRAR ……..…….…… 3RD DEFENDANT

RULING

(Application seeking to strike out suit for failure to serve summons; suit filed in the year 2005; no summons served upon the 1st defendant; no activity in the file from the year 2005 to the year 2017 when the suit was listed for dismissal for want of prosecution though not dismissed; subsequently 1st defendant getting to know of the suit in the year 2019 after an application seeking to consolidate this suit with others was advertised in a daily newspaper; 1st defendant appointing counsel under protest and filing an application to strike out suit for failure to serve summons; Order 5 of the Civil Procedure Rules on validity of summons; summons expired in the year 2007 and suit was liable for dismissal for failure to serve summons; to call upon the 1st defendant to defend a suit which has been idle in court for more than 15 years would be an injustice to the 1st defendant; suit struck out)

1. There are two applications before me both filed by the 1st defendant. The first is that dated 20 March 2019 and the second is that dated 12 March 2020.

2. The application dated 20 March 2019 seeks orders to have this suit dismissed as against the 1st defendant. It is based on the following grounds :-

(1) The 1st defendant has never been served with summons to enter appearance despite summons having been issued on 28 February 2005.

(2) It is now 14 years since this suit was filed on 25 February 2005.

(3) The validity of summons to enter appearance for the 1st defendant expired on 28 February 2006, about 13 years ago and the validity thereof has never been extended.

(4) There is no suit due to the failure to extend the validity of summons and to serve the same upon the 1st defendant.

(5) This court has powers under Order 5 Rule 2 (2) and (7) of the Civil Procedure Rules, 2010 to dismiss this suit because it is well over 24 months from the date of issuance of the original summons because the validity of the summons was never extended.

(6) The plaintiff is not interested in prosecuting this suit as demonstrated by its indolence and failure to move the court for a period of 12 years, from 25 February 2005 when the suit was filed until 30 March 2017 when the case was listed down by the court for dismissal.

(7) The plaintiff did not abide with the court's order requiring it to comply with pretrial procedures as directed on 20 July 2018.

(8) Despite having been ordered on 30 July 2018 to serve notice to the 1st defendant, the plaintiff again did not comply.

(9) The 1st defendant only came to learn of this suit when the plaintiff served notice of its application dated 21 November 2018 through advertisement.

(10) The 1st defendant is a company with well-known offices, properties and business in Mombasa and could easily be served with court process.

(11) Failure to serve summons and seeking extension of their validity is fatal to this suit.

(12) The plaintiff's claim over the suit property has been overtaken by events following the ruling in JR Misc. Application No. 17 of 2018 : Republic v The National Land Commission Ex-Parte Supernova Properties Limited in which the court quashed the decision by the National Land Commission to revoke the 1st defendant's title on the basis that the suit property belongs to the plaintiff.

3. The application dated 12 March 2020 seeks that the order made on 30 January 2020, which granted the plaintiff leave to amend the plaint, to be set aside and that the Amended Plaint dated 28 January 2020 and filed on 29 January 2020 and the Further Amended Plaint dated 28 February 2020 and filed on 9 March 2020 to be struck out. The application is based on grounds that the plaintiff listed the matter before court on 30 January 2019 without notifying the applicant; that on the said date the plaintiff orally sought and was granted leave to amend the plaint; that as at 30 January 2020 when the plaintiff sought and was granted leave to amend the plaint, an amended plaint dated 28 January 2020 was already on record having been filed on 29 January 2020; that the amended plaint was accordingly filed without the leave of the court and is therefore irregularly on record; that the plaintiff also filed a further amended plaint on 9 March 2020 and that leave was only granted to amend the plaint and not to further amend it ; that the further amended plaint was filed without leave; that the filing of the Amended Plaint and the Further Amended Plaint is aimed at defeating the 1st defendant's application dated 20 March 2019 which seeks the dismissal of this suit as against the 1st defendant on the basis that the suit has abated for want of service of summons. It is contended that the Amended Plaint and the Further Amended Plaint are highly irregular for the following reasons :-

(i) This suit already abated as at 30 January 2020 when the leave to amend the plaint was applied for by the plaintiff because summons were issued on 28 February 2005 and have never been served upon the 1st defendant to date and thus there was no suit capable of amendment;

(ii) The Amended Plaint was filed on 29 January 2020 before leave was granted on 30 January 2020.

(iii) The Further Amended Plaint was filed without leave to amend the Plaint further;

(iv) The plaintiff obtained leave to amend the Plaint irregularly without filing a formal application and on a mention date;

(v) The 1st defendant was not notified of the mention date of 30 January 2020 during which the leave to amend the Plaint was applied for and granted. It is in fact not clear from the court file how the matter was fixed for mention on 30 January 2020 yet it already had a date of 13 February 2020 for hearing of the 1st defendant's application dated 20 March 2019;

(vi) The amendment of the Plaint is highly prejudicial to the 1st defendant, coming 15 years after the suit was filed and after the same abated for want of service of summons.

