



**Mwangangi v Mutua & another (Environment & Land Case
E005 of 2021) [2022] KEELC 2208 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E005 OF 2021**

**LG KIMANI, J
JUNE 30, 2022**

BETWEEN

CHRISTINA MUTWA MWANGANGI PLAINTIFF

AND

CHRISTOPHER NGUMBO MUTUA 1ST DEFENDANT

REBECCA MBINYA 2ND DEFENDANT

RULING

1. Before the court is an Amended Notice of Preliminary Objection dated 24th January 2022 on the following point:
 1. The suit herein has abated because of the Plaintiff and/or his Advocate having failed to prepare, have signed, collect and serve the Defendants herein with Summons to Enter Appearance in line with the mandatory/express provisions of Order 5 Rule 1(2), (3), (5) and Rule (6) of the *Civil Procedure Rules* 2010 hence both the Plaintiff and the Application herein ought to be deemed and struck out with costs to the Defendants.
2. The main suit is a claim against the Defendants for trespassing on the suit property registered in the Plaintiff's name, LR Mwingi/Mbondoni/2206 measuring approximately 10.76Ha since 2016. The Plaintiff also filed a Notice of Motion Application dated 29th November 2021 seeking an injunction against the Defendants from dealing with the suit property pending the hearing and determination of the application and the suit respectively.

The Defendants Submissions on the Notice of Preliminary Objection.

3. Before the application proceeded for hearing the Defendants' Counsel filed a Notice of Preliminary Objection dated 24th January 2022 and an Affidavit in support thereof sworn by Apollo Muinde Advocate on 7th March 2022. He claimed that he confirmed after perusal of the Court file on 24th



January 2022 that no summons to enter appearance had ever been taken out he therefore proceeded to file a Notice of Appointment of Advocates and brought the matter to the attention of the Court. Counsel for the Defendants claims that it is only after he had brought to the courts attention the fact that summons to enter appearance had not been filed that the Plaintiffs Counsel started purporting to pursue them by writing emails to the Court.

4. The court directed that the Notice of Preliminary Objection be heard first.
5. In their written submissions, the Defendants submitted that the law applicable is Order 5(1) of the Civil Procedure Rules (2010) on the issue of summons to enter appearance and that the Plaintiff's suit is fatally defective and incompetent as no summons to enter appearance has been filed and none has been served upon them.
6. The Defendants submission is that Order 5 rule 1(2),(3), and (5) of the Civil Procedure Rules 2010 are couched in the mandatory term 'shall' and that the ripple effect that the summons were not signed by the Judge or an officer appointed by him and sealed with the Court seal renders the suit fatally defective an incompetent. They relied on the position taken in Grace Wairimu Mungai v Catherine Njambi Muya [2014]eKLR.
7. The Defendants submitted that the failure to file summons cannot be remedied by the overriding objective of the Court or Article 159 of the Constitution of Kenya (2010) and stated the inaction should not be excused because it is a requirement as they relied on the holding in Martin Luther King Andati vs Bank of Africa Kenya Ltd & 3 others (2018) eKLR. Counsel further relied on the authority of John Onger Mariaria & 2 others vs Paul Matundura 2 EA 163 and prayed that the Court strike out the plaintiff's suit with costs to the Defendants.

The Plaintiffs case

8. The Plaintiff filed an affidavit in reply to the preliminary objection sworn by on 31st January 2022 claiming that on 6th December 2021 through her Advocates she filed "a notice of motion application, supporting affidavit, plaint statement thereto and the documents appurtenant thereto collectively with summons to enter appearance against the Defendants"
9. She further claimed that her advocates made efforts to follow up on the same whether they had been signed but the same had not been signed. The Advocate was then forced to serve the application without the summons to enter appearance. She thus states that failure to serve the application together with summons to enter appearance was nto attributable to her or her advocates. She further states that it was only on 28th January 2022 that her Advocate received email communication from the Court registry that the summons had been signed and were ready for collection.
10. The Counsel for the Plaintiff did not file written submissions.

Analysis and Determination

11. The issue at hand is whether the Defendants' Notice of Preliminary Objection should be upheld, rendering the entire suit struck out or not.

According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

"In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary....."



12. The above legal proposition has been cemented in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd.* [1969] E.A. 696. The Learned Judge then held that:-

“A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

13. I am of the view that allegations of failure to prepare, have signed, collect and serve summons to enter appearance raises issues of fact and law which if the facts are not in dispute may result in disposing of the suit as it is a requirement premised in the Civil Procedure Rules. Order 5 Rule 1 of the [Civil Procedure Rules](#) (2010) provides that:-

“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 suit.
- (3) Every summons shall be accompanied by a copy of the plaint.
- (4) The time for 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 summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (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.”

Order (7) (1)

provides:-

“Where a Defendant has been served with summons to appear he shall unless some order be made by the court file his appearance within the time prescribed in the summons.”

Order 7 (1) provides:-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service “.



14. The Defendants objection is that the Plaintiff never prepared, have signed, collect and serve the Defendants summons to enter appearance. The Plaintiff on the other hand denies all the facts in the notice of preliminary objection save for the fact that at the time when the Notice of Preliminary Objection was filed summons had not been served. An examination of the Court file shows that Summons to Enter Appearance are in the file and were signed and stamped on the 25th of January 2022. I am not certain whether the summons were filed at the time when the Plaintiff filed the suit or whether they were in the Court file when Counsel for the Defendants perused the Court file. What is certain is that the summonses are in the Court file and they are still valid. Counsel for the Defendant has deponed to the fact that when he perused the file on 24th January 2022 the summons were not in the Court file. I find that these are issues of fact which at the moment remain in dispute and unascertained and the same cannot form the basis for a determination by way of a preliminary objection. In the case of [Oraro v Mbaja](#) [2005] eKLR the Court found that if facts must be proved using the rules of evidence, then this is not a true preliminary objection based on a point of law:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are divers weighty authorities carrying the message..... As already remarked, anything that purports to be a preliminary objection must not deal with disputed facts , and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence . If the Applicant’s instant matter required the affidavit of Barak Eston Mbaja dated and filed on 7th October, 2004 to give it validity before the Court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law.”

15. Further, this position was confirmed in the case of [Attorney General & another v Andrew Maina Gitbinji & another](#) [2016] eKLR when the Court held that:-

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (*supra*). That is first, that the Preliminary Objection raises a pure point of law,
Second, that there is demonstration that all the facts pleaded by the other side are correct; and Third, that there is no fact that needs to be ascertained.”

16. The matter arising now is whether the summons were served upon the Defendants or not. My view on this issue is that at the time of filing the Notice of Preliminary Objection on 24th January 2022 the summons to enter appearance had not been issued. The same were issued on 25th January 2022. Consequently the provisions of Order 5 Rule 6 had not yet kicked in. The said Rule provides that “Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.”

17. Further, I find that it would be beyond the perview and/or scope of examination of the preliminary objection as filed to delve into whether or not summons to enter appearance have been served after



the said objection was filed in court since this would call for adducing of further evidence. I opine that service of the summons to enter appearance is not a pure point of law and the Notice of Preliminary Objection would fail on this ground.

18. The Defendants counsel relied on the case of *Grace Wairimu Mungai v Catherine Njambi Muya* [2014] eKLR where the court struck out a suit for failure to serve summons to enter appearance. However, the above case is different and distinguishable from the present case since in the Grace Wairimu case the court was dealing with a case where summons to enter appearance were present in the court file but had not been served and the same had abated. In the present case the summons are in the court file and the same are still valid. The Preliminary objection was raised before the summonses were issued and could be served. Further, in *Martin Luther King Andati- vs Bank of Africa Kenya Ltd & 3 others* [2018] eKLR the court was dealing with an application to strike out the suit while in the present suit the court is dealing with a notice of preliminary objection.
19. In summary I do find that the issues raise in the Notice of Preliminary Objection of the Plaintiffs failure to prepare, have signed, collect and serve summons to enter appearance and the consequences thereof are issues of fact and law which if the facts are not in dispute may result in disposing of the suit. I however find that in the present case the issues of fact remain in dispute and unascertained at the moment and the same cannot form the basis for a determination by way of a preliminary objection.
20. For the foregoing reasons I find that the Defendants' Preliminary Objection dated 24th January 2022 lacks merit and the same is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 30TH DAY OF JUNE 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

C. Nzioka Court Assistant

.....Advocate for the Plaintiff

.....Advocate for the Defendants

