



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIRONMENTAL AND LAND DIVISION
ELC CASE NO. 425 OF 2011

FRANCIS COLLINS OMINDE..... PLAINTIFF

VERSUS

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

ALI HUSSEIN MUHAMUD2ND DEFENDANT

RULING

By Notice of motion dated 18th October, 2012 brought under Order 2 Rules 15(i)(b) (c) and (d) of the Civil Procedure Rule and Section 1A,1B and 3A of the Civil Procedure Act , the 2nd Defendant (Applicant), one Ali Hussein Muhamud has sought for these orders:-

- a. **That the plaint dated 19th august, 2011 and filed herein on 22nd August, 2011 be struck out with costs.**
- b. **That cost of this application be provided for.**

The application was supported on the following grounds.

- i. **The Plaintiff has no cause of action against the 2nd Defendant.**
- ii. **The Plaintiff's suit herein is misconceived and an abuse of the process of the court.**
- iii. **The suit though filed on 22nd august, 2011 the same has not been served upon the 2nd Defendant to date until the summons have expired.**
- iv. **By reason of (a) and (b) above, the suit is frivolous, vexatious and an abuse of the process of the Court.**

The application was also supported by the supporting affidavit of Ali Hussein Muhamud who averred that he is the lawful owner of plot No. Tassia -11-21190/4155. That he purchased the same from Zahara Gelet Boja on or about 23rd May, 2010. He further averred that on or about 21st March 2011, while he was away the plaintiff herein unlawfully permitted Safaricom limited to install a telephone mast on his property without any authority and or consent. That further when he requested Safaricom to remove the said telephone mast, he was informed that the property was subject of this civil suit. That though the plaintiff filed the suit on 22nd august, 2011, the plaintiff has never served the 2nd Defendant with summons and thus this application.

The Plaintiff opposed the application and filed his Replying Affidavit dated 14th December, 2012. He

alleged that the mistakes herein was caused by the former clerk to the plaintiff's advocates who always reported that the court file went missing and therefore the application for interlocutory judgment could not be filed. He therefore asked the court not to dismiss this suit.

The parties canvassed the application by way of written submissions. The court has now considered the instant application and the written submissions and makes these findings.

The applicant has brought this application under order 2 Rule 15(c) which deals with the issue of striking out. It reads as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

- a. **It discloses no reasonable cause of action or defence in law.**
- b. **It is scandalous, frivolous or vexatious.**
- c. **It may prejudice embarrass or delay the fair trial of the action.**
- d. **It is otherwise an abuse of the process of the court.”**

The applicant in his application stated that the Plaintiff has no cause of action against the 2nd Defendant as the Plaintiff has not served the 2nd Defendant with summons or the plaint.

Order 5 (i) deals with the issue of summons and it states that

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

“Further Order 5 Rule 2(7) states that “ Where application for renewal of summons has not been made, the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.”

It is evident that the Plaintiff herein filed this suit on 22nd August, 2011. Applicant (2nd Defendant) alleged that he did not receive summons to enter appearance and only got to know about the suit when his advocate wrote to Safaricom on the installation of telephone mast on his property.

Plaintiff has alleged that he did not file for interlocutory judgment as the clerk to the Advocates firm had misled his Advocate that the court file was missing. However there was no evidence that summons had been served on the 2nd Defendant. No return of service has been filed in the court file. It is also very clear that after the plaintiff filed the suit, no other action was taken by him until the 2nd Defendant filed the instant application. That is indeed misuse of the court process. Why do I say so? The Plaintiff did not serve summons to 2nd Defendant and did not seek an extension of Summons against him (2nd Defendant). As it is provided by Order 5 Rule 2(1) Summons shall be valid in the first instance for twelve months. The Plaintiff herein has never sought for extension of Summons against the 2nd Defendant. The summons have therefore expired and there is no valid cause of action against the 2nd Defendant. Though plaintiff alleged that his advocate had attempted to file for entry of interlocutory judgment, such application was not attached to the replying affidavit. I will not accept that submission.

I have considered the authorities cited by the parties herein I will concur with the findings of Justice Mary Kasango in the case of **MAE PROPERTIES LTD v DAVIDSON NGINI (2005) eKLR** who followed the Ruling in **RAJANI AND OTHER v THAITHI (1996) LLR**, where the Court of Appeal found that

“Non compliance with the procedural aspects of Order V which provides a comprehensive code for the duration and renewal of summons is a fundamental defect that cannot be cured under Section 3A of the Civil procedure Act. it was further held that “In the absence of those summons the plaint remains impotent. That being my

finding, the plaint cannot be allowed to continue to subsist on record when it lacks valid summons.”

I will concur with the 2nd Defendant submissions that the plaintiff matter is non-suited and he therefore has no cause of action. The suit is therefore an abuse of the court process. The court finds that his suit is a proper candidate of striking out.

Consequently, the court allows the 2nd Defendant’s application dated 18th October, 2012 and proceeds to strike out the plaint dated 19th August, 2011 with costs to the 2nd Defendant.

Applicant /2nd Defendant is also awarded costs of this application.

It is so ordered

Dated, signed and delivered at Nairobi this 20th day of August, 2013

L. N. GACHERU,

JUDGE