Langat & 3 others (Suing as the administrators of the Estate of Samuel Cheruiyot Lang'at) v Byomdo (Environment and Land Case Civil Suit 114 of 2018) [2022] KEELC 13499 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13499 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE CIVIL SUIT 114 OF 2018

FM NJOROGE, J

OCTOBER 6, 2022

BETWEEN

ELIZABETH CHEBET LANGAT ..... 1ST PLAINTIFF

ERNEST KIPROTICH CHERUIYOT ..... 2ND PLAINTIFF

ERICK LANGAT CHERUIYOT ..... 3RD PLAINTIFF

ENOCK KIPTOO CHERUIYOT ..... 4TH PLAINTIFF

SUING AS THE ADMINISTRATORS OF THE ESTATE OF SAMUEL CHERUIYOT LANG'AT

AND

JOEL KIPNGENO BYOMDO ..... DEFENDANT

RULING

1. This is a ruling with respect to the defendant's notice of motion application dated April 19, 2022. It has been brought under section 19 & 20 of the *Civil Procedure Act*, order 5 ule 1(1) (2), (3), (4), (5) and (6) of the *Civil Procedure Rules* which seeks the following orders;

    a. The interlocutory judgement entered against the defendant/applicant be set aside forthwith.

    b. The plaint herein be struck out for failure on the part of the plaintiffs/respondents to prepare and extract the summons and failure to serve the same on the defendant/applicant.

    c. The cost of this application and the entire suit be borne by the plaintiffs.

2. The application is supported by the grounds on the face of the application and the affidavit sworn by Joel Kimutai Bosek counsel for the 1st defendant. He deposed that the plaintiffs filed a certificate of urgency and a notice of motion application dated March 16, 2018March 16, 2018 together with the

plaint and served them upon the defendant/applicant; that the plaintiffs never prepared summons to be signed by an officer of the court at the time of the filing of the suit; that therefore no summons were served upon the defendant and so no memorandum of appearance and defence could be filed; with respect to the application filed by the plaintiffs, the defendant filed a notice of appointment and the application was duly dispensed with; that judgement in default cannot be entered where summons to enter appearance was never served upon the defendant and it therefore ought to be set aside; that the plaintiffs suit is incurably defective and ought to be struck out and that it is in the interest of justice and fairness that the plaintiffs suit be dismissed with costs.

3. In response to the application, the 4th plaintiff filed on May 11, 2022 a replying affidavit sworn on May 10, 2022 and deposed that on March 16, 2018, the plaintiffs in their capacity as the administrators of the Estate of Samwel Cheruiyot Lang'at filed a plaint seeking a declaration that the estate is the beneficial and legal owner of land parcel no. Nakuru/Olenguruone/Kiptagich/59 by virtue of adverse possession; that on the same date an application was filed under certificate of urgency seeking for an injunction to stop the defendant from evicting them from the suit property; that the defendant filed a replying affidavit and submissions and a ruling delivered in their favor on November 28, 2018; that the defendant filed an application to strike out the suit on August 27, 2020 which was dismissed on November 16, 2021; that the plaintiffs fixed the matter for mention on February 28, 2022 and served the defendant who did not show up; that his advocates on record sought for leave to apply for judgment in default to ensure expeditious disposal of the suit; that he is advised by his advocates on record that to warrant the grant of an order for setting aside of an interlocutory judgement one needs to sufficiently demonstrate as to why they failed to file a defence; that he is further advised by his advocates on record that the purpose of summons is to inform a defendant of the institution of a suit; that from the defendant's conduct, he clearly had information on the suit as he participated in defending the applications, initiating applications and actively participating in the suit; that under the doctrine of estoppel, the defendant cannot in the circumstances claim not to have known about the suit as he had actively participated and therefore the defendant is not entitled to the orders sought.

4. The application was argued by way of written submissions. The defendant filed his submissions dated July 7, 2022 on July 12, 2022 while the plaintiffs filed their submissions dated July 28, 2022 on July 29, 2022.

5. The defendant in his submissions gave a background of the matter and submitted that the plaintiffs' failure to prepare summons renders the proceedings incompetent and ripe for dismissal. The defendant further pointed out that the plaintiffs' advocates requested the court to enter judgement against the defendant for failure to enter appearance and submitted that the court lacks jurisdiction to enter judgement in a matter wherein the plaintiff failed to seek the court's authority. The defendant also submitted that plaintiffs cannot be heard as they ignored to prepare and serve summons to enter appearance.

