



Ngatho & another v Moki Savings Cooperative Society Ltd & 21 others (Environmental and Land Originating Summons 745 of 2001) [2022] KEELC 13505 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 745 OF 2001**

**JO MBOYA, J
OCTOBER 13, 2022**

BETWEEN

LILIAN WAIRIMU NGATHO 1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE 2ND PLAINTIFF

AND

**MOKI SAVINGS COOPERATIVE SOCIETY LTD & 21
OTHERS RESPONDENT**

RULING

1. The Ruling herein is in respect of two Applications, namely, the Application dated the July 7, 2022 and the Application dated the July 19, 2022, respectively.
2. The Application dated the July 7, 2022 has been filed by and on behalf of the 2nd Defendant, whereas the Application dated the July 19, 2022, has been filed by the Plaintiffs.
3. As pertains to the Application dated the July 7, 2022, the Reliefs thereunder are as follows;
 - a. Spent
 - b. The 1st Defendant's name be struck out of this Suit.
 - c. This Honorable court be pleased to strike out from the Originating Summons the following paragraphs which relate to the 1st Defendant, (a) paragraph 2, (b) paragraph 3, (c) paragraph 4, (d) paragraph 5, (e) paragraph 6, (f) paragraph 7, (g) paragraph 8, (h) paragraph 9, (i) paragraph 13, (j) paragraph 14, and (k) paragraph 22.
 - d. Cost of this application be provided for.
4. The subject application is premised on the grounds contained on the face thereof and same is further supported by the affidavit of Lucy Wanjiru Kiruhi sworn on the 7th of July 2022.



5. Following the filing of the Application herein, the Plaintiffs filed a Replying affidavit sworn on the July 19, 2022. For clarity, the Replying affidavit has been sworn by one Elizabeth Murungari Njoroge.
6. The Second Application and which is dated the July 19, 2022 seeks the following Reliefs;
 - i. Spent.
 - ii. This Honourable Court be pleased to strike out the Bundle of Documents dated July 12, 2022 by the firm of Boniface Njiru and Company Advocates on behalf of the 13th to 22nd Defendant.
 - iii. That this honorable court be pleased to strike out the Replying Affidavits filed on behalf of the 13th, 14th, 15th, 16th, 17th, 18th and 22nd Defendants.
 - iv. That this honorable court be pleased to strike out the Replying Affidavits sworn by Leah Wambui Waihumbu and Peter Munene Kimani.
 - v. That upon grant of prayer i, judgment be entered in favor of the Plaintiff as against the 13th, 14th, 15th, 16th, 17th, 18th and 22nd Defendants.
 - vi. That costs of the application and suit be awarded to the Plaintiffs.
7. Similarly, the application dated the July 19, 2022 is premised on the various grounds contained and enumerated in the body thereof and same is supported by the affidavit of Martin Kuria Mwangi sworn on even date.
8. Suffice it to point out that the application herein is opposed and a Replying affidavit in opposition thereto and same has been sworn by one Peter Munene Kimani.
9. Other than the Replying affidavit sworn by Peter Munene Kimani, the rest of the Defendants/ Respondents have not filed any Responses, whether by way of a Replying affidavit or Grounds of Opposition.
10. In the premises, the foregoing documents, details of which have been alluded to in the preceding paragraphs, reflect the totality of the pleadings and documents filed by the Parties in respect of two Application herein.

Deposition by the Parties:

a. Application dated the July 7, 2022

11. Vide Supporting affidavit sworn on the July 7, 2022, one Lucy Wanjiru Kiruhi has averred and stated that same is the 2nd Defendant in respect of the subject matter.
12. On the other hand, the deponent has averred that the 1st Defendant herein, namely Moki Savings Cooperative Society, was indeed being run by one Kiruhi Kimondo, now deceased, who died in the year 2000.
13. Further it has been averred that upon the death of Kiruhi Kimondo, who was the Proprietor/chairman of the 1st Defendant herein, the operations of the 1st Defendant grounded to a halt and that currently, even though the 1st Defendant has not been wound up, same remains inactive.
14. On the other hand, the deponent has also averred that despite the fact that the 1st Defendant was sued and impleaded in the matter, same was never served with summons to enter appearance. In this



