



**Sindiyo v Maina & another (Environment and Land Case Civil Suit
430 of 2017) [2022] KEELC 3568 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3568 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND CASE CIVIL SUIT 430 OF 2017**

CG MBOGO, J

MAY 17, 2022

FORMERLY NAKURU ELC 136 OF 2016

BETWEEN

JAMES SINDIYO PLAINTIFF

AND

NAOMI WANGARE MAINA 1ST DEFENDANT

NAROK DISTRICT LAND REGISTRAR 2ND DEFENDANT

RULING

1. What is before this court for determination is a Notice of Preliminary Objection dated December 2, 2021 filed by the 1st defendant which seeks to have the plaintiff's entire suit struck out on the following grounds: -
 1. That in so far as the 1st defendant suit is based on expired summons to enter appearance, the same is incompetent and bad in law.
 2. That the entire suit offends the provisions of Order 5 rule 2 of the *Civil Procedure Rules, 2010*.
 3. That the entire suit via plaint dated April 18, 2016 has otherwise abated and is an abuse of the court process.
2. On the February 18, 2022, the plaintiff filed written submissions dated February 16, 2022. The plaintiff submitted that a Preliminary Objection can only be raised where it involves a pure point of law not where there is room for discretion by the court or where there is a remedy provided in law. The plaintiff relied on the case of *Mukbisa Biscuits Manufacturing Co Ltd v West End Distributors Limited*. The plaintiff further submitted that the allegations on the grounds of the Preliminary Objection are subject of a formal application to give the other party a chance to reply hence it falls short of this requirement. The plaintiff submitted that a perusal of the records shows that the file has never been dormant since



it was transferred from Nakuru ELC court and at one point, an application for substituted service and an application for injunction were made.

3. The plaintiff further submitted that in the application for substituted service, the plaintiff prayed for renewal of summons to enter appearance and before the same could be done, it became possible to reach the cell phone number of the 1st defendant and it was also clear that she could be served through Whatsapp as can be seen from a return of service by John Mwangi Hinga, the process server.
4. The plaintiff further submitted that it is clear that the 1st defendant is not keen to defend the suit on the grounds that no summons to enter appearance have been issued and served upon her. The plaintiff admitted that indeed there are no summons since the original summons would not have been extended before confirming availability of the 1st defendant to be served with summons and for this reason a Preliminary Objection cannot suffice in the current circumstance.
5. The plaintiff further submitted that there is no provision in law that after lapse of 24 months, a suit abates for non-renewal of summons to enter appearance and that the act provides for an application to renew or extend the same. That the mere fact that the 1st defendant has been served with pleadings, she should be ready to defend the suit. The plaintiff further submitted that the orders for service of summons by substituted means exists but has not been executed as it was possible to serve the 1st defendant without necessarily engaging the service through advertisement.
6. The plaintiff submitted that the Civil Procedure Rules did not anticipate a situation where a defendant would instruct an advocate without being served with Summons to Enter Appearance and therefore for purposes of complying with the Civil Procedure Rules on service of Summons to Enter Appearance, the same can now be applied by way of formal application by the plaintiff since the 1st defendant has an advocate on record.
7. On the January 10, 2022 the 1st defendant filed written submissions dated January 3, 2021. The 1st defendant submitted that the Summons to Enter Appearance were issued on May 20, 2016 and the same expired in May, 2017 and there being no valid summons to enter appearance the suit has abated for want of issue and service of summons to enter appearance.
8. The 1st defendant has raised 3 issues for determination as follows: -
 1. Whether the preliminary objection is a pure point of law.
 2. Whether there exists valid summons to enter appearance.
 3. Who should bear the costs of the preliminary objection.
9. The 1st defendant submitted that the Preliminary Objection is premised on Order 5 rule 1,2 and 4 of the *Civil Procedure Rules* and that there is no doubt that failure to serve summons and failure to extend summons whilst still valid offends express and clear provisions of the law.
10. The 1st defendant further submitted that the word 'shall' is a word of command which denotes an obligation. That the summons having already expired on the May 20, 2017 the same could not be extended as per provisions under Order 5 Rule 1 and 2 of the *Civil Procedure Rules*. The 1st defendant submitted that the plaintiff did not take any steps to extend the validity of summons and there being no valid Summons to Enter Appearance, then the suit is ripe for dismissal or has otherwise abated. Notably is that the matter had been scheduled for dismissal for want of prosecution. That the provisions contained in Order 5 rule 1 and 2 of the *Civil Procedure Rules* are couched in mandatory terms and cannot be taken lightly. The 1st defendant relies on the case of *Udaykumar Chandulai Rajani & 4 others v Charles Thaitbi* [1997] eKLR and Lee *Mwathi Kimani v National Security Fund & another*



