



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (MILIMANI LAW COURTS)

Environmental & Land Case 541 of 2008

JAMES GICHUKI

MUGAMBI.....PLAINTIFF

VERSUS

**AYUB MUNYIFWA.....1ST
DEFENDANT**

**CAROLINE GATHONI MUCHIRI.....2ND
DEFENDANT**

**JACKSON MUTURI NJUE.....3RD
DEFENDANT**

**EUSTAS NYAGA MUCHEMI.....4TH
DEFENDANT**

**JAMES NGUGI KAMAU.....5TH
DEFENDANT**

RULING

The Defendants/Applicants have by a Notice of Motion application dated 3/6/2011 sought that this Honorable Court be pleased to strike out the suit herein filed on 14/11/2008 for want of summons, or in the alternative, the Court be pleased to dismiss the suit with costs for want of prosecution. The Applicants also seek costs of this application.

The application is premised on the grounds that the Plaintiff has not taken any steps to ensure that summons to enter appearance are issued and served upon the Defendants. That he has not taken any steps to ensure that the suit is ready to be set down for hearing as it has been more than 2 years since the suit was filed under certificate of urgency yet no action has been taken to ensure that the matter progresses. That the suit is an abuse of the Court process, and oppressive against the Defendants for reasons that the Plaintiff’s claim is for an alleged sum of Kshs. 1 Million, which continues to accrue interest to their detriment.

The Applicant has sworn a disposition on his own behalf and that of the other Defendants on the even date. Therein, he states that there has been no action since 21/01/2009 when the matter was last mentioned before Hon. Justice Osiemo. That since the Plaintiff moved the court on 4/11/2008, the suit

parcel of land has been lying idle which is a continuous loss to him. With respect to the summons to enter appearance, he depones that summons are valid for 12 months, and ought to be served within their period of validity. That the suit having been filed on 4/11/2008, summons expired on 3/11/2009 before they were issued and served. To explain why the Defendants have not taken any steps to have the suit progress, the deponent avers that unless summons to enter appearance is served and pleadings have been closed, there is not much that a Defendant can do to progress a matter.

The application was opposed. The Plaintiff swore a Replying Affidavit dated 15/9/2011. He depones that he did not take out summons to enter appearance due to the fact that the matter was instituted under Certificate of Urgency. That they wrote to Court to be issued with summons to enter appearance on 16/9/2009. That the matter was scheduled for *inter-partes* hearing on 19/11/2008 but the same could not proceed as it was not listed in the day's cause list. That since then, the Court file was misplaced and at one time, it found itself in the Family Division. That he has made several attempts to prosecute the matter to no avail, and that he cannot be issued with the summons whilst the file is missing.

From the pleadings of the parties, and the oral submissions made by both counsels, I find that the issue for determination is with respect to Summons to Enter Appearance, and delay in the prosecution of the suit by the Plaintiff. I do note that when a suit is filed, summons shall issue as provided under the Civil Procedure Rules. I also note that summons is necessary as it orders the defendant to appear within a specified period of time. It is common ground that the Plaintiff did not extract summons when he moved the court on 4/11/2008. That I find was an omission on his part and he should have filed the appropriate application for re-issue of the summons. A plaint was filed and summons was not served. If I were to strike out the suit the Plaintiff will have to file suit again. With respect to the delay in prosecuting this matter, the Plaintiff avers that the delay in prosecuting the matter is not of his wrongdoing, but because the file has been missing at the Court's Registry. He has demonstrated that he has made efforts to invite the Defendants to take a suitable date, and also written to the Deputy Registrar to with the aim of having the file availed at the registry for the their further action. I find that the delay is not entirely the fault of the Plaintiff, as it is a possibility that the file was misplaced.

Section 1A and section 1B of the Civil Procedure Act, guides me on the overriding objective of the Act and the rules made to govern suits such as this. It provides that the objective of the Act and Rules is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. Guided by the Act, subsection (2) thereof states that,

“The Court shall in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objectives”.

Subsection (3) states that,

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court”.

It is on this basis that I disallow this application noting that the Plaintiff may file suit all over in the event that I dismiss it on a technical ground, which then beats the purpose of overriding objective mentioned herein. With the above provisions of in mind, I find that to help expedite the disposal of this suit, I will not grant the said orders, but I order the Plaintiff to file an application for issuance of the summons within 21 days from the date of this ruling, as provided for in the Civil Procedure Rules. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 26th day of July 2012.

R. OUGO

JUDGE

In the Presence of:-

.....For the Applicants

.....For the Respondents

Kabiru

Court Clerk