4. It is further urged that by placing the file before the Judge on 30 January 2020 without inviting or notifying the 1st defendant, the plaintiff abetted a well choreographed scheme aimed at defeating the 1st defendant's application dated 20 March 2019. It is averred that this suit was before Omollo J on 26 June 2019 when the Judge directed that it be separated from the file numbers 41, 42, and 43 of 2005 and that the 1st defendant's application dated 20 March 2019 be heard on 2 October 2019. It is stated that the application was not heard on 2 October 2019 as Omollo J had been transferred, and I , as the incoming Judge, was on leave, and the court itself fixed the application for hearing on 13 February 2020, which date was served upon counsel for the plaintiff. It is said that despite being aware of the new date of 13 February 2020, the plaintiff's advocates mysteriously appeared before court on 30 January 2020 without notifying the 1st defendant's advocate, during which, the plaintiff applied for and was granted, leave to amend the plaint while knowing too well that the suit was under challenge for having abated. It is urged that the Amended Plaint is highly prejudicial to the 1st defendant inter alia because the 1st defendant had already filed an application challenging the suit on the basis that it has abated and there was therefore no suit capable of being amended. It is also contended that the amended plaint and further amended plaint are statute barred as they seek to challenge the 1st defendant's certificate of lease which was issued way back on 15 December 2005, over 14 years ago. It is asserted that the plaintiff has never been interested in prosecuting this suit as demonstrated by its indolence and failure to move court for a period of 12 years from 25 February 2005, when the suit was filed, to 30 March 2017 when the case was listed down by the court for dismissal. It is urged that the plaintiff's indolence to prosecute the suit for over 12 years has occasioned great prejudice to the 1st defendant for the following reasons :-

(a) The new Constitution of Kenya, 2010 has since been promulgated after the suit was filed;

(b) The National Land Commission (NLC) was formed, and institution that did not exist at the time the suit was filed in 2005;

(c) The plaintiff lodged a parallel complaint to NLC which led the NLC to revoke the 1st defendant's title;

(d) The said revocation was successfully challenged in court in JR Misc. Application No. 17 of 2018, Republic vs The National Land Commission ex parte Supernova Properties Limited.

(e) The above developments have materially and substantially changed the legal landscape since 2005 when the suit was filed and there is a real danger that if this suit is permitted to go on, the 1st defendant's title will be subjected to legal challenge twice.

(f) The delay in prosecuting this suit has greatly prejudiced the 1st defendant whose title was revoked albeit the revocation was quashed by a court of law;

(g) To subject the 1st defendant to another court process challenging its title will amount to double jeopardy;

(h) The plaintiff did not abide with the court's order requiring it to comply with pre-trial procedures as directed on 30 July 2018.

(i) Despite having been ordered on 30 July 2018 to serve notice to the 1st defendant, the plaintiff again did not comply;

(j) The 1st defendant only came to learn of this suit when the plaintiff served notice of its application dated 21 November 2018 through advertisement;

(k) The plaintiff's claim over the suit property has been overtaken by events following the ruling in JR Misc. Application No. 17 of 2018.

5. It is claimed that if the Amended Plaint and Further Amended Plaint are allowed to stand, the 1st defendant's application dated 20 March 2019 will be defeated, yet it was filed earlier in time, and that the justifiable option is to strike out the Amended Plaint and the Further Amended Plaint, and declare that this suit has already abated as against the 1st defendant.

6. The application is supported by the affidavit of Ashok Labshanker Doshi, a director of the 1st defendant. He has deposed that the plaintiff was never served with summons to enter appearance and only came to learn of the suit through a notice of substituted service in the Standard Newspaper of 29 January 2019, through which the plaintiff served notice of its application dated 21 November 2018, seeking to consolidate this suit with others. The 1st defendant thus filed the application dated 20 March 2019 seeking the dismissal of this suit on the basis that it has abated. He has deposed that on 26 June 2019, Omollo J expressly ordered that this suit be separated from the suits Nos. 41, 42, and 43 of 2005 and therefore any order made in those files cannot be binding on this case. He has stated that the plaintiff fixed this matter before the Judge on 30 January 2020 without notifying the 1st defendant, during which the plaintiff sought and was granted leave to amend the plaint. He has pointed out that at this time there was already filed, on 29 January 2020, an Amended Plaint dated 28 January 2020, and he has repeated the irregularities that he based the application on which I elaborated above. He also annexed the ruling in Mombasa ELC, JR No. 17 of 2018.

7. The plaintiff opposed the applications by filing a replying affidavit sworn by Stephen Kyandih, the plaintiff's Principal Legal Officer. On the application dated 20 March 2019, Mr. Kyandih has deposed that this matter forms part of a series of files in this court being the Case Numbers 41, 42, and 43 of 2005, and Numbers 496, 497, 498, and 499 of 2001, and No. 211 of 2019. He avers that these cases raise common questions of law and fact which made it desirable that they be disposed of at the same time. He has deposed that the 1st defendant was served with summons to enter appearance, contrary to its assertion that it was never served, and he has annexed a letter dated 21 March 2005 from M/s Timamy & Company Advocates, who were the advocates on record for the plaintiff when the suit was filed. He has deposed that the plaintiff has always been keen and interested in prosecuting this suit. He has averred that when the case came up for pre-trial on 8 March 2021, the plaintiff had already complied with its pre-trial obligations and the case was fit for trial save for the 1st defendant's applications. He deposes that the 1st defendant has not demonstrated how it stands to be prejudiced if the suit is sustained. On the suit *JR No. 17 of 2019*, he has deposed that the decision was founded on a procedural issue, and not the merits of the claim, unlike this suit, and there can be no conflict of decisions. He avers that the application to have the suit dismissed is not bona fide but is intended to defeat justice. On the application dated 12 March 2020, he deposed that the application is deficient as to the truth of the court record. He has deposed that on 29 November 2018, the court granted leave for substituted service upon the 1st defendant on the application dated 21 November 2018, seeking to consolidate the suits mentioned as being related; that on 4 February 2019, the 1st defendant filed a notice of appointment of advocate under protest; that on 19 February 2019, the matter could not proceed on the application for consolidation because the 1st defendant sought an adjournment and the same was deferred to 21 March 2019; that the 1st defendant then filed the application dated 20 March 2019 seeking to dismiss this suit; that on 21 March 2019 after hearing all counsel, the court directed that the application dated 20 March 2019 be heard first; that all the while the files Nos. 41, 42 and 43 of 2005 were available before court and orders made herein applied to them; that on 26 June 2019, the court made directions on some applications made by interested parties in the files Nos. 41, 42 and 43, and fixed the intended interested parties' applications for hearing on 25 September 2019, and the 1st defendant's application for hearing on 2 October 2019, which directions were issued in the presence of the 1st defendant; that on 25 September 2019, the court allowed the applications by the intended interested parties and granted the plaintiff leave to amend its pleadings to capture the new parties and directed that all files be mentioned on 30 January 2020 for further directions; that it is not the plaintiff who listed the matter for 30 January 2020 as claimed by the 1st defendant; that all counsel were present save for the 1st defendant's counsel who elected not to attend despite being aware that the matter was coming up for the hearing of the intended interested parties' applications. He deposes that the court in fact placed aside all the files to enable counsel attend and called them out after the call-over of its cause list but the 1st defendant's counsel, Mr. Oluga, refused to attend, intimating that the court had told him to attend before it for his client's application on 2 October 2019. He deposes further that on 30 January 2020, the court in the presence of all counsel, save for counsel for the 1st defendant, proceeded to give directions including a mention for 16 April 2020, and that the plaintiff was granted leave to further amend its plaint, and this was not with any intent to defeat the 1st defendant's application dated 20 March 2019 as claimed by the 1st defendant. He avers that the 1st defendant had opportunity to oppose the grant of leave to amend the plaint but chose not to attend court. He has stated that the land in dispute is public land vested in the plaintiff. He has urged that to dismiss the suit against the 1st defendant would be unjust and against public policy and that if the suit is dismissed as against the 1st defendant, the plaintiff can still proceed with the suit against the 2nd and 3rd defendant which will result in the 1st defendant complaining that it is being condemned unheard.