- [2014] eKLR. The 1st defendant submitted that once Summons to Enter Appearance are expired before extension whilst valid they become null, void and mute and that the 1st defendant not having been served with any summons, is not obliged to make appearance to defend the claim. That want of service is a substantive issue. The 1st defendant relied on the case of *Terry Wanjiku Kariuki v Equity Bank Limited & another* [2012] eKLR.
11. The 1st defendant further submitted that invalid Summons to Enter Appearance is not an issue of mere procedural technicality but procedural substance and it violates mandatory and express provisions of the law. Further, that failure to renew expired summons before expiry violates mandatory substantive procedural law and that a nullity cannot be cured by seeking refuge in article 159 (2) (d) of the *Constitution*. To buttress their submissions, the 1st defendant relies on the case of *Raila Odinga v IEBC & others* [2013] eKLR and *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR.
 12. I have analysed and considered the Notice of Preliminary Objection and the written submissions filed by the plaintiff and the 1st defendant and the sole issue for determination before me is whether the Notice of Preliminary Objection dated December 2, 2021 is merited.
 13. The law on Preliminary Objection is now well settled. In the celebrated case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* 1969 EA 696; the Court defined Preliminary Objection as follows;

“...is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
 14. The position on what constitutes a Preliminary Objection was reiterated by the Supreme Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR and stated as follows:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”
 15. I have perused the records in this file. The Complaint dated April 18, 2016 was filed at the Nakuru ELC Court April 19, 2016. The Complaint is accompanied by 2 copies of undated Summons to Enter Appearance that bears the seal of the judiciary and a signature appended either by the magistrate/executive and on the flip side, it bears a signature of receipt or acknowledgment by an unknown person dated May 20, 2016. There is a Notice of Motion Application dated December 18, 2019 seeking orders for extension of validity of summons to enter appearance upon the 1st defendant and substitution of service of Summons to Enter Appearance by way of advertisement through one of the local dailies. In the application, the plaintiff has annexed a copy of the Summons to Enter Appearance dated May 19, 2016. There is also a Notice of Motion Application dated February 25, 2021 seeking orders of temporary injunction.
 16. A perusal of the proceedings indicate that the Notice of Motion application dated December 18, 2019 is scheduled for hearing on March 31, 2020. On the 30th June, 2020, the matter was fixed for mention on August 3, 2020 for taking directions. On August 6, 2020 the matter was listed for mention for further directions on September 23, 2020. The matter was again in court severally thereafter before the Deputy Registrar on September 23, 2020, October 27, 2020 and December 7, 2020. The matter was again mentioned in court on February 2, 2021 for dismissal for want of prosecution. The court set aside the Notice to Show Cause dated November 3, 2020 and allowed the application dated December



- 18, 2019 and directed that the substitution be made within 30 days. Further mention was slated on April 24, 2021.
17. The 1st defendant has sought dismissal of the suit on the basis that it offends Order 5 rule 2 of the Civil Procedure Rules which provides that: -
- 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.
 - (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 sub-rule (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 suit 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 sub-rule (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.
18. As earlier on observed in this ruling, on February 2, 2021, the court set aside the Notice to Show Cause dated November 3, 2020 and allowed the application dated December 18, 2019 and went ahead and gave directions that substituted service be made within 30 days. I believe, my brother Justice Kullow, also allowed the prayer number 1 in the application for extension of validity of the summons to enter appearance.
19. Order 5 rule 2 (3) provides “Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended”. The court having allowed the application dated December 8, 2019, the plaintiff would have before service by substituted means obtained an official stamp on the Summons to Enter Appearance showing the period for which validity has been extended. This was not done.
20. It is the summons which calls upon the defendant or defendants to enter appearance and not the plaint. The plaint simply states a party’s case. The summons calls upon the cited party to enter appearance within the period stated in the summons. If I was to consider the copy of the summons to enter appearance dated May 19, 2016 annexed in the plaintiff’s supporting affidavit dated December 18, 2019, it would then mean that the Summons to Enter Appearance expired in May, 2017. An application for extension of the same would mean that it expired again in May of 2018. The application for extension of validity of summons dated December 18, 2019 would then not be in order. In the case of *Kenya Industrial Estates Limited v Ogana & another* [2004] 1 EA 96 the Hon. Kasango J. held that the court has no power to extend the validity of summons beyond 24 months. In so holding, the



learned judge derived guidance from the decision by the Court of Appeal in *Rajjani & others v Thaihi* [1996] LLR 443, wherein the Court of Appeal said;

“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure.”

21. Arising from the above, I find that the Notice of Preliminary Objection dated December 2, 2021 has merit. The Plaintiff dated April 18, 2016 has abated for want of Summons to Enter Appearance contrary to Order 5 rule 2 of the [Civil Procedure Rules](#) and is hereby struck out with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 17TH MAY, 2022.

MBOGO C.G

JUDGE

17/5/2022

In the presence of: -

CA: Timothy Chuma

