



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO 17 OF 2021

KENYA LIME PRODUCTS LIMITED.....PLAINTIFF

VERSUS

ALFRED KITIKU KALUNDE & 10 OTHERS.....DEFENDANT

RULING

1. By a Notice of Motion Application dated 12th of October 2021 brought under Article 62(2) of the Constitution, Section 2 and 24(h) of the Land Registration Act 2012, Section 9(2)(c)(ii) of the Land Act, Order 5 Rule (1)(6), Order 51 of the Civil Procedure Rules, 2010 and Section 1A, 1B, 3A of the Civil Procedure Act and all other enabling provisions of the law, the Applicant is seeking for the following orders:

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1. Spent.

2. That the Plaintiff's suit be dismissed with costs to the Defendants/Applicants.

APPLICANT'S CASE

2. The application is premised on the grounds appearing on the face of the application and on the supporting affidavit of the 1st Defendant/Applicant Alfred Kitiku Kalunde the sworn on 13th of October 2021. A summary of the grounds and the averments is that the lease issued to the Plaintiff/Respondent expired in 2009 and that the same has never been extended.

3. That upon expiry of the lease, the land automatically converted to public land and vested in Makueni County Government within whose geographical limits the land is situated.

4. The Applicant further averred that without the extension of the lease, the Plaintiff has no proprietary rights over the land or locus to institute the instant suit. He argued that the Plaintiff has no title to the said land and that it has never been the registered owner at any material time. He argued that the suit had abated as the Plaintiff never applied for Summons to Enter Appearance nor served the same on time as required by the law.

THE RESPONDENT 'S CASE

5. The application is opposed vide the replying affidavit of Sigey Arap Bett Advocate sworn on 4th November 2021. Counsel averred that the application is frivolous, vexatious and abuse of the court process. Counsel further averred that the Defendants could not purport not to have been served with the Summons to Enter Appearance yet they had filed a Defence. That moreover the return of service filed by the process server was sufficient proof that the Defendants were served with the summons to enter appearance. Counsel argued that the on issue as to whether the Plaintiff holds title was not pleaded in the application or in the pleadings and that same can only be determined on merit.

6. The application was canvassed by way of written submissions.

SUBMISSIONS

7. Through the written submissions filed on 25th of January 2022, the Applicants submitted that the lease issued to the Respondent expired in the year 2009 and without the extension of the same, the Plaintiff had no proprietary rights over the land or the *locus standi* to institute this suit. Counsel submitted that the Respondent did not deny in its replying affidavit that it does not have a title to the property. Counsel argued that after the expiry of lease in 2009, the revisionary interest reverted to the County Government of Makueni. To buttress this point, Counsel relied on Article 62(1)(c) and (2) of the Constitution He further submitted that the suit had abated as the Respondents had never applied for summons to enter appearance nor served the same on time as required by the law.

8. Counsel further submitted that the suit was null and *void abinitio* as the Plaintiff did not have *locus standi* to institute the suit. Counsel argued that the lack of locus was the reason why the Plaintiff did not authorize the Advocate and the deponent of the verifying affidavit to bring the suit under Order 4 Rule 1(4) of the Civil Procedure Rules Which provides that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. That in the instant case, no such authority was issued.

9. Counsel further submitted that a copy of the summons was not issued by the court as required. He argued that the court process server lied under oath as there was no way summons could be re issued before the initial ones were issued. And did not the summons that he served in his affidavit of service. He maintains that to date the Plaintiff/Respondent Advocates had not supplied the Defence with summons purportedly served.

10. Through the written submissions filed of 17th of February 2022, the Respondent submitted that the court issued the Summons to Enter Appearance and the same were served upon the Defendants. Counsel submitted that the Applicants while cross examining the process server dealt on the questions on whether the process server extended or re-issued summons the Defendants and not on whether the Defendants were served. Counsel submitted that the court did not order the re issue of summons but for the Defendants to be served afresh. Counsel maintains that the Defendants were aware that a case had been filed against them. He places reliance on the following authorities: -

a) Board of Trustees of African Independent Pentecostal Church of Africa Vs Peter Mungai & 12 Others (2016).

b) Naji Bhai Prabhudas & Co Ltd Vs Standard Bank ltd (19860 EA (K) 670.

c) Equatorial Commercial Bank Ltd Vs Maham Sons Ltd (2012) eKLR.

11. Counsel further submitted that issues not specifically pleaded by the parties cannot be raised at the submission stage but at the early stages of the case. Counsel argued that the issue as to whether the Plaintiff holds title was not pleaded in the application or in the pleadings and that same can only be determined on merit.

12. He places reliance on **Order 2 Rule 4 of the Civil Procedure Rules, Order 2 Rule 1 to 4 and on the case of David Sironga Ole Tukai Vs Francis Arap Muge & 2 Others (2014) eKLR.**

13. Counsel submitted that on the issue that the Plaintiff's Company did not grant the deponent authority to file the suit was an axillary issue which the Applicant sought to introduce. Counsel submitted that a copy of the authority was attached in the submissions.

ANALYSIS AND DETERMINATION

14. Having considered the application, the oral evidence of the process server and the rival submissions I find that the issue for determination is whether the suit should be declared to have abated or dismissed for failure to Serve Summons pursuant to Order 5 Rule 1(6) of the Civil Procedure Rules.

15. The Applicants submitted that the court did not issue the summons to enter appearance nor were the same served upon the Applicants as required by the law. Order 5 Rule 1 of the Civil Procedure Rules provides for the issue and service of summons as follows: -

1. (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 without delay, and in any event not more than thirty days from the date of filing the suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for the appearance shall be fixed with reference to the place of residence of the Defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summon shall be prepared by the plaintiff or his advocate and filed with the plaint 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 which the suit shall abate.

16. It is clear from the above provisions of the law that once a suit is filed, it is the duty of the court to issue summons to enter appearance which must be dated, signed by the judge or officer appointed by the judge and sealed with the seal of the court without delay. Counsel submitted that the court did not issue any Summons to enter Appearance. Upon perusal of the court record, I note that the court issued summons to enter appearance dated 29th of July 2021. Copies of the summons which are duly signed and sealed are in place on the court record.

17. On the issue of service of summons upon the Defendants, Isaac Makau Malonza a licensed process server was cross examined at length

by Mr Nthiwa and Mr Mwangangi Counsels representing the Defendants/Applicants. Upon perusal of the court record, I note that there on 16th of July 2021 the firm of Mwangangi and Associates filed a Notice of Appointment of Advocate, a Notice of Intention to raise a Preliminary Objection, a Preliminary Objection and Replying Affidavit sworn by the 8th Respondent. I also note that on 1st of October 2021, the firm of Stanely Nthiwa and Advocates filed Statement of Defence on behalf of the 1st to 7th, 9th and 11th Defendants. It is evident that the Defendants have been participating in these proceedings

18. Order 5 Rule 1 of the Civil Procedure Rules provides that the function of the Summons to enter Appearance is to order the Defendant to appear within a specified time. Where the Defendant gets notice of a suit against him through other means other than summons and participates in the subsequent proceedings no prejudice would be occasioned by the delay in the issue and service of summons that would warrant the dismissal of a suit. In so finding I am persuaded in this regard by the Court of Appeal decision in the case of **Industrial and Commercial Development Corporation Vs Sum Modez Industries Ltd C.A Civil Appeal No. 229 of 2001** where the court held 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. It will depend largely on the circumstances of each case.”

19. In the present matter, I find that Summons to Enter Appearance were issued by the court as they are dated, signed and sealed as required. There is an affidavit of service by the process server returning the copies thereof. It is evident that the Defendants have been participating in these proceedings. I therefore find that the defendants were duly served with the summons to enter appearance. The Applicant further sought to have the Plaintiff’s suit dismissed with costs on the grounds that the plaintiff has no locus to institute this suit since the lease issued to it had expired. Counsel submitted at length on the issue of *locus standi*.

20. I have carefully considered the application and the submissions thereto and I find that the court ought to act cautiously and to consider all the facts of the case. At this stage the court ought not to deal with the merits of the case as that is a function reserved for the trial.

21. No suit ought to be summarily dismissed unless it appears so hopeless that it obviously discloses no cause of action or is so weak beyond redemption. The Plaintiff deserves to be given a chance to litigate and ventilate its case.

22. In the end, I find that the application is dated 12th of October 2021 is devoid of merit and the same is dismissed with costs to the Plaintiff/Respondent.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TERMS THIS 20TH DAY OF APRIL, 2022.

IN THE PRECENCE OF: -

Court assistant – Mr. Mohammed