6. The defendant relied on the cases *Frenze Investment Limited v Kenya Way Limited* [2001] eKLR, Court of Appeal in CA 85 of 1996 *Uday Kumar Chandillal Rajani & ORS T/A Lit Petrol Station v Charles Thaitu, Packer Woods Limited v Bank of Africa Limited* [2021] eKLR among other cases and sought that the suit be dismissed with costs.

7. The plaintiffs in their submissions submitted on whether there is a plausible explanation as to why the defendant failed to file a defence and whether any triable issues have been raised. On the first issue, the plaintiffs relied on the cases of *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Others* [2016] eKLR and *Equatorial Commercial Bank Ltd v Mohansons (K) Ltd* [2012] and submitted that the defendant actively participated in previous

interlocutory applications filed herein and therefore had knowledge of the present suit and must be deemed to have participated in it.

8. On the 2nd issue the plaintiffs relied on the cases of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR and *Francis Mutindi Mutula & 3 Others v Stephen Kivandi Kamula & 5 others* [2021]eKLR among other cases and submitted that the defendant has not filed his statement of defence and has therefore not demonstrated that it has any triable issues to be considered before this court and has not shown any reason why the interlocutory judgement should be set aside or why the plaint should be struck out. The plaintiffs concluded their submissions by submitting that the defendant's application has no merit and should be dismissed.

Analysis and Determination

9. After considering the application, affidavits and submissions the issues that arise for determination are whether the court should set aside the interlocutory judgement entered against the defendant and whether the suit should be struck out for failure to serve the defendant with summons to enter appearance.

10. On the first issue, the defendant argued that the court cannot enter judgement in default as the plaintiffs had failed to serve summons to enter appearance upon him while the plaintiffs argued that their advocates requested for judgement against the defendant because he failed to file his statement of defence.

11. A perusal of the court record shows that a request for judgement dated March 3, 2022 was filed by the plaintiffs advocates on the same date. A further perusal of the court record shows that interlocutory judgment was entered for the plaintiff against the defendant on March 3, 2022.

12. The court in the case of *Beatrice Wanjiru Kimani v John Kibira Muiruri* (2016) eKLR held as follows:

> " 5. I have considered the matter. The claim herein is not a liquidated claim or a claim for general damages. If it were a liquidated claim, and no defence is filed, order 10 rule 4 would apply. The same provides as follows: -
>
> 4. Judgment upon a liquidated demand [order 10, rule 4.] (1) Where the plaint makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in form no. 13 of appendix a, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
>
> (2) Where the plaint makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the court shall, on request in form no. 13 of appendix a, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.

6. If it were a claim for general damages order 10 rule 6 would apply and interlocutory judgment could be entered. The said provision is drawn as follows: -

> 6. Interlocutory judgment [order 10, rule 6.]
>
> Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in form no 13 of appendix a, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

7. It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory judgment, and as I have mentioned earlier, that was the reason why no interlocutory judgment was entered for the plaintiff when she applied for the same but instead, the plaintiff was granted a hearing date with the stipulation that she serves notice of the same upon the defendant."

13. The court further in the case of *Solomon Mwobobia Nkuraaru v Jacob Mwiti* (2015) eKLR held as follows:

> " The subject matter of the suit herein being land, the question which arises is whether given the fact that the plaintiff's claim is not a liquidated one, the entry of interlocutory judgment in favour of the plaintiff had any basis in law. Concerning this question, it is noteworthy that the law contemplates that interlocutory judgment could only be entered in respect of the liquidated claim only."