8. In response to the above averments, the plaintiff filed two supplementary affidavits, one sworn by Mr. Doshi and another by Mr. Oluga. In his supplementary affidavit, Mr. Doshi has denied that this suit forms a series with other files and that there is any order for consolidation. He has deposed that this suit is unique and different from the other files. He has referred to the letter written to the plaintiff by M/s Timamy & Company Advocates where the Advocates stated that they have served the defendants, and has averred that the only way to prove service is through an affidavit of service, and not through a letter, thus the said letter cannot be proof of service. He has reiterated that the plaintiff never bothered to serve the 1st defendant with summons and has to date never served the same. He has also repeated that the plaintiff has been indolent in prosecuting the matter which led to it being listed for dismissal for want of prosecution on 30 March 2017. He has averred that the plaintiff is mixing up proceedings in this case and those in other cases so as to cloud the mind of the court. He has averred that the 1st defendant has not filed defence because it is yet to be served with summons and its participation has been limited to the two applications that it has filed. He does not see how it can be argued that the 1st defendant does not stand to suffer any prejudice yet the plaintiff has failed to prosecute the case for 16 years and the 1st defendant acquired the property 23 years ago. He has averred that the plaintiff is invoking the issue that the suit herein touches on public land so as to appeal to the emotions of the court. He finds it ironical that an entity bestowed with public trust would file a case in court and leave it lying idle for 12 good years without taking a single step to prosecute the case. He avers that if the plaintiff knew that this was public land, it could have moved with due alacrity to recover it by prosecuting its case. He has contended that the delay in prosecuting this case goes against Article 159 of the Constitution and is also inimical to public interest. He has deposed that this suit was filed in 2005, 7 years after the 1st defendant had acquired the property, and that if the plaintiff had served the 1st defendant with summons within one year as required by law, the 1st defendant had all the documents and evidence it required to defend itself and explain how it acquired title. He deposes that at this time, 23 years after acquiring title, the 1st defendant has lost crucial evidence that it requires to defend itself, for instance, he cannot trace the original allottee of the land, one Jackson Suter, who sold the land to the 1st defendant, and he could be dead; that the documents relating to purchase of the land are not available especially because the bank through which payment was made has closed down; that the 1st defendant has lost touch with the professionals such as the surveyor who surveyed the land and prepared the deed plans. He deposes that if the 1st defendant is called to file defence 16 years after the case was filed, it will face challenges defending itself properly due to attrition of evidence attributed to the lapse of time since the case was filed. He avers that the period of 16 years is way beyond the 12 year limitation period provided by law for filing land matters. He has contended that instead of prosecuting this suit, the plaintiff lodged the same complaint to the NLC and has only returned to this court after the revocation of title by the NLC was successfully challenged. He has deposed that the right to be heard must be qualitative in nature. He is baffled by the claim that parties have complied with pre-trial yet the 1st defendant is yet to enter appearance and has not filed defence. He argues that justice is a double edged sword and cannot be construed with reference to the plaintiff only. He believes that the plaintiff thinks that because it is a public entity it can get away with grave non-compliance with court procedures and the law. He has reiterated that the 1st defendant only came to know of the case 13 years after it was filed and has argued that no public policy permits the plaintiff to keep a case in court for 16 years without serving summons.

9. The supplementary affidavit of Mr. Oluga more or less addresses the manner in which the plaint was amended and the deposition of Mr. Kyandih that Mr. Oluga is the one who did not attend court when orders of amendment were made. Mr. Oluga feels that the affidavit of Mr. Kyandih is false and misleading and is also a direct impeachment of his character and conduct as an Advocate and officer of this court. He has pointed out that Mr. Kyandih stated that he (Mr. Oluga) failed to attend court. He has deposed that the correct position is that on 20 March 2019 the 1st defendant filed its application seeking to dismiss this suit on the basis that it had not been served with summons; that on 26 June 2019, the case was placed before Omollo J together with the case numbers 41, 42 and 43 of 2005 which the plaintiff sought to consolidate, but the Judge ordered that this case be separated from the rest and the application dated 20 March 2019 be fixed for hearing. He has then reiterated more or less what was said to be the correct record as deposed in the supporting affidavit of Mr. Doshi. He has emphasised that this suit was not fixed for hearing on 25 September 2019 as alleged by Mr. Kyandih, and thus the 1st defendant did not attend court on that day. He has also asserted that the 1st defendant was not aware of the date of 30 January 2020 since he was not present in court on 25 September 2019. He has reiterated that the court did not sit on 2 October 2019, and itself gave the date of 13 February 2020, which is the date that he was aware of. He is of opinion that the proceedings of 30 January 2020 must thus be set aside. He has added that there was no leave granted to amend this plaint on 25 September 2019.

10. Mr. Kyandih swore another affidavit to respond to what Mr. Oluga filed. I see nothing new in it, for it more or less repeats what is claimed to be the correct record of the court and repeats the claim that Mr. Oluga deliberately failed to attend court on 25 September 2019.

11. I directed that the two applications be canvassed together by way of written submissions and I have taken note of the submissions filed by Mr. Ondego of M/s AB Patel & Patel, the law firm on record for the plaintiff, and those of Mr. Oluga, counsel for the 1st defendant. I have considered the same.

12. I will start with addressing the application dated 20 March 2019. In fact, if I allow it, there may not be any need to address the application dated 12 March 2020 because the result would be to have the suit as against the 1st defendant dismissed. It will be recalled that in this application, the 1st defendant wishes to have the suit against her dismissed, inter alia for the reason that she has never been served with summons since the suit was filed in the year 2005 and it is her position that this suit has abated for failure to serve summons in time.

13. Before I go too deeply into the matter, I feel that it is prudent for me to set out what is reflected in the record of the court. I have seen that this suit was commenced through a plaint which was filed on 25 February 2005 against three defendants. The 1st defendant is the applicant herein, whereas the 2nd and 3rd defendants are the Commissioner of Lands and the Chief Land Registrar. The plaint was filed through the law firm of M/s Timamy & Company Advocates. The cause of action relates to ownership of the land parcel Mombasa/Block XLVII/113. It is claimed in the plaint, that this land was registered in the name of the General Manager, East African Railways and Harbours Corporation, for and on behalf of East African Harbours Corporation. It is pleaded that in 1978, East African Harbours Corporation was disbanded, and by an Act of Parliament, the plaintiff was established as the successor in title and thus the plaintiff took over the disputed property. It is pleaded that on 17 December 1999, the 2nd defendant (Commissioner of Lands) allocated the property to one Jackson Suter on a 99 year old lease from 5 October 1999. It is pleaded that again in December 1999, the 1st defendant purchased the property from the said Jackson Suter. In the suit, the plaintiff basically wishes to have the 1st defendant's title cancelled and it be declared and registered as the proprietor of the disputed land. Summons to Enter Appearance were signed on 28 February 2005. On 15 July 2005, the Attorney General entered appearance for the 2nd and 3rd defendants. There is no affidavit of service on record demonstrating service against any of the defendants. There is no record of anything having happened in the file or any action taken by the plaintiff to move the file until a Notice of Change of Advocates was filed on

5 June 2014, with the law firm of M/s A.B Patel & Patel taking over from the law firm of M/s Timamy & Company Advocates. This is about 9 years after the case was filed. I have seen a letter written by M/s AB Patel & Patel dated 5 May 2014 and received in court on the same day, addressed to the Executive Oficer, High Court Mombasa, asking for the matters to be fixed for pretrial on 9 July 2014. I see no record of any action being taken on the basis of this letter, and it could be that it was because the law firm of M/s A.B Patel & Patel were not on record at the time. After the notice of change of advocate filed on 5 June 2014, again there was no action taken to move the matter, until the court, on its own motion, on 1 March 2017, issued notice to the plaintiff to show cause why the suit should not be dismissed for want of prosecution. This, it will be observed was more than 12 years since the case was filed. The notice was heard on 30 March 2017 by Komingoi J, who was persuaded not to dismiss the suit.

14. There followed a series of mentions culminating in a mention on 13 June 2018 before Omollo J. On that day, the court ordered that proof of service of summons be put in the file and the file be returned to the registry for parties to comply. I have not seen any affidavit of service filed pursuant to the above directions, and indeed nothing much appears to have happened in the file, save for some fruitless mention dates and a dismissal for want of prosecution made on 5 November 2018 by Matheka J, but which was set aside on the same day, because Mr. Ondego, counsel for the plaintiff, later appeared in court after the dismissal and convinced the court that the matter was one that was consolidated before Omollo J. Subsequently, on 23 November 2018, an application dated 21 November 2018 was filed, seeking to consolidate this suit together with the files Nos. 41, 42 and 43 of 2005 filed in this court. Omollo J directed that the application be served by way of substituted means, which was done through the Standard Newspaper of 29 January 2019, indicating that the application will come up for hearing on 19 February 2019. It is on 4 February 2019 that the 1st defendant appointed counsel under protest and subsequently filed the application dated 20 March 2019 seeking to have the suit against her dismissed.

15. It will be recalled that the main complaint of the 1st defendant is that she has never been served with summons to enter appearance despite the suit having been filed in the year 2005. I have already mentioned that there is no affidavit of service on record demonstrating that the 1st defendant was ever served with summons. In his replying affidavit, Mr. Kyandih did depose that the 1st defendant was duly served with summons and referred me to the letter dated 21 March 2005 written to her by M/s Timamy & Company Advocates. In brief, the letter states that the defendants have been served and what is awaited is for them to enter appearance. I agree with the plaintiff that this letter in no way proves that service of summons was effected. Proof of service would be through the filing of an affidavit of service. Aside from there being no affidavit of service, there is no mention whatsoever in that letter as to when service was effected, who was served, and whether the summons was acknowledged as received or not. I must come to the conclusion that summons to enter appearance has never been served upon the 1st defendant. I have no basis to disbelieve the 1st defendant when she avers that she only got wind of this case after seeing the advertisement of 29 January 2019, which advertised the application for consolidation.

16. The contention of the 1st defendant is that since summons was not served, and has not been served since the year 2005, the suit has abated and deserves to be dismissed. In 2005 when this suit was filed, the law regarding validity and service of summons was set out in Order V of the Civil Procedure Rules. Order V Rule 1 (1) provided as follows :-

> *(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.*
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> *(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*
>
> *(3) Where the validity of a summons has been extended under subrule (2), before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.*
>
> *(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same sum which has not been served so as to extend its validity until the period specified in the order.*
>
> *(5) An application for an order under subrule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.*
>
> *(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.*
>
> *(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 current law is no different from the above, save that the above provision is now Order 5 Rule 2.

17. It will be seen that summons in the first instance is valid for only 12 months. Under Rule 2 (2) the court may extend the validity of summons from time to time where such summons has not been served upon a defendant, but under subrule (5), one is required to file an application to extend the validity of summons, and the plaintiff is required to file an affidavit setting out the attempts made at service and their result. Under subrule (7), where no application for extension of validity of summons is made, the court may dismiss the suit on expiry of 24 months from the date of issue of the original summons.

18. It is the view of the 1st defendant that the suit should be dismissed given the above provisions. The 1st defendant has stated that if the case continues, she will be prejudiced, as a lot of water has passed under the bridge since she purchased the suit property in the year 1999, which is more than 20 years ago. The 1st defendant has mentioned the non-availability of documents and witnesses and the lapse of time which militate against her and which causes her a handicap to enable her mount a defence to the plaintiff's suit. Mr. Oluga, in his submissions referred me to the cases of *Udaykumar Chandulal Rajani & 3 Others vs Charles Thaithi (1991) eKLR*, *Leonard Njogu vs Barclays Bank of*

Kenya & Another (2014) eKLR, and *Law Society of Kenya vs Martin Day & 3 Others (2015) eKLR* to support the argument that the suit needs to be dismissed. In replying to the submissions of the 1st defendant, counsel for the plaintiff referred me to Order 3 Rule 1 of the Civil Procedure Rules, 2010 and submitted that a plaint is the document which commences suit. He submitted that a suit is not commenced by summons to enter appearance and added that there is still a valid suit existing against all the defendants. He submitted that the purpose of summons is to inform a party of the existence of the suit and invite the party to defend the suit, and that service of summons sets the clock for counting time within which to enter appearance and nothing more. He submitted that the 1st defendant is now aware of the existence of this suit despite getting notice of the suit through other means other than summons and it will be a travesty of justice to have the suit dismissed on account of non-service of summons. He submitted that justice should be administered without due regard to procedural technicalities. He referred me to the cases of *Waithira Kimondo & Another vs Vigillant Auctioneers & 2 Others (2019) eKLR*, *Paulina Wanza Maingi vs Diamond Trust Bank Limited & Another (2015) eKLR* and *Benel Development Limited vs First Community Bank Limited & Another (2021) eKLR*. He submitted that this court has discretion to extend time fixed for doing any act. He also referred me to dictum in the case of *Industrial and Commercial Development Corporation vs Sum Model Industries Limited (2007) eKLR* where it was said that *"service of summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void."*

19. In our case, it will be recalled that I have found that no service of summons was effected upon the 1st defendant within the period of one year of issue of the summons or at all. I have not seen any application made to extend the validity of the summons and the validity of the original summons expired one year after issue. In fact, the submission of Mr. Ondego, learned counsel for the plaintiff, appear to concede that summons were not served upon the 1st defendant. From the old Order V Rule 1 (7) and the current Order 5 Rule 2 (7), the court retains the discretion to dismiss a suit, where summons have not been served 24 months after filing suit. In our case, it is not just 24 months that have passed, but more than 15 years since the suit was filed. In those circumstances, should the suit be allowed to stand ?

20. I have gone through the authorities provided by counsel regarding the issue of summons vis-à-vis the validity of the suit. There is clearly two schools of thought, one which regards summons key to the validity of the suit, and the other which does not do so, but looks at summons as a means of informing the defendant of the presence of a suit and no more. Mr. Oluga's reference to the case of *Udaykumar & Others T/A Lit Petrol Station vs Charles Thaithi*, must be looked at in the context of the law that prevailed at the time it was decided. The law then, under Order V Rule 1 (2), was that *"where a summons has not been served on a defendant, the court may by order extend the validity of the summons from time to time for such period not exceeding in all twenty-four months from the date of its issue if satisfied that it is just so to do."* The facts of the case were that a suit was filed in the year 1987 and summons were issued but not properly served. In March 1992, the Deputy Registrar, upon request from the plaintiff's counsel, re-issued the summons and service was effected in September 1992. A preliminary objection was raised to the suit on the grounds that summons expired in the year 1988 and no application was made to extend the same for the period of its validity. This objection was dismissed, with the High Court holding that any irregularity in the issuance of summons was cured by the fact that the defendants had entered appearance without protest, and under Section 3A of the Civil Procedure Act, the court had inherent power to issue such orders as may be necessary for the ends of justice. On appeal to the Court of Appeal, the Court of Appeal held that validity of summons could only be extended for a period not exceeding 24 months from the date of issue.

21. That case was decided before amendment to Order V Rule 1 (2) in 1996. The amended Order V Rule 1 (2) was as follows :-

> *Where summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied that it is just to do so.*

22. In my view, the effect of the 1996 amendment was to remove the 24 month maximum period previously given for the validity of summons. Now, summons may be extended from time to time, without there being a statutory limitation period, save that the court must be satisfied that it is just to do so.

23. In the case of *Leonard Njogu vs Barclays Bank & Another*, also relied upon by Mr. Oluga, Gikonyo J, stated inter alia as follows :- *"My own view is; where a summons to enter appearance has expired and its validity has not been extended under the rules, there is not really a suit to talk about. The term "validity of summons" is used in the rules and it is not without any specific meaning and effect."* These words must be weighed carefully as they were stated obiter, because the application before court was one for dismissal for want of prosecution, and not on the question of validity of summons. In the case of *Law Society of Kenya vs Martin Day & Others*, an objection to the suit was raised by the 4th defendant, on the basis that the plaintiff had failed to comply with the provisions of Order 5 Rule 21 and 22 on service upon the 1st and 2nd defendants. Rules 21 and 22 touch on service of summons outside the jurisdiction of the court. In the suit, the original summons was issued on 1 November 2013. No service was effected upon the 1st and 2nd defendants within the first 12 months. On 20 April 2015, the plaintiff obtained fresh summons. The court noted that the summons had expired and there was no attempt to validate the same. The court held that non-compliance rendered the suit invalid as against the 1st and 2nd defendants.

24. In the case of *Waithira Kimondo & Another vs Vigillant Auctioneers & Others*, the 2nd defendant, in the year 2018, raised a preliminary objection that the court has no jurisdiction to hear the suit as the 2nd defendant had not been served with summons since the suit was filed in the year 2006. Kemei J dismissed the preliminary objection. She held that the 2nd defendant had been aware of the suit from the year 2006 and had actively participated including filing a defence and agreeing to a hearing date. The court found that the 2nd defendant had fully submitted to the jurisdiction of the court. A more or less similar position was taken in the case of *Paulina Wanza Maingi vs Diamond Trust Bank Limited & Another*. An objection was raised that the suit should be dismissed for failure to serve summons to enter appearance despite lapse of two years. The facts were that the suit was filed in the year 2009 accompanied by an application and summons which were however not signed. The application took time to be decided and ruling was delivered in 2010. The plaint was subsequently amended in the year 2013 with the 1st defendant filing a statement of defence. The court refused to dismiss the suit. It found that the suit was properly filed with summons, but they could not be extracted, as the file was with the judge pending ruling. The court was of the view that the purpose of the summons was to notify the defendant of the suit and invite them to defend it, and since the 1st defendant had filed defence, which was not under protest, there would be no prejudice. It found the issue of failure to serve the summons in good time was being taken up too late after the 1st defendant had participated in the case and had submitted to the jurisdiction of the court. In *ICDC vs Sum Model Industries*, a suit was filed by the respondent in the year 1994. It was heard and judgment delivered in the year 2000 in his favour where it was awarded special

damages against the appellant. The appellant appealed and among the grounds of appeal was that there was no valid summons to enter appearance served upon the appellant. The Court of Appeal found that there was a memorandum of appearance filed on 12 March 1998. The court did find that summons was served four years after issue but that the appellant did not raise any objection at the trial of the case. It found that the appellant entered appearance unconditionally and proceeded with the case without complaint. It held that it was now too late for it to raise the issue about the validity and service of summons. It held that failure to serve within the stipulated time did not necessarily render the proceedings null and void.

25. I agree with the position that the essence of summons is nothing more than to inform the defendant that there is a case filed and that he is required to respond to it within the period stipulated in the summons. The case or suit is not the summons; the case is the plaint or whatever document it is that contains the cause of action. The summons is the means that informs the defendant that there is a case filed and also advises the defendant of the period within which he is required to enter appearance to the case and defend the suit, and the consequences of failing to respond to the suit. I decline to elevate a summons to be of equal status to a suit. I hold the position that where a defendant has entered appearance or appointed counsel and has proceeded to file a defence to the suit without protest then the purpose of the summons is spent and any defect in the summons must be considered as having been waived by the defendant. The defendant cannot subsequently after having filed his pleadings now be heard to complain about the summons for the purpose of the summons is spent once he has filed defence to the suit without protest. That is indeed what the court held in the above cases of *Waithira Kimondo v Vigilant Auctioneers* and *ICDC vs Sum Model*. I am in full agreement with the decisions therein.

26. It follows that the fact that there is a defect in the summons does not in all cases make the suit a nullity. However, the law does prescribe that where summons have not been served within 24 months, and there has been no extension of the same, then the court reserves the discretion to dismiss the suit. My view of this provision is that its aim is to remove from the system cases which are dormant for want of service of summons. In the same way that a court has discretion to dismiss a suit for want of prosecution under order 17 Rule 2, where it has been dormant for a period of one year, the court also has discretion to dismiss a suit where no summons has been served within 24 months. In my view, Order 5 Rule 7 presupposes a position where there has been no service of summons, and therefore the defendant has not appeared in the case, and the case is thus dormant for want of service. There is good reason why the court is given the discretion to dismiss a suit where no service has been effected for more than 2 years. First the suit is dormant and there is no purpose served by having a dormant file in the court system. Secondly, there is prejudice to the defendant, for with lapse of time, the defendant is compromised in his capacity to mount a defence to the suit. Witnesses can die and documents can be destroyed or lost.

27. In our case, no summons has been served upon the 1st defendant for more than 15 years after the case was instituted. In fact, there appears to be consensus that the 1st defendant only got wind of the case in January 2019, about 14 years after the suit was filed, and this was only after an application for consolidation was advertised. There was absolutely no attempt to serve summons or inform the 1st defendant of the presence of this suit until more than 14 years lapsed. The 1st defendant has not entered appearance to this suit and has not filed any defence. She has not actively participated in the suit. In fact, she has expressly declined to participate in the suit and has cited prejudice to it given the lapse of time. This case is thus distinguishable to what transpired in the authorities referred to me by counsel for the plaintiff.

28. I am persuaded to agree with the 1st defendant that the failure by the plaintiff to serve summons and/or in any other way inform the 1st defendant of the presence of this suit for 14 years vitiates the veracity of the suit. This is a suit that is liable to be dismissed for failure to serve summons after lapse of 24 months under Order 5 Rule 2 (7). There has not been any attempt to extend the validity of summons before the lapse of 24 months and neither was any attempt made to inform the 1st defendant of the suit until 14 years from the time the suit was filed had lapsed. That to me is an extremely inordinate period of time. It is now 17 years since the suit was filed. I am persuaded that to call upon the 1st defendant to file defence, after the lapse of 17 years since the suit was filed, would not only be against public policy, but will also cause injustice to the 1st defendant. The 1st defendant has pointed out that she purchased the disputed property in the year 1999. It is now 23 years since she purchased the land. I am persuaded that the 1st defendant has demonstrated that she stands to be prejudiced if she is called upon to defend this suit. The 1st defendant has mentioned that Jackson Suter who sold to her the land cannot be traced. The plaintiff has not insinuated that Jackson Suter is a person who can be traced. The 1st defendant has also mentioned that the surveyor who did the survey, and who drew the deed plans, cannot also be found. That has not been disputed by the plaintiff. The plaintiff has also mentioned that she cannot access crucial documents to support her defence. I agree. The 1st defendant has had her title for more than 12 years. She never knew that there was any challenge to this title. She must be forgiven if she thought that since she has had title for 12 years, nobody was keen to challenge it, given that 12 years is the limitation period for challenging title to land. Although the plaintiff has tried to urge that it is trying to reclaim public land through this suit, that does not negate the fact that the defendant is also protected by law. Justice is a double edged sword. In as much as the plaintiff has a right to seek to claim land what it considers as belonging to her, the 1st defendant is also entitled to the right to defend that title, and cannot properly defend it given the great lapse of time. In this instance, the scales of justice tilt in favour of the 1st defendant. The playing field must be made level for every person. It cannot be made uneven, for the benefit of the plaintiff and to the detriment of the 1st defendant, on the sole contention that what the plaintiff seeks to claim is public land. In fact if it is the position that the plaintiff was through this suit attempting to reclaim what was public land then its conduct is appalling and must be severely condemned. The plaintiff should be ashamed of herself. How do you file suit seeking to claim what you think to be public land yet be so lackadaisical ? How do you not take a single step to move a case that alleges to be reclaiming public property for more than 15 years ? Not even a mention date was taken by the plaintiff from the year 2005, when the suit was filed, to the year 2017, when the court listed the case for dismissal for want of prosecution. This suit was liable for dismissal in February 2007, which is 24 months from the issuance of the original summons, which summons has never been extended. It is now 15 years since. The plaintiff is not even been penitent. It has not asked within this application for the validity of the summons to be extended, though I doubt that I would have allowed such request given the circumstances of this case. I refuse to sacrifice justice to the 1st defendant at the altar of the indolence of the plaintiff.

29. For the above reasons, I strike out the suit against the 1st defendant. There cannot be any cause of action that can be maintained against the 1st and 2nd defendants in the absence of the 1st defendant who is the person who holds title to the disputed property. The result is that the entire suit is hereby struck out.

30. With my above finding, I find it unnecessary to address myself to the 2nd application which seeks orders that the Further Amended Plaint be struck out for having been filed without leave, since the entire suit has been struck out.

31. The plaintiff will bear the costs of the suit and the costs of the two applications filed by the 1st defendant.

32. Orders accordingly.

DATED AND DELIVERED THIS 22ND DAY OF APRIL 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA