



Kilongu & 5 others v Linti & 10 others (Environment & Land Case 39 of 2020) [2022] KEELC 3635 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 39 OF 2020**

JM MUTUNGI, J

JULY 26, 2022

BETWEEN

- IPITIETI OLE KILONGU ALIAS IPITE OLE KILOKU
(CHAIRMAN 1ST PLAINTIFF**
- LENKONKO OLE NKAMPAA (SECRETARY) 2ND PLAINTIFF**
- LAMELOI PANINI (TREASURER) (ALL SUING AS THE OFFICIALS OF
NARANKA SELF HELP GROUP 3RD PLAINTIFF**
- LAMONDOI OLE RAKITA SANOE (CHAIRMAN) 4TH PLAINTIFF**
- ANTHONY MOREKE KIMINTA (SECRETARY) 5TH PLAINTIFF**
- KILINTA OLE KITOINE KARARO (TREASURER) (ALL SUING AS THE
OFFICE BEARESRS OF ENAIBOR-AJIJIK NGATET 1380 SELF HELP
GROUP) 6TH PLAINTIFF**

AND

- LEKISHON OLE LINTI ALIAS CLLR. JOHN LEDIDI 1ST DEFENDANT**
- KASHAU OLE OLOLKUO 2ND DEFENDANT**
- NAKURRO MAMEI 3RD DEFENDANT**
- JOSEPH OLE LEMUNI LEDAMA 4TH DEFENDANT**
- SAPONYO OLE NKURUNA 5TH DEFENDANT**
- WILSON LETOUWON OLENKAMASAI 6TH DEFENDANT**
- NAIVASHA SUB-COUNTY LAND REGISTRAR 7TH DEFENDANT**
- CHIEF LAND REGISTRAR 8TH DEFENDANT**
- DIRECTOR OF SURVEY 9TH DEFENDANT**



RULING

1. Before me for determination is the 1st, 2nd, 3rd, 4th, 5th and 6th defendants' preliminary objection dated 21st March, 2022 filed on 22nd March, 2022. The preliminary objection is based on the following ground: -
 1. That the suit be marked as having abated for non-compliance with the mandatory provisions of Order 5 Rules 1, 5 and 6 of the Civil Procedure Rules.
2. The Plaintiffs through the 1st plaintiff, Ipitieti Ole Kilongu filed a replying affidavit in response to the preliminary objection sworn by the 1st plaintiff herein on 18th May, 2022. The 1st plaintiff averred that the court on 26th June, 2020 issued summons to enter appearance in respect of all defendants and further that on diverse dates 26th, 29th and 30th June, 2020 the firm of David Gichuki & Co. Advocates effected service of the said documents and on 2nd July, 2020 filed affidavits of service in respect of the same.
3. The 1st plaintiff averred that he had been advised by the plaintiffs advocate on record which information he believes to be true, that all defendants including the 1st, 2nd, 3rd, 4th, 5th and 6th defendants were served with all court documents including summons to enter appearance.
4. The preliminary objection was canvassed by way of written submissions. The 1st to the 6th defendants/ applicants and the plaintiffs filed submissions. The 7th to 11th defendants did not file any submissions.
5. The plaintiffs' in their submissions cited several authorities including the Supreme Court case in *Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others* [2015] eKLR and submitted that the preliminary objection is improper as it is based on facts and not a specific point of law. They contended that the preliminary objection raised factual aspects that called for proof and evidence to demonstrate the existence and service of summons to enter appearance and thus the same cannot qualify as a preliminary objection. The plaintiffs further argued that they complied with the mandatory provisions of Order 5 Rules 1, 5 and 6 of the *Civil Procedure Rules* when they instituted this suit on 24th June, 2020. They reiterated the contents of their replying affidavit dated 18th May, 2022 and submitted that they served the defendants herein with the summons to enter appearance which then caused the defendants to instruct their current advocates on record. They further submitted that it was trite law that where there is a presumption of service as stated in the process server's report, the burden lies on the party questioning it to show that the affidavit of service is incorrect and that had not been done in the instant suit.
6. The plaintiffs argued that the 1st to 6th defendants have not requested the court for an order for cross-examination of the process servers and urged the court to deem the affidavits of service filed in court on 2nd July 2020 as proof that all the defendants including the 1st to 6th defendants were served with the court process. The Plaintiffs' submitted that the 1st to 6th defendants filed the preliminary objection to avoid the legal consequences of not entering appearance and filing defence within the statutory timeline and with the intention of delaying the hearing and determination of the matter. In conclusion, the plaintiffs submitted that the preliminary objection is misconceived, an abuse of the court process with no merit and ought to be dismissed with costs.



7. The 1st to 6th defendants' submitted that this suit was instituted by way of a plaint on 24th June, 2020 and that no summons to enter appearance was or had been taken out and if they were, none of them had ever been served. They have relied on several authorities such as the case of Nairobi H.C. ELC NO. 250 of 2010 *Lee Mwathi Kimani V National Social Security Fund and Another* [2014] eKLR. They have also cited the Court of Appeal case No. 25 of 2019 *Brenda Karanja V Mweki Dominic* [2021] eKLR.
8. All the above authorities relied upon by the 1st to 6th defendants' are couched on the provisions of Order 5 Rules 1-6 of the Civil Procedure Rules. They emphasize the need for a plaintiff who institutes a suit to ensure that summons to enter appearance accompany the plaint and are served upon the defendant.
9. In the instant suit, it is not in dispute that the plaintiffs' instituted this suit vide a plaint on 24th June, 2020. The 1st to 6th defendants deny that summons to enter appearance were taken out by the plaintiffs' and claim that in the event they were taken out, none of them had ever been served. The dispute herein is therefore whether summons to enter appearance were taken out and whether the summons were served upon the 1st to 6th defendants'.
10. The plaintiffs' contended that the preliminary objection as raised by the 1st to 6th defendants' was not sustainable as it was not on a pure point of law and does not satisfy the threshold of what constitutes a preliminary objection as established in the case *Mukisa Biscuit Co Ltd -vs- West End Distributors Ltd* (1969) EA 696. The 1st to 6th defendants' preliminary objection challenged the competency of the plaintiffs' suit as they asserted that the suit had abated on the basis of non-compliance with Order 5 Rules 1, 5 and 6 of the Civil Procedure Rules on account that summons to enter appearance had never been taken out and/or that the same had not been served on them.
11. Whether or not a suit has abated is a legal issue and in my view can be raised as a preliminary objection as it is a point of law. To determine whether a suit has abated, the court would need to review the pleadings, the court record and the evidence placed before the court by the parties. The Court would also need to consider the operative provisions of the law.
12. Order 5 Rule 1 of the Civil Procedure Rules provides as follows:-

Where a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.

Order 5 rule 1(3) provides

Every summons shall be accompanied by a copy of the plaint.

Order 5 Rule 1 (5) provides:-

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.

Order 5 Rule 1(6) provides:-

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.
13. The court record indicates summons to enter appearance in respect of all the 11 defendants were duly signed sealed by the court and issued by the court on 26th June 2020. The record further shows all the summons to enter appearance in respect of all the defendants were collected on behalf of the firm D.K Gichuki & Company Advocates on 26th June 2020 and signed for. It is thus clear and evident that the



provisions of order 5 rules 2 and 6 were complied with as relates to issue and collection of the summons to enter appearance.

14. In the present suit, the plaintiffs' filed a replying affidavit where they averred that they took out summons and that the 1st to 6th defendants were in fact served with the summons to enter appearance on 29th June, 2020 at 4:00pm. They have annexed a copy of the Affidavit of Service sworn by one Patrick Mutinda Mutisya on 2nd July, 2020. The affidavit of service confirms that summons were served upon the 1st to 6th defendants' who accepted service but declined to sign.
15. In the case of *Equatorial Commercial Bank Ltd V Mohan Sons (K) Ltd* [2012] eKLR the Court of Appeal, citing other Court of Appeal decisions including *Nanjibhai Prabhudas & Company Ltd Vs Standard Bank Ltd* [1968] EA (K) 670 stated:

.we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law.”
16. In the instant matter while the 1st to 6th defendants claim they were not served with summons to enter appearance; the record does not bear them out. The affidavit of service by Patrick Mutinda Mutisya sworn on 2nd July 2020 and filed on the same date under paragraph 2 identifies the documents he received for service upon the defendants which included an order dated 26th June 2020, summons to enter appearance, a certificate of urgency, Notice of Motion, plaint and annexures in support of the Notice of Motion. These were the documents which as per paragraph 5 of the affidavit of service were served on each of the defendants. On 3rd July 2020 the firm of Karanja Mbugua & Co Advocates filed a Notice of appointment of Advocates to act for all the 1st to 6th defendants and on 6th July 2020 filed the initial preliminary objection which the court considered and dismissed.
17. The affidavit of service filed speaks to the documents that were served. The 1st to 6th defendants advocates on record filed a Notice of Appointment of Advocates following the service that had been effected on the 1st to 6th defendants. What documents were served on these defendants? On the basis of the fact that there is an affidavit of service on record that identifies the documents that were served on the 1st to 6th defendants, I cannot hold that all the other documents indicated were served save the summons to enter appearance. The record is clear that the summons to enter appearance were issued and collected by the plaintiffs' representative. The affidavit of service was not challenged nor proved to be false. I accept that the 1st to 6th defendants were indeed served and that is how they almost immediately after service instructed their advocates on record.
18. I have considered and reviewed the 1st to 6th defendants submissions and the authorities they have cited in support of their preliminary objection but note that the circumstance and facts in the instant case, are distinguishable from the facts in the cited cases. In the cases cited the summons to enter appearance were either not taken out at all and/or were not taken out within the prescribed period. In the present matter the summons were issued within the prescribed period and were served within their validity period. In my view there was compliance with Order 5 Rule 1 and service of the summons to enter appearance was validly effected on the defendants.
19. The preliminary objection in my considered view is misconceived and is for dismissal and I order the same dismissed with costs to the plaintiffs.
20. The court notes the 1st to 6th defendants as well as the 7th to 11th defendants have not filed their respective defences, documents and witness statements. In order to facilitate the finalization of this matter the



court grants leave to the defendants to file their defences and compliance documents within the next 60 days from today. The matter is fixed for pre-trial conference on 12th October 2022.

21. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF JULY 2022.

J M MUTUNGI

JUDGE