14. In light of the decisions of the court in the aforementioned cases, interlocutory judgement in the strictest sense may not apply in land matters as they are not liquidated claims. However, I have noted that it is the deputy registrar who keeps court records and she is normally the appropriate person to certify whether the appropriate pleadings have been filed or placed in the court record or not. To this end when a party seeks interlocutory judgment before court the court resorts to her input. In ordinary liquidated claims interlocutory judgment is entered. In other matters such as land matters, the practice in the past, even for the court, is to mark that milestone finding that no appearance or defence has been filed by indicating that interlocutory judgment has been entered, but only to the extent that the plaintiff is allowed to set down his claim for hearing. Such a certification makes the court's work easier and there would be no need of wasting time at the hearing over whether a defendant's documents are filed or not. In this post covid-19 pandemic era where filing by way of electronic mail and non-cash methods of payment for pleadings have been adopted, the certification makes much sense. Indeed, the applicant can only be certain of their position once the keeper of the court record makes the proper certification. A deputy registrar cannot therefore be blamed for indicating, especially at the court's request, that no appearance or defence has been filed. The only minor omission in this particular case is that she did not indicate that the judgment was only to the extent that the applicant was allowed to set down his claim for hearing.

15. A perusal of the record including the plaintiffs' response to the instant application shows that though a defence was not filed, summons were not prepared or served. The plaintiffs do not maintain that they served them, or that there is an affidavit of service filed. It is therefore this court's view that the

interlocutory judgement entered on March 3, 2022 was not properly entered as there was no affidavit of service of summons.

16. On the second issue of whether the suit should be struck out for failure to serve the defendant with summons to enter appearance, the defendant argued that the plaintiffs did not take out summons to enter appearance and therefore the Plaint should be struck out. The plaintiffs on the other hand argued that the defendant had already actively participated in the proceedings and he was aware of the matter and so he cannot seek to have the suit dismissed for failure to extract and serve the summons to enter appearance.

17. A perusal of the court record shows that there are no summons to enter appearance in the file but there is an affidavit of service sworn on 3/04/2018 and filed on May 2, 2018 which shows that the defendant was served with the application dated March 16, 2018 and a bundle of documents on March 29, 2018. A further perusal of the court record shows that the defendant filed a replying affidavit on May 16, 2018 and has generally participated in the proceedings as pointed out by the plaintiffs.

18. It is summons that call on a defendant to respond to a suit. That does not apply when a defendant voluntarily files a memorandum of appearance without having been served with summons. That is why it would be normal for an advocate to file a notice of appointment and defend and application without filing a memorandum of appearance. A notice of appointment is sufficient for an application in practice where summons to enter appearance have not been served, and it would be unfair for a court to compel filing of a memorandum of appearance where no summons have been served. The defendant's participation in the interlocutory applications before court does not divest the plaintiffs of their duty to serve summons upon him. Indeed, that should be replicated in all suits as it would not be known or assumed that after the interlocutory application is concluded the plaintiff will want to proceed further with the main claim against the defendant. And to underscore this fact, it has been evident that many a suit have been abandoned after applications for injunctions failed. The failure omission or neglect to serve summons should not be taken lightly or condoned by this court, and a defendant who has filed no defence has sufficient justification in the reason that no summons were served upon them. Perchance he files a defence in the absence of service of summons however, a defendant cannot take refuge afterwards in the non-service of summons for any purpose and he must be deemed to have waived his right to be served with summons and the hearing of the suit can proceed. Conduct of a defendant who participates extensively in a substantive hearing may disentitle him from pleading that those proceedings are null for want of service of summons, especially where they have demonstrated no prejudice to them. Such cases are those that are cited by the respondents herein, *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 Others* [2016] eKLR and Equatorial Commercial *Bank Ltd v Mohansons (K) Ltd* [2012] where the defendants had evidently entered unconditional appearance.

19. The court in the case of *Margaret Njoki Migwi v Barclays Bank of Kenya Limited* [2016] eKLR relied on the case of *Tejprakasha Shem Vs Petroafric Company Ltd & Two Others* NBI Elc Case No 703 Of 2011 where the court held that where a defendant gets notice of the suit against him through other means and participates in subsequent proceedings, no prejudice is caused and the delay in the issuance and want of service of summons should not warrant the dismissal of a suit.

20. The Court of Appeal in the case of Industrial and *Commercial Development Corporation v Sum Modez Industries Ltd CA* Civil Appeal No 229 Of 2001 held as follows:

> " Service of summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case".

21. It is this court's view therefore that the plaintiff's suit cannot be dismissed for failure to serve summons to enter appearance.

22. In conclusion, the defendant's application succeeds only partially and I therefore allow the notice of motion dated April 19, 2022 in terms of prayers no (1) and (3) only.

23. The plaintiffs shall serve summons as required upon the defendant and the suit shall be mentioned on December 1, 2022 for further directions.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU