



**MATUMBATO ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**PHYLLIS OUKO EUNICE .....DEFENDANT**

**R U L I N G**

**The Application**

1. The application before court is the Notice of Motion dated 3/07/2009 by which the Defendant/Applicant seeks to have the Plaintiff's suit dismissed for want of prosecution. In the alternative, the Defendant prays that the Plaintiff's suit be dismissed upon expiry of the validity of the Summons to Enter Appearance and/or failure of service thereof. The Defendant also prays that the ex parte order of injunction made herein on 8/11/2001 against the Defendant restraining the Defendant from continuing with the erection of an extension to house number 26 situated on LR Number 37/704 (original number 37/50/1) Upper Hill be reviewed, discharged and or set aside.
2. The application is premised on grounds that the ex parte order issued on 8/11/2001 was issued without any or any proper service of the relevant Chamber Summons application dated 9/10/2001; that a copy of the said order of injunction made on 8/11/2001 was not served upon the Defendant until May 2009; that the Summons to Enter Appearance, which were issued on 29/10/2001 have never been served upon the Defendant; that the Plaintiff's counsel herein has persistently and unilaterally proceeded to fix the case for hearing when it is clear that the pleadings have not even closed; that the last time the Plaintiff's advocates tried to fix the suit for hearing on 9/05/2007 for full hearing was on the 8<sup>th</sup> and 9/10/2007. The Defendant also avers that there has been unreasonable delay on the part of the Plaintiff/Respondent in prosecuting the suit herein and that because of the Plaintiff's

conduct in the matter, it is only fair and just that the ex parte order of injunction granted to the Plaintiff/Respondent be reviewed and/or discharged and or set aside unconditionally and/or upon such terms as the Honourable Court may deem fit and just to grant. The Defendant also avers that in or about 14/07/2009, the Plaintiff/Respondent by itself and/or its security guard(s) employees, servants, and/or agent(s) unlawfully and without just cause, prevented the Defendant's tenant from accessing house Number 26 situated on LR Number 37/704 (original Title Number 37/50/1) Upper Hill Nairobi, thereby causing the said tenant to suffer great inconvenience and hardship. The Defendant finally contends that the Plaintiff/Respondent is clearly abusing the ex parte order of injunction herein and that unless the instant application is allowed, the Defendant will continue to suffer unlawful harassment at the hands of the Plaintiff/Respondent.

3. The application is also supported by the Defendant's affidavit sworn on 3/07/2009. It is the Defendant's case that there is no justification whatsoever for the continued existence not only of the ex parte order of injunction issued on 8/11/2001 but for the Plaintiff's entire suit.
4. The application is opposed. There is a Replying Affidavit sworn by Kennedy Keango Nyaencha on 17/07/2009. Mr. Nyaencha is the counsel appearing for the Plaintiff/Respondent. In brief, Mr. Nyaencha says that the Defendant herein was served with the Chamber Summons application dated 9/10/2001 on the 15/10/2001. The court notes that the Affidavit of Service marked as annexure "KKN 1" to Mr. Nyaencha's Replying Affidavit does not show when, if at all, the order issued on 8/11/2001 was ever served upon the Defendant. Mr. Nyaencha has also annexed some random correspondence to show that the Defendant was invited to fix hearing dates for the matter on more than six occasions and that on all these occasions, the Defendant failed to turn up, thereby necessitating fixing of the hearing dates ex parte.

### **The Defendant's Submissions**

5. This application proceeded by way of written submissions. The Defendant filed her submissions on the 23/09/2009, through her advocates, M/s Kibanya and Kamau Advocates. It is submitted on behalf of the Defendant that the Defendant's

application is meritorious for reasons that the Plaintiff failed to serve Summons to Enter Appearance upon the Defendant despite the said Summons having been issued as far back as 29/10/2001. The Defendant disputes service of any court documents as alleged by the Plaintiff and says that the Affidavit of Service sworn by Leonard Peter Kimani Waichari on 31/10/2001 does not mention Summons to Enter Appearance as some of the documents that were served upon the Defendant on 15/10/2001. Paragraph 2 of the said affidavit of service reads:-

*“2. THAT on 11<sup>th</sup> day of October 2001 I was given by Nyaencha Waichari and Company Advocates for the Plaintiff Chamber Summons application under Certificate of Urgency application under Certificate of Urgency together with a plaint to be served upon the Defendant herein Phyllis Auko Eunice. The Chamber Summons application was set for hearing for the 5<sup>th</sup> November 2001.”*

6. It is thus true as submitted by counsel for the Defendant that Summons to Enter Appearance were not among the documents that were served upon the Defendant by Leonard Peter Kimani Waichari on the 15/10/2001.
7. As regards prosecution of the Plaintiff's suit, counsel for the Defendant submitted that the Plaintiff could not have gone ahead to fix the suit for hearing because:-
  - Summons to Enter Appearance have never been served upon the Defendant and therefore no defence has or could be filed.
  - No discovery of documents and/or agreement of issues has been done and that even then, the last time that the Plaintiff fixed the suit for hearing was on 8 and 9/10/2007. The Defendant contends that the Plaintiff has not been diligent in pursuing its case against the Defendant. The Defendant also contends that since 29/10/2001 when Summons to Enter Appearance were issued and which Summons have never been served upon the Defendant, the Plaintiff has not made any application for extension of the validity of such summons and that in the absence of such application and extension, the Plaintiff's suit is dead. Counsel for the Defendant submitted that since it is more than 24 months since the original Summons to Enter Appearance were issued, the court should proceed to dismiss the suit as prayed. Further, counsel for the Defendant submitted that this suit ought to be dismissed for want of prosecution under Order 16 Rules 5(c) and

(d) of the Civil Procedure Rules. Order 16 Rule 5 provides as follows:-

*“5. If, within three months after –*

*(a) The close of pleadings; or*

*(b) (Deleted by L.N. 36/00)*

*(c) The removal of the suit from the hearing list; or*

*(d) The adjournment of the suit generally, the Plaintiff, or the court of its own motion on notice to the parties, does not set down the suit for hearing, the Defendant may either set the suit down for hearing or apply for its dismissal.”*

In the instant case, the suit was last removed from the hearing list on 8 and 9/10/2007 which is more than the three months provided for under rule 5(c) above.

8. Regarding the prayer for review/discharge and/or setting aside of the exparte orders of injunction made on 8/10/2001, counsel for the Defendant submitted that the order so issued was never served personally upon the Defendant since the only affidavit of service sworn by Leonard Peter Kimani Waichari on 31/10/2001 does not say that the order of 8/11/2001 was ever served upon the Defendant either on 15/10/2001 (before the said order was issued) or at any other time thereafter. I have already noted earlier in this ruling that the Order of 8/11/2001 was never served upon the Defendant within the time stipulated by the rules. Order 39 Rule 3(3) of the Civil Procedure Rules provides that –

*“3(3) In any case where the court grants an exparte injunction the Applicant shall within three days from the date of the order, serve the order, the application and the pleadings on the party sought to be restrained.” [Emphasis supplied].*

9. The evidence that is on the record shows that the exparte order of injunction was not served within the three days’ as provided by subrule 3 of rule 3 of Order 39 of the Civil Procedure Rules. The sub-rule is couched in mandatory terms. The Plaintiff was required to serve the order the application giving rise to the order the pleadings, namely the Summons to Enter Appearance together with the plaint within the stipulated time. It is now clear that though the plaint may have been served, (though the Defendant denies such service), the Summons to Enter Appearance were never served. The effect of the non-service of the exparte order within the statutory time means that the order lapsed at the expiry of those three days.

10. The Defendant also prays for an order of injunction against the Plaintiff incase the

court does not dismiss the Plaintiff's suit for the reasons that have been given hereinabove by the Defendant's counsel. The Defendant wants the Plaintiff/Respondent restrained from denying and/or in any other way interfering with the Defendant's/Applicant's access to house number 26 situated on LR No. 37/74 (Original Title Number 37/50/1) Upper Hill Nairobi and/or that of her tenant(s), employees) servant(s) and/or agents. The Defendant submits that the Plaintiff/Respondent has threatened to lock out the Defendant. The Defendant contends that the Plaintiff/Respondent has remained mute on the Defendants contention that the Plaintiff/Respondent wants to throw out the Defendant from the suit premises.

11. The Defendant also contends that even if a lease between the parties allowed the Plaintiff/Respondent to throw out the Defendant from the suit premises, the Plaintiff/Respondent could not do so without a relevant court order. For these reasons, the Defendant prays that the temporary injunctive orders granted to the Defendant on 29/07/2009 should remain in force until this suit is heard and determined. The Defendant also prays that costs of the application and of the entire suit be accorded to the Defendant.

### **The Plaintiff's Submissions**

12. The Plaintiff's brief submissions dated 3/11/2009 were filed in court on 10/11/2009. The Plaintiff's main contention against the Defendant's application is that the many varied prayers by the Defendant cannot be sought and obtained in one and the same application, and that in the circumstances, the Defendant's application is null and void and incurably defective.
13. The Plaintiff also contends that the Defendants prayer to dismiss the Plaintiff's suit under order IV of the Civil Procedure Rules is misplaced because the said order deals only with institution of suits and issue of summons. Regarding the summons, the Plaintiff says that the plaint and summons were prepared issued and served upon the Defendant in accordance with the relevant rules. Plaintiff also says that the Defendant's complaints that summons were not issued and served is not supported by documentary evidence from the Defendant. The Plaintiff says that the Plaintiff has attached evidence to show that summons were served upon the Defendant; and

that the affidavits of service have not been challenged by the Defendant. I have already found in earlier paragraphs of this ruling that Summons to Enter Appearance were not served upon the Defendant.

14. Concerning the Defendant's prayer for an order of injunction the Plaintiff says that such an application must come by way of a Chamber Summons. It is further argued that there was no reason for the granting of the interlocutory relief since the Defendant did not show that there was discovery of new and important matter or mistake or error or some other sufficient reason. The Plaintiff argues that the reason given by the Defendant for seeking review namely lack of service of summons is not sufficient reason for the orders sought. The Plaintiff prays that the Defendant's application be dismissed with costs.

### **Issues, Findings and Conclusion**

15. Before I discuss the issues for determination, I will comment briefly on the various provisions under which the Defendant's application is brought. The application is brought under Orders IV, V Rule 1(1) and (7), XVI Rule 5(c) or (d); XXXIX Rules 3 and 4, XLIV Rule 1, 3(2) and 4 and L Rules 1, 3 and 7 of the Civil Procedure Rules, Sections 3A, 20, 63(e) and 80 of the Civil Procedure Act (Chapter 21, Laws of Kenya) and all enabling provisions of the law. Order IV deals with Institution of Suits and Issue of Summons. One can only guess that this order has been invoked by the Defendant because the Defendant says the Summons were never served upon the Defendant. Order V deals with service of Summons while Order XVI deals with Dismissal of suits for want of prosecution. Order XXXIX is on injunctions while Order XLIV is on review. The court is of the view that each of the Orders invoked by the Defendant has its specific role to play. The question that arises for determination is whether the Defendant's composite application can stand.
16. I have now considered the application as filed and the submissions made for and against the application. I would agree with counsel for the Plaintiff that the application as filed cannot stand. It is now settled law that a party cannot seek a multiplicity of orders under the same application. A party must choose under which order to proceed and which orders to seek from the court. In the present application, the Defendant seeks such multiplicity of orders that the application is rendered

defective and incurably defective.

17. In view of the above finding, I do not find it necessary to go into the merits of each prayer of the Defendant's application save to say that Order IV of the Civil Procedure Rules contemplates that summons will be issued and served simultaneously with the plaint, and it is the duty of the Plaintiff to ensure compliance with the provisions of the said order. In the instant case, it is clear that summons were not served upon the Defendant together with the plaint.
18. On the prayer for dismissal of suit for want of prosecution, the principles governing applications for such orders must be shown and these are that:-
  - (a) *the delay in prosecuting the suit is inordinate*
  - (b) *the inordinate delay is inexcusable or*
  - (c) *the defendant is likely to be prejudiced by the delay*

It is always the duty of the Plaintiff and his counsel (if he is represented by counsel) to set down the suit for hearing and failure to discharge that obligation would be detrimental to their case. In the instant suit, the Plaintiff attempted on a number of occasions to set down the suit for hearing but for one reason or another, the case has never taken off. It is worth noting that Summons to Enter Appearance herein have never been served, and therefore pleadings are not yet closed so that it was premature for the Plaintiff to fix the suit for hearing. In the circumstances, even if the application were properly before the court I would not have dismissed this suit under Order XVI Rule 5 of the Civil Procedure Rules. In any event, the Defendant is not certain whether the prayer for dismissal is being made under rule 5(c) or (d) because the application refers to Order XVI Rule 5(c) or (d). It was incumbent upon the Applicant to specify either of the two and not to put the court into a situation of deciding which of the sub-paragraphs the suit should be dismissed under.

19. Regarding the prayer for review under Order XLIV of the Civil Procedure Rules, for a party to succeed on such an application, it must show that:-
  - *there is discovery of new and important matter of evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made; or*
  - *on account of some mistake or error apparent on the face of the record; or*

· *for any other sufficient reason.*

for the court to grant an order for review.

20. As rightly submitted by counsel for the Plaintiff, the Defendant has not met any of the three conditions above stated to warrant the granting of the prayer for review, even if this application was properly before the court. The prayer would therefore fail.
21. In the premises the Defendant's application dated 3/07/2009 is found to be defective and incurable. The same is hereby dismissed. As for costs, I order that each party bears its own costs.

Orders accordingly.

**Dated and Delivered at Nairobi this 12<sup>th</sup> day of March, 2010.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. Nyaencha (absent) for the Plaintiff/Respondent

Mr. Kibanya (present) for the Defendant/Applicant

Weche – court clerk