



**Darvish v Nathoo & 3 others (Environment & Land Case  
E008 of 2024) [2025] KEELC 3154 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3154 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E008 OF 2024**

**YM ANGIMA, J**

**APRIL 3, 2025**

**BETWEEN**

**ZAHRA SALIM DARVISH ..... PLAINTIFF**

**AND**

**NAZLIN AMINHOMAMED NATHOO ..... 1<sup>ST</sup> DEFENDANT**

**FAREENA AMINMOHAMED NATHOO ..... 2<sup>ND</sup> DEFENDANT**

**AMYNAZ AMINMOHMADED NATHOO ..... 3<sup>RD</sup> DEFENDANT**

**IMRAN KHOSLA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. There are two applications and two notices of preliminary objection in this matter. The first application is the plaintiff's notice of motion dated 24.04.2024 seeking, inter alia, summary judgment, an eviction order, compensation to the tune of Kshs. 10,350,000/= and costs of the suit. The second application is the 4<sup>th</sup> defendant's notice of motion dated 24.04.2024 seeking to be struck out of the proceedings.
2. The defendants filed a notice of preliminary objection dated 24.04.2024 seeking to have the suit struck out on the basis that summons to enter appearance had not been served as required by law. The defendants also filed a notice of preliminary objection dated 25.09.2024 seeking to have the suit struck out on the basis that the plaintiff was suffering from a mental illness hence legally incompetent to file a suit without compliance with provisions of the *Mental Health Act* (Cap 248).
3. The nature and scope of a preliminary objection was considered in the case of Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696 whereby it was held, inter alia, that a preliminary objection should be a pure point of law which should not be raised if any facts have to be investigated or ascertained. The question of whether or not the plaintiff is mentally competent to file



- or prosecute a suit cannot be canvassed and determined as a preliminary objection. It is a matter which would require evaluation of factual and medical evidence which may be contested or even inconclusive.
4. The court is further of the view that the issue of service of summons to enter appearance cannot be canvassed as a preliminary objection either since it may require factual information to be laid before the court. Moreover, a party's failure or lateness in serving summons is not necessarily fatal to an action. It all depends on whether or not the summons have been signed, sealed and issued by the court in the first place and the explanation given for any default on the part of the plaintiffs. The court is thus not satisfied that the issue can be fairly canvassed and determined as a preliminary objection.
  5. The 4<sup>th</sup> defendant's application dated 22.04.2024 seeks to have him removed from the suit on the basis that the claim against him was based on hearsay evidence. It was contended that there was no cogent evidence that he was the one paying service charge or occupying the suit property. The court is far from satisfied that there is a legitimate reason to remove the 4<sup>th</sup> defendant from the proceedings bearing in mind that the plaintiff's obligation to tender evidence at the trial has not reached.
  6. Order 1 rule 7 of the Civil Procedure Rules which deals with parties to a suit stipulates that;  

“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable and to what extent, may be determined as between all parties.”
  7. In the premises, the 4<sup>th</sup> defendant is not entitled to prematurely exit the proceedings before the question of his liability is determined at the trial. The court takes the view that a plaintiff is only obligated to prove his claim at the trial and not at interlocutory proceedings.
  8. The court has considered the plaintiff's application for summary judgment dated 24.04.2024. The application is grounded upon Order 36 Rule 1 (1) of the Civil Procedure Rules which stipulates that;  

“(1) in all suits where a plaintiff seeks judgment for-

    - (a) a liquidated demand with or without interest; or
    - (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

Where the defendant has appeared but has not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for the recovery of the land and rent or mesne profits” (Emphasize added)
  9. It is evident from the material on record that the defendants have not yet entered appearance to the suit. In fact, they have contended that they have not been served with summons to enter appearance in the first place. The court is thus of the opinion that the plaintiff's application is premature as the defendants have not entered appearance. It does not matter whether the failure to appear is a result of neglect or want of service of summons. On that score alone, the court is inclined to disallow the application for summary judgment.
  10. The upshot of the forgoing is that the court finds no merit in the applications and the two notices of preliminary objection on record in this matter. As a consequence, the court makes the following orders for disposal thereof;



- a. The defendants' notice of preliminary objection dated 24.04.2024 is hereby overruled.
- b. The defendants' notice of preliminary objection dated 25.09.2024 is hereby overruled.
- c. The 4<sup>th</sup> defendant's notice of motion dated 24.04.2024 is hereby dismissed.
- d. The plaintiff's notice of motion dated 24.02.2024 is hereby dismissed.
- e. Costs of the preliminary objections and the 2 applications shall be in the cause.
- f. The plaintiff is hereby granted leave to serve witness summons upon the defendants within 14 days from the date hereof in case they have not been served.
- g. The matter shall be mentioned on 03.06.2025 for pre-trial directions.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 3<sup>RD</sup> DAY OF APRIL 2025.**

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**Y. M. ANGIMA**

**JUDGE**

In the presence

Court assistant Gillian

Mr. Hans Oichoe for plaintiff

Mr. Steve Nyamu for defendants

