



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 170 OF 2008

LAWRENCE MUKIRI MUNGAI PLAINTIFF

VERSUS

ATTORNEY GENERAL1ST DEFENDANT

DAVID MWAURA KARANJA.....2ND DEFENDANT

BENJAMIN KANYINGI NDUNG’U.....3RD DEFENDANT

SIMON KIRUTHI NDUNG’U.....4TH DEFENDANT

MICHAEL MWAURA NDUNG’U.....5TH DEFENDANT

RUTH WANJIKU THURURU.....6TH DEFENDANT

RULING

Before me for determination is the Notice of Preliminary Objection dated 13th March 2013 in which the 3rd, 4th, 5th and 6th Defendants pray for this suit to be struck out on the grounds that the Plaintiff’s suit was filed on 11th April 2008 and the Summons to enter appearance was served on them on 2nd July 2010 by which time the suit against them had abated as per the provisions of the law.

In response thereto, the Plaintiff filed two replying affidavits and his written submissions. The first Replying Affidavit was sworn on 21st March 2013 by Bancy Waikuru Mwaura, a process server working for Lawrence Mungai & Co. Advocates who are on record for the Plaintiff. She averred that on 11th April 2008, she was given copies of the plaint, an application under certificate of urgency and summons to enter appearance to file in court by her employer. She averred that due to the big number of defendants to serve, she overlooked to collect the summons to enter appearance. She further stated that on 22nd June 2010, it came to the attention of her employer that the summons to enter appearance were never issued by the court or served on the 3rd to 6th Defendants. She stated further that her employer wrote a letter on the same date to the Deputy Registrar requesting for issuance of the summons and attached fresh summons for execution by the Deputy Registrar. She further stated that while at the court registry, she together with

the registry official noted that the year on the summons read 2008 instead of 2010. She stated that on the same day being 23rd June 2010, she was issued with the summons to enter appearance with the correction on the year made by the registry officials to read 2010 instead of 2008. She further deposed that she went to serve the summons on the 3rd to 6th Defendants on 2nd July 2010 when she noticed that the copies she had handed over bore the year 2008. She further deposed that she requested the receptionist to hand over the copies back to her but she declined.

The second Replying Affidavit was sworn on 22nd March 2013 by Gladys Mwangi, an advocate practicing with the law firm of Lawrence Mungai & Co. Advocates who are on record for the Plaintiff. She averred that the 3rd – 6th Defendants have actively participated in the proceedings herein since the year 2008 when the suit was filed and they are guilty of inordinate delay in moving the court to have the suit struck out. She further asserted that contrary to what the Defendants stated, the summons to enter appearance was served regularly and within the law. She further conceded that the summons to enter appearance which was served on the 3rd to 6th Defendants indicates that it was issued on 23rd June 2008 but the correct position is that the summons was issued on 23rd June 2010 and the error is well explained by Bancy Waikuru Mwaura in her replying affidavit. She further stated that the 3rd to 6th Defendants have now been served with the summons to enter appearance and have filed their defenses which is a clear indication that they did not and will not suffer any prejudice following the delay in service of the summons to enter appearance.

In response thereto, S. Kimondo Mubea, counsel on record for the 3rd to 6th Defendants, filed his Replying Affidavit sworn on 23rd April 2013 in which he stated that the allegation that the alterations of the year from 2008 to 2010 by hand on the summons to enter appearance was effected by the Deputy Registrar are not true. He asserted that the summons to enter appearance dated 23rd June 2008 was served on his clients through his firm on 2nd July 2010. He further stated that his secretary, one Rachel Njeri informed him that Bancy Wakiuru Mwaura served her with summons to enter appearance dated 23rd June 2008 on 2nd July 2010 and did not raise an issue of any wrong date at that time but only came the following day requesting to be allowed to alter the year appearing on the said summons to read 2010 as opposed to 2008. He further asserted that the 3rd to 6th Defendants were not guilty of any inordinate delay in raising their preliminary objection as they intimated their intention to do so at the very onset of these proceedings hence the reason they entered appearance under protest and filed their defence under protest.

In his written submissions, the Plaintiff argued that this suit was filed before the Civil Procedure Rules, 2010 were enacted and was filed under the annulled Civil Procedure Rules which has no provision to the effect that failure to file summons to enter appearance together with the plaint would render the suit a nullity. He further submitted that even under the new Civil Procedure Rules, 2010, the Plaintiff complied with the requirements of Order 5 rule 6(1) since the 30 day period runs from the date of issue or notification. He argued that in this suit, the summons was issued on 23rd June 2010 and service upon the 3rd to 6th Defendants was effected on 2nd July 2010 which was within the 30 days period. He further submitted that the striking out of a suit is a drastic action which should only be exercised in the most obvious cases where the suit is so hopeless that it will not serve any purpose to keep it alive.

The 3rd to 6th Defendants also filed their written submissions wherein they contended that the summons to enter appearance was issued by the court on 23rd June 2008 and not 23rd June 2010 as the Plaintiff was contending and that the same was served upon them on 2nd July 2010, which was well outside the time period prescribed by law. They further argued that this is what prompted them to enter appearance and file their defence under protest. They further argued that in view of these facts, the suit against them had abated and there was no competent suit before this court and the same should be struck out.

The applicable law then was the now annulled Civil Procedure Rules, specifically Order IV Rule 3(5) which provided as follows:

“Every summons 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.”

Order IV Rule 3(2) provided as follows:

“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.”

Order V Rule 1(1) provided as follows:

“A summons ... shall be valid in the first instance for twelve months beginning with the date of its issue ...”

The important date against which the validity of the summons is to be calculated is the date of issuance of the same by the court. That is when the validity period of 12 months begins to count. I have perused this file and do see that indeed, the Plaintiff filed his plaint on 11th April 2008 together with copies of summons to enter appearance. The unsigned summonses are on the court file and bear the year 2008. It is quite apparent that the same were never signed, issued by the court or served upon the 3rd to 6th Defendants. It is also apparent from the court file that the Plaintiff wrote to the court on 22nd June 2010 requesting for the summons to be issued. From the court file, I can ascertain that the court granted this request and proceeded to issue summons dated 23rd June 2010. Based on these findings, I disagree with the 3rd to 6th Defendants in their contention that the summons were issued on 23rd June 2008. Based on these findings, I agree with the Plaintiff that service upon the 3rd to 6th Defendants on 2nd July 2010 was well within the validity period of the summons and that at that time, the suit had not abated against the 3rd to 6th Defendants. I therefore find that the suit has not abated against the 3rd to 6th Defendant.

Arising from the foregoing, I hereby dismiss the Preliminary Objection. Costs shall be in the cause.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE