



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 664 OF 2009
EUNICE NYAMBURA IRUNGU.....
.....PLAINTIFF

VERSUS

LIBEY NJOKI MUNENE

JAMES CHEGE MUNENE

FACKSON WAINAINA KAGWE

(Sued jointly as the Administrators of the Estate

Of James Flavian Chege Munene)

.....1ST DEFENDANT

BALWANT SINGH.....2ND DEFENDANT

EIGHTY FOUR INVESTMENT LIMITED.....3RD
DEFENDANT

RULING

1. The Administrators of the estate of the late **James Flavian Chege Munene** who have been sued as the 1st Defendants in the suit herein have taken out a Notice of Motion application under the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act as well as under all other enabling provisions of the law. They pray that the suit herein be marked as having abated and/or otherwise it be dismissed for want of issuance and service of Summons to enter appearance. The grounds supporting the application were that summons to enter appearance were never served on the 1st Defendant and that the 1st Defendant entered appearance and defence in protest and without prejudicing their rights to raise the point of lack of service. That in any event the suit against the 1st Defendant has abated. **Libey Njoki Munene** one of the executors of the deceased's Will swore the affidavit in support of the application and deponed that summons to enter appearance were never served and hence the suit

has abated.

2. The Plaintiff/Respondent filed grounds of opposition that the application is frivolous and an abuse of the due process of the court lacking in merit and should be dismissed with costs. The Replying Affidavit in opposition to the application was sworn by the Plaintiff. She deposed that summons to enter appearance were indeed issued and served on the Defendants and she annexed to her such Replying Affidavit an affidavit of service sworn by one Samuel Mothomi a process server who stated that he received the summons to enter appearance on 6/12/2011 from the Plaintiff's advocates and served the same on the same date on M/s Njenga Mbugua & Nyanjua Advocates and also on the firm of Githara & Associates Advocates and the same were received by a secretary in the firm.

3. The impugned suit was filed on 28th December 2009 and it is not denied that summons to enter appearance did not issue until 23rd November 2011 and the same were served on the 1st Defendants' advocates on 6/12/2011. The applicable Civil Procedure Order at the time of filing the suit is Order V(1) as concerns validity of summons and it provides, in so far as is relevant to this application;

“Order V Rule 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.....”

It is not contested that summons to enter appearance issued on 23/11/2011. It follows naturally that such summons were valid on 6/12/2011 when they were served as that was within their validity period of twelve months. And therefore although the suit was filed on 28th December 2009 summons did not issue until 23/11/2011 and hence the question to answer is whether the plaint filed without the summons is an invalid one. The then Order IV Rule 1 stated

“Order IV Rule 1 Every suit shall be instituted by presenting a plaint to court or such other manner as may be prescribed.”

That was followed by the then Rule 2(2) which provided that the plaint would then be presented to the registry during office hours together with the requisite fees for the filing of the same and the plaint would then be date stamped making that the date of filing. Upto that point it is crystal clear that the filing of the plaint became complete upon being date stamped and payment of due fees paid. That was done in this case on 28/12/2009. That then became a valid plaint.

4. The old Order IV Rules 1, 2 and (5) did make it mandatory to file the plaint simultaneously with the summons to enter appearance as submitted by counsel for the applicant. And further Order IV Rule 3(1) provided:-

“Order IV Rule 3(1) when a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein (emphasis is mine).

It is indeed the summons that was to be accompanied by a copy of the plaint when being served on the Defendant as provided for in **Order IV Rule 3 (3)**. Order IV Rule (5) is couched in mandatory terms thus

“Order IV Rule (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.

In the current application therefore, did the failure to serve the Summons make the suit abate and/or should the suit be dismissed for want of service of summons to enter appearance?

I would think that a suit does not abate for the mere reason of non service of summons to enter appearance. That in my considered view would be elevating technicalities over substantive justice. It may well be the 1st Defendant filed their defence in protest but they filed their defence anyway and they have not shown what prejudice they suffered because of not being served with the summons to enter appearance. The facts in this case must be distinguished from those in the authorities relied on by the 1st

Defendant for they are clearly different. The point of departure is that in those authorities summons to enter appearance had indeed issued and the issue for determination there was the validity of those summons. In this case summons to enter appearance were not issued at the filing of the plaint. That as I have already concluded could not have possibly invalidated the plaint. When finally summons to enter appearance were issued, the Defendants were served with the same during the validity of those summons and no injustice was occasioned the Defendants in this case.

5. The provisions of Sections 1A, 1B and 3A of the Civil Procedure Act would require that this court do facilitate the just and proportionate resolution of Civil disputes in the most efficient manner. Article 159(1)(d) of the Constitution would require that no undue reliance on technicalities is placed in the path of substantive justice. In the premises therefore and in the circumstances of this case, I come to the considered conclusion that the suit herein has not abated and the same is not good for dismissal for having been served without the summons to enter appearance. Valid summons have since been served and the Defendants have not shown that they have suffered any prejudice whatsoever. The application under consideration is in the circumstances dismissed. Costs will abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2012.

**P.M. MWILU
JUDGE**

In the presence of:-

.....Advocate for Plaintiff/Respondent

.....Advocate for 1st Defendant/Applicant

.....Advocate for 3rd Defendant/Respondent

.....Advocate for 4th Defendant/Respondent

..... Court Clerk

**P.M. MWILU
JUDGE**