- regard, the deponent has added that to this extent that the 1st Defendant was never served, the subject proceedings ought to be terminated as against the 1st Defendant.
15. Be that as it may, the deponent has stated that most of the Complaints and/or allegations contained in the body of the amended originated summons relates to claims against the 1st Defendant.
 16. Other than the foregoing, the deponent has averred that it has come to her attention that M/s Otieno Okeyo & Company Advocates purported to enter appearance on behalf of both the Defendants, including the 1st Defendant.
 17. However, the deponent has stated that the Memorandum of appearance was/is erroneous, insofar as the 1st Defendant neither retained nor engaged the services of M/s Otieno Okeyo & Co Advocates.
 18. At any rate, it has been averred that thereafter the firm of Njiru Boniface & Company Advocates was engaged and/or retained to take over the conduct of the Defendants case.
 19. Similarly, the deponent has stated that even though the firm of M/S Njiru Boniface and Company Advocates filed a Notice of change of advocate and took over the conduct of the Defendants' case from the firm of M/s Otieno Okeyo & Co Advocates, the Notice of change was also erroneous.
 20. Be that as it may, the deponent has contended that she only instructed M/s Otieno Okeyo & Co Advocate to act for her and not otherwise.
 21. Based on the foregoing, the deponent has averred that both the law firm of M/s Otieno Okeyo & Co Advocate and M/S Njiru Boniface & Co Advocate, were retained and/or instructed to appear for the 2nd Defendant only and not otherwise.
 22. Further, the deponent has added that if the said two firms filed any Documents and pleadings purporting to be acting on behalf of the 1st Defendant, then any such document filed on behalf of the said firms were irregular and unlawful.
 23. In view of the foregoing, the deponent has therefore raised assorted grounds, including lack of service of the Summons to Enter appearance and has therefore contended that the Plaintiffs suit against the 1st Defendant ought to be struck out on account of lack of service.

b. Response by the plaintiff/respondent

24. In opposition to the application dated the July 7, 2022, the 2nd Plaintiff herein, that is Elizabeth Murungari Njoroge has filed a Replying affidavit and wherein same avers that she is the duly appointed administratrix of Lilian Wairimu Gatho, now deceased.
25. Besides, the deponent has also averred that the suit herein was filed by Lilian Wairimu Gatho who has since passed on and upon the filing of the suit, the advocates who were duly retained and engaged by the deceased extracted summons to enter appearance and thereafter proceeded to and caused same to be served upon the two named Defendants.
26. On the other hand, the deponent has averred that upon being served with the summons to enter appearance and the originating summons herein, both the 1st and 2nd Defendants proceeded to and instructed the firm of M/s Otieno Okeyo & Company Advocates to enter appearance on their behalf.
27. Besides, the deponent has averred that arising from and pursuant to the service, the advocate for the Defendants indeed filed a Memorandum of appearance, Replying affidavit, wherein same indicated that he (advocate) had been duly retained and engaged by the two Defendants.



28. Be that as it may, the witness herein has added that upon the entry of appearance and the filing of the memorandum of appearance, the firm of m/s Otieno Okeyo thereafter appeared before various Judges and indeed made representation for and on behalf of both Defendants.
29. Other than the foregoing, the deponent has also averred that later on the firm of M/S Njiru Boniface and Company Advocates were instructed and same proceeded to and filed the requisite Notice of change, whereby same indicated that he had been appointed to act for the named two Defendants.
30. On the other hand, the deponent has further added that the subject dispute relates to a substantial chunk of land and hence the court should be able to entertain and adjudicate the issues that have been raised.
31. Notwithstanding the foregoing, the deponent has also added that the entire court proceedings have been taken and/or conducted on the basis that indeed the 1st and 2nd Defendants were served.
32. In any event, the deponent has further clarified that after entry of appearance, the 1st and 2nd Defendants advocates on record, proceeded to and made various appearances and responses before the Honourable Court.
33. In view of the foregoing, the deponent has therefore averred that the filing of a Memorandum of appearance and the subsequent appearances on behalf of the 1st and 2nd Defendants, would operate to estop, bar and prohibit the 2ND Defendant, from curiously raising the issue of none service.
34. On the other hand, the deponent has also averred that the subject application by the 2nd Defendant/ Applicant is therefore a ploy to assist the Defendants to evade the liability that may arise or ultimately ensue.

c. Application dated July 19, 2022

d. Plaintiff's/applicant's Case

35. The Second application is premised and based on the supporting Affidavit sworn by one Martin Kuria Mwangi. For clarity, the deponent has averred that same is a duly constituted and appointed advocate of the High court of Kenya.
36. Other than the foregoing, the deponent has averred that there are parties who have since filed Replying Affidavits, but who were never admitted to or joined into the subject suit vide the Ruling dated the 29th September 2021.
37. For the avoidance of doubt, the deponent has averred that one David Waihumbu and Leah Wambui Waihungu have been included in the suit herein, albeit without prior leave having been sought for or obtained.
38. Other than the foregoing, it has been averred that there are also Parties who failed and or neglected to file and serve their Responses, if any, within the timeline that was stipulated by the Honourable court.
39. As a result of the failure and or neglect to file their pleadings within time, Learned Counsel for the Plaintiff/Applicant herein, has therefore contended that the impugned documents, which have since been filed, albeit without leave of the court, ought to be Expunged.
40. In the premises, it is the Plaintiff's case that the rights and interests of the Plaintiff/Applicant herein over and in respect of the suit property, ought to be protected, in particular, against the named Defendants who failed to file their responses within the stipulated timeline that was granted by the Honourable court.



e. Response To The Application Dated 19th July 2022

41. The Application herein has been respondent to vide the Replying affidavit sworn by the 23rd Defendant, wherein same has averred that he entered into a lawful land sale agreement and thereafter same acquired lawful and legitimate title in respect of a portion of the suit property, which is the subject of the instant suit.
42. On the other hand, the deponent has also averred that upon entry into and execution of the sale agreement, the portion of the suit property which was bought was transferred to and registered in his name.
43. In the premises, the deponent herein has averred and contended that same is therefore a lawful purchaser for value without notice and hence it is appropriate that his name be retained in the subject suit, contrary to the tenor of the application by the Plaintiffs.
44. At any rate, the 23rd Respondent herein has also averred that same only got to know of the suit herein recently and to the extent that the suit affects his title and or claim to title, same therefore has lawful rights to warrant his Joinder and participation.

Submissions By The Parties:

a. Submissions By The 2nd Defendant/applicant

45. Counsel for the 2nd Defendant/Applicant submitted and contended before the court that upon the filing of the Originating Summons herein, it was incumbent upon the Plaintiff herein to extract or take out and serve the summons to enter appearance upon all the Defendants who had been sued.
46. Nevertheless, counsel for the 2nd Defendant added that as pertains to the subject matter, the Plaintiff never served the Summons to enter appearance upon the 1st Defendant or at all.
47. Further, it was contended by Counsel for the 2nd Defendant that as a result of the failure by the Plaintiff to extract and serve the requisite Summons to enter appearance, the 1st Defendant herein has never entered appearance nor filed any Responses to the substantive suit herein.
48. Other than the foregoing, Counsel for the 2nd Defendant contended that same has never been engaged or retained to act for the 1st Respondent. In this regard, counsel for the 2nd Defendant/Applicant therefore contended that the subject proceedings cannot continue or be taken, albeit without service on a principal party.
49. At any rate, counsel for the 2nd Defendant submitted that service of court process is a critical and essential process in the administration of justice. Consequently, a failure to serve summons to enter appearance, renders the claim or suit to be incompetent and hence a nullity in law.
50. Notwithstanding the foregoing, counsel also added that the issue of service is elaborately provided for under the Civil Procedure Rules and the law requires that service be duly effect upon the Parties to the suit.
51. However, it has been added that where service was not effected, the court has no jurisdiction.
52. Other than the foregoing, counsel for the 2nd Defendant further added that his law firm has only been acting for the 2nd Defendant and therefore there was need by counsel for the Plaintiff to extract Summons to Enter Appearance as well as to serve the amended Originating Summons on the First Defendant.



53. Finally, counsel for the 2nd Defendant has submitted that upon taking over the prosecution of the subject matter, same duly filed a Notice of change of advocates. However, it is conceded that the Notice of change alluded to the Defendants and not the 2nd Defendant.
54. In the premises, counsel for the 2nd Defendant/Applicant has therefore stated that the contents of the Notice of change of advocates is Erroneous and ought to be rectified.
55. Nevertheless, counsel for the 2nd Defendant added that the mere fact that a document filed speaks to and or includes a Third party, that alone does not constitute a waiver of right. For the avoidance of doubt, counsel for the 2nd Defendant contended and reiterated that same has never acted for the 1st Defendant herein.

b. Submissions By The Plaintiff

56. On behalf of the Plaintiff, it was submitted that upon the filling of the subject suit, summons to enter appearance were duly extracted and served upon the 1st and 2nd Defendants, who were originally the only Defendants in the matter.
57. Secondly, counsel for the Plaintiff has contended that after service of Summons to enter appearance, the 1st Defendant proceeded to and engaged the services of m/s Otieno Okeyo as their own advocate.
58. The deponent has further added that the firm of m/s Otieno Okeyo Advocate duly entered appearance and filed the requisite pleadings on behalf of both the Defendants.
59. At any rate, counsel for the Plaintiff added that other than the entry of appearance and the filing of the Responses to the originating summons, the said counsel also attended court and participated in various court processes, albeit without any protest or at all.
60. Premised on the contents of the Memorandum of appearance and the various pleadings filed, counsel for the Plaintiff has therefore submitted that it is incorrect and erroneous for counsel for the 2nd Defendant to now purport that same was never engaged or instructed by the 1st Defendant.
61. At any rate, the counsel for the Plaintiff has added that the 2nd Defendant is bound by the terms and tenor of the pleadings filed in court.
62. Be that as it may, counsel of the Plaintiff has also submitted that the allegation by and or on behalf of the 2nd Defendant are not genuine and that the Defendants herein were duly and lawfully served.
63. Finally, counsel for the Plaintiff has contended that this Honourable Court is a Court of record and that the Record of the court are clear and explicit and same authenticate that both Mr. Otieno Okeyo and Mr. Boniface Njiru, Advocates, have all participated in the proceedings herein for and on behalf of the 1st and 2nd Defendants.
64. In short, counsel for the Plaintiff herein has therefore termed the current application as a gross abuse of the due process of the court.
65. As pertains to the application dated the 19th July 2022, counsel for the Plaintiff has submitted that the said application is meritorious and therefore same deserves to be granted.
66. Be that as it may, it has been pointed out that no party, other the Original Parties, can enter upon or be a Party to Civil Proceedings, without Leave of the Court having been sought for or obtained beforehand.



67. Nevertheless, counsel for the Plaintiff has pointed out that certain parties, namely the 23rd and 34th Defendants have been joined into the proceedings and constituted as Parties, albeit without the authority of the court.
68. In view of the foregoing, counsel for the Plaintiff has therefore contended that both the 23rd and 24th Defendants herein therefore ought to be expunged and removed from the record of the court.
69. At any rate, counsel for the Plaintiff has submitted that the inclusion of the names of said Defendants is therefore likely to culminate into chaos and prejudice against the Plaintiff.
70. Other than the foregoing, the Plaintiff also submitted that during the Pre-trial conference, the Honourable court ordered and or directed that Parties do file their respective pleadings and bundle of documents within a set time. Consequently, it has been pointed out that all the Parties were therefore obligated to comply with and adhere to the terms of the court orders.
71. Nevertheless, counsel for the Plaintiff has added that despite the clear terms and stipulations contained in the order, the 13th to 18th and 22nd Defendants failed to file their pleadings/Replying affidavit within the stipulated timeline.
72. Based on the foregoing , the Counsel for the Plaintiff has submitted that the impugned pleadings or documents which were filed on behalf of the said Defendants, albeit out of time and without Leave ought to be struck out or expunged.
73. On the other hand, Counsel for the Plaintiff further submitted that two additional parties have also been joined into the proceedings, albeit without an express order of the court.
74. In this regard, counsel for the Plaintiff pointed out that the 23rd and 24th Defendants were not parties to the previous applications which was allowed by the court vide ruling rendered on the 29th September 2021.
75. Premised on the foregoing, counsel for the Plaintiff has thus contended that the said 23rd and 24th Defendants are therefore strangers in respect of the subject suit and hence same ought to be struck out.

c. Submissions By The 3rd to 7th Defendants

76. On behalf of the 3rd to 7th Defendants, Learned Counsel submitted that the two applications, namely, application dated the 7th July 2022 and the 19th July 2022, constitute and amounts to an abuse of the due process of the court.
77. Further, counsel for the 3rd to 7th Defendants submitted that the contention by counsel for the 2nd Defendant that no Summons to enter appearance was served upon the 1st Defendant, is not only mischievous but misconceived and legally untenable.
78. For the avoidance of doubt, counsel pointed out that indeed the 1st Defendant was duly served with summons to enter appearance and upon such service, same duly instructed and retained counsel to enter appearance and file pleadings on her behalf. In thus regard, counsel invited the court to take cognizance of the memorandum of appearance dated the 21st May 2001.
79. Other than the memorandum of appearance, counsel for the 3rd to 7th Defendants also submitted that the previous advocates was instructed by both the 1st and 2nd Defendants, proceeded to and appeared before the court on various occasion and same confirmed his participation on behalf of both the 1st and 2nd Defendants.



80. Thirdly, counsel pointed out that the record of the court which shows that M/S Otieno Okeyo Advocates was appearing for both Defendants remains unchallenged to date.
81. Based on the foregoing, counsel for the 3rd to 7th Defendant has submitted that by virtue of being a court of record, this court should uphold the sanctity of the record of the court as opposed to the curious invitation by counsel for the 2nd Defendant.
82. In respect of the application dated the 19th July 2022, counsel submitted that the delay of the filing of the pleadings on behalf of the named Defendants was neither unreasonable nor inordinate.
83. At any rate, counsel added that even the Plaintiff herein had failed to file her own amended pleadings within the timeline that was provided for and stipulated for by the court. For clarity, counsel clarified that the court had to extend timelines for the Plaintiffs to file the amended pleadings.
84. In the premises, counsel added that the filing of the current application by the Plaintiff is tantamount to seeing the log in the eyes of the opposite Party, albeit without taking cognizance of the peck in the eyes of the Applicant.
85. Notwithstanding the foregoing, counsel for the 3rd to 7th Defendant further submitted that the Dispute before the court concerned land and hence all efforts and endeavors ought to be made to ensure that the dispute is determined on merit, once and for all.
86. In the circumstances, counsel for the 3rd to 7th Defendants therefore invited the court to find and hold that the two sets of Application were legally untenable and devoid of merits.

d. Submissions On Behalf of The 8th to 12th Defendants:

87. On behalf of the 8th to 12th Defendants, counsel Mr. Karuga Maina associated himself with the elaborate and extensive submissions ventilated by Learned Counsel for the 3rd to 7th Defendants.
88. Essentially, counsel for the 8th to 12th Defendants pointed out that the issues that were raised at the foot of the two applications were misconceived and legally untenable.
89. In the premises, counsel similarly invited the court to dismiss the two applications, save for the two Defendants who were irregularly joined as parties.

Issues for Determination

90. Having Reviewed The Two Applications dated the 7th July 2022 and 19th July 2022, respectively, together with the Supporting affidavits thereto and having considered the Responses filed as well as the submissions made on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the 1st Defendant was duly served with Summons to enter appearance in respect of the subject matter.
 - ii. Whether the delay and lateness in filing of the Pleadings/Responses by the designated Defendants is such that the impugned pleadings ought to be expunged.
 - iii. Whether this Honourable Court can enter and endorse Interlocutory Judgment in favor of the Plaintiff as pertains to a claim where there is no plea for Liquidated/Pecuniary Damages.



Analysis and Determination

Issue Number 1 Whether the 1st Defendant was duly served with Summons to enter appearance in respect of the subject matter.

91. The 2nd Defendant herein has filed the application dated the 7th July 2022 seeking to have the Plaintiff's suit struck out against the 1st Defendant struck out herein.
92. According to the 2nd Defendant, no summons to enter appearance were ever extracted and served upon the 1st Defendant, either in accordance with the law or at all.
93. At any rate, counsel for the 2nd Defendant has added that the failure to extract and serve the summons to enter appearance upon the 1st Defendant, therefore invalidate the Plaintiff suit as against the said 1st Defendant.
94. Despite the submissions by and on behalf of the 2nd Defendant, there is no gainsaying that the 1st and 2nd Defendants herein duly instructed and retained the firm of Otieno Okeyo to enter appearance and file the requisite responses.
95. Upon receipt of the instruction to act on behalf of the 1st and 2nd Defendants (who were the only Defendants in the matter then), the nominated advocate crafted and filed a Memorandum of Appearance dated the 21st of May 2001.
96. At this juncture, it is appropriate to underscore that the Memorandum of appearance clearly shows that the nominated advocate was clearly acting for the Defendants/Respondents in the matter.
97. In view of the contents of the Memorandum of appearance, it is safe and sound to hold that the nominated advocate was duly and lawfully retained by both 1st and 2nd Defendants.
98. At any rate, it is common ground to hold and state that the Memorandum of appearance, which was filed at the onset of the subject suit, has neither been challenged, impeached or set aside.
99. In the circumstance, the obvious conclusion is that the 1st Defendant was indeed served with the summons to enter appearance or better still, became aware of the subject suit and chose to instruct, engage and retain counsel.
100. Having chosen and instructed counsel, the presupposition is that the 1st Defendant was knowledgeable and aware of the suit. Consequently, it cannot now be contended that the 1st Defendant was neither served nor aware of the suit.
101. Nevertheless, it is also appropriate to point out that the purpose of service of summons to enter appearance is to draw the attention of the Respondent to the existence of the suit and to enable the Parties to take steps of his/hers in the matter.
102. In this regard, having instructed and engaged counsel, the 1st Defendant therefore conceded and acknowledged service of the summons to enter appearance and the court process.
103. In the premises, it cannot now be said that the 1st Defendant was never served, either in the manner contended by the 2nd Defendant or at all.
104. Nevertheless, the question that then arises is, if the 1st Defendant was never served with the Summons to Enter Appearance, then how did same get to know of the existence of the suit, in the first place.



105. Be that as it may, having duly instructed and engaged counsel, it cannot lie in the mouth of the 2nd Defendant herein to contend that the 1st Defendant was never served.
106. On the other hand, one would have expected the contention of none service, if at, all to be raised by the 1st Defendant and not the 2nd Defendant.
107. Be that as it may, it is clear that the 1st Defendant herein, who is admitted to be still in existence, has neither challenged nor disputed service of the summons to enter appearance on her.
108. Besides, it is also common ground that the same 1st Defendant has also not contested or disputed the fact that same duly engaged and instructed the firm of M/s Otieno Okeyo and Company Advocate to act on her behalf.
109. Suffice it to point out that if there was a contest on service, such a contest would only be raised and be ventilated by or on behalf of the 1st Defendant and not the 2ND Defendant herein.
110. Nevertheless, even the 1st Defendant would still find it difficult to contest service of summons to enter appearance on the face of the Memorandum of appearance filed by m/s Otieno Okeyo Advocates.
111. Suffice it to point out that the Memorandum of appearance, which is said to have been filed on behalf of both the 1st and 2nd Defendants, would operate as an Estoppel as against the 1st Respondent.
112. In a nutshell, the claim by the 2nd Defendant that the 1st Defendant herein was not served with summons to enter appearance is therefore misconceived and legally untenable on the face of the documentation that are obtaining in respect of the subject matter.
113. Other than the foregoing, it is also appropriate to state that both the previous counsel, namely Mr. Otieno Okeyo as well as the current advocate, have hitherto signaled and indicated that same were appearing for both the 1st and 2nd Defendants.
114. Pursuant to the representation made by both the previous and current advocates, the record of the court, right from the commencement of the suit reveal that both the 1st and 2nd Defendants, were duly represented before the court.
115. In the premises, it is difficult to discern and appreciate the circumstances under which counsel for the 2nd Defendant can now seek to impeach service of the summons to enter appearance against the 1st Defendant.
116. In a nutshell, it is my finding and holding that the 1st Defendant was duly and lawfully served with the summons to enter appearance and that upon such service, same duly instructed counsel. In this regard, the claim by the 2nd Defendant, which seeks to impeach the issue of service is not only misconceived but legally untenable.
117. Consequently, it is my finding and holding that the 1st Defendant was duly and lawfully served and therefore the failure, if any, to file her statement of defense or responses, cannot be relied on or leveraged upon to negate, frustrate and or defeat the hearing and determination of the subject suit.
118. To buttress the foregoing observation, it is appropriate to take cognizance of the decision in the case of *Equatorial Commercial Bank Limited v Mobansons (K) Limited* [2012] eKLR, where the court observed as hereunder;

“The object of service of a summonsis that the defendant may be informed of the institution of the suit in due time before the date fixed for hearing”.



119. Clearly, the Memorandum of appearance that was filed for and on behalf of the 1st and 2nd Defendants is sufficient testament that in fact the summons were duly served upon the 1st Defendant, contrary to the claim/allegations being made by the 2nd Defendant.
120. At any rate, the filing of the Memorandum of appearance signaled that the purpose of the Summons to enter appearance have been achieved and realized.
121. In a nutshell, I find and hold that the contest as to whether or not the 1st Defendant was duly served with the summons to enter appearance (which has curiously been raised by the 2nd Defendant) is misconceived and legally untenable.
122. Put differently, I find and hold that the 1st Defendant was duly served and that explains the reason why same found it fit, appropriate and expedient to vindicate her rights by engaging and instructing counsel who thereafter filed a Memorandum of appearance.

Issue Number 2

Whether the Delay and Lateness in filing of the Pleadings/Responses by the designated Defendants is such that the impugned pleadings ought to be expunged.

123. Before delving into and addressing the issue herein, it is appropriate to point out that on the 29th September 2021, this court rendered and delivered a ruling whereby the judgment which had hitherto been rendered on the 30th July 2010 was duly set aside and discharged.
124. On the other hand, upon the setting aside of the impugned judgment, the court ordered and or directed that the proposed Interested Parties/Applicants, who had filed applications seeking to be joined as Parties to the suit, were indeed admitted and constituted as Defendants.
125. Further, the court proceeded to and directed that because of the joinder of the Parties who had sought to be joined into the proceedings, it was therefore necessary that the Plaintiff herein does amend the originating summons with a view to reflecting the inclusion of the admitted Defendants.
126. For clarity, the direction in this regard were in accordance with the provisions of Order 1 Rule 10(4) of the *Civil Procedure Rules*.
127. It is also imperative to point out that the direction on amendment on the originating summons was to be carried out and undertaken within a duration of 14 days and thereafter the admitted Defendants were to enter appearance and file statement of defense, if any and where appropriate.
128. Notwithstanding the explicit directions and orders that were issued on the 29th September 2021, the counsel for the Plaintiff herein failed to comply with the terms of the order and the failure precipitated the filing of several application by the Defendants who sought to have the suit by the Plaintiff struck out on account of failure to comply with and abide by the orders of the court.
129. Be that as it may, the Defendants who had filed the various applications were implored upon and beseeched by the court to withdraw the application for striking out of the suit and to allow the Plaintiff to amend the originating summons within an extended timeline/duration. For clarity, a consent on terms was thereafter entered into and endorsed by the court on the 16th May 2022.
130. It has become important to provide the foregoing background because if every party were to adopt the hardline stand taken by the Plaintiff herein at this juncture, then the Plaintiffs suit would long be struck out, on the basis of lateness and failure to comply with set timelines.



131. Nevertheless, having benefited from the indulgence and accommodation by the Defendants, one would have expected the Plaintiff to adopt a similar stand and offer indulgence, if there was any lapse or delay on the part of the named Defendants to file their pleadings in time.
132. However, to the contrary the Plaintiff herein has taken it upon herself to utilize the lapse and seek to expunge the belated pleadings filed on behalf of the named Defendants.
133. To my mind, the delay to file the pleadings by and on behalf of the named Defendants was neither inordinate nor unreasonable. In any event, the Hearing of the suit herein, is yet to commence.
134. Consequently, the impugned delay, which has now been invoked by the Plaintiff, for purposes of striking out cannot without more, be a basis to strike out the impugned pleadings.
135. In my humble view, striking out of the pleadings/responses by the named Defendants would be so draconian and tantamount to meting out punishment against the named Defendants.
136. Suffice it to point out that Courts of law do not exist to mete out punishment or discipline on Parties, merely because of some minor infraction/breach of procedural law or mistake/failure to comply with the procedural timeline.
137. At any rate, there are certain lapses, mistakes and or failures that are excusable and pardonable. Consequently, I am prepared to adopt and endorse the words of Wisdom that fell from the Lips of Apaloo JA, in the case of *Philip Keipto Chemwolo v Augustine Kubende & another* (1986) eKLR, where it was held as hereunder;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

138. Nourished by the word of wisdom alluded to in the decision supra, I would not accede to the invite at the foot of the application dated the 19th July 2022, essentially to expunge the impugned pleadings, merely on the basis of lateness.
139. Other than the foregoing reason, I would similarly be reluctant to expunge the impugned pleadings on the basis of lateness because the dispute before-hand relates to land and hence it behooves the Honourable court to endeavor to and determine the dispute, where appropriate on merits as opposed to technicality.
140. Consequently, the circumstances of this matter behooves me to be more inclined to deal with the merits of the pleadings rather than resort to the shortcut, which the Plaintiff seems intent to invite the court to adopt.
141. To this end, I am minded to adopt and rely on the holding of the Court in the case of *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, where the court, Ouko, JA, held as hereunder;

“In Kenya the attachment to land is passionate, emotional and almost fanatical. Nations, neighbours, siblings, spouses and even strangers fight over land. In some instances, the disputes degenerate into bloodshed and death. This Court in *Gitamaiyu Trading Company*



Ltd v Nyakinyua Mugumo Kiambaa Co. Ltd & 11 others Civil Appeal No 84 of 2013, explained why land is such an important asset thus;

“Land, no doubt, is not only the most important factor of production but also a very emotive issue in Kenya. Land remains the most notable source of frequent conflicts between persons and communities.”

142. Informed by the foregoing observation I am disinclined to strike out or expunged the pleadings filed on behalf of the named Defendants, merely on the basis of lateness. For clarity, the emotive nature of land obliges me to venture and deal with the merits.
143. Nevertheless, I must point out that the foregoing reason does not apply in respect of the 23rd and 24th Defendants who have jumped into the proceedings or whose names have been included in the pleadings albeit without Leave having been sought and obtained before-hand.
144. In the premises, the names of the 23rd and 24th Defendants, who were not captured at the foot of the ruling rendered on the 29th September 2021, are hereby struck out and removed from the proceedings.

Issue Number 3

Whether this Honourable Court can enter and endorse Interlocutory Judgment in favor of the Plaintiff as pertains to a claim where there is no plea for Liquidated/Pecuniary Damages.

145. The Plaintiff herein had implored the court that upon striking out or expunging the pleadings filed by the named Defendants, on account of lateness, the court should proceed to enter judgment in favor of the Plaintiff.
146. Nevertheless, it is important to point out and underscore that the suit before hand does not contain any relief or prayer for liquidated of pecuniary damages.
147. In the absence of a prayer/claim for liquidated or pecuniary damages, it is common ground that no Interlocutory Judgment can issue.
148. In respect of the foregoing, it is worthy to take cognizance of the decision in the case of *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR, where the Court of Appeal stated as hereunder;

“Although the entry of the interlocutory judgment was not appealed against, we think ourselves that the question is so closely intertwined with the appeal that to fail to deal with it will result in more loss of time and further expense. In any case, the amended plaintiff not being a liquidated claim, the entry of interlocutory judgment was irregular”.
149. In a nutshell, even if I had acceded to the request to expunge and strike out the pleading by the named Defendants, on account of lateness (which I have declined), it would not have been legally tenable to enter Judgment in favor of the Plaintiff in the manner sought.

Final Disposition:

150. In conclusion, it must have become crystal clear that the two applications which were filed by the Plaintiff on one hand and the 2nd Defendant on the other hand, are clearly misconceived and legally untenable.
151. Consequently and on the basis of the reasons which have been articulated herein before, the two Application are devoid of merits.



152. In the premises, I make the following orders;

- i. The Application dated the July 7, 2022 be and is hereby Dismissed with costs to the Plaintiff and the Defendants Numbers 3 to 12th, respectively.
- ii. The Application dated the 19th July 2022 be and is hereby dismissed with costs to the 2nd to 22nd Defendants.
- iii. The names of the 23rd and 24th Defendants, namely Peter Munene Kimani and David Waihumbu, respectively be and hereby expunged from the proceedings.

153. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13 TH DAY OF OCTOBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin/ Benson Court Assistant

Mr. Kuria for the Plaintiff

Mr. Masore for the 3rd to 7th Defendant.

Ms. Mugo h/b for Mr. Boniface for the 2nd Defendant

Mr. Mwathe h/b for Mr. Kibe for the 13th to 22nd Defendants

N/A for the 8th to 12th Defendants

