



Muya (Suing as the Attorney for Flora Itumbi Ngei) v Ndaisi (Environment & Land Case 65 of 2016) [2022] KEELC 14850 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 65 OF 2016
CA OCHIENG, J
NOVEMBER 17, 2022**

BETWEEN

SARAH KALEKYE MUYA (SUING AS THE ATTORNEY FOR FLORA ITUMBI NGEI) PLAINTIFF

AND

WILLIAM KIVAI NDAISI DEFENDANT

RULING

1. What is before the court for determination is the Defendant's Notice of Motion Application dated the January 25, 2022 where he sought the following orders:
 1. That the Plaintiff filed herein be struck out with costs.
 2. That the costs of this application be provided for.
2. The Application is supported by the affidavit of William Kivai Ndaisi, the Defendant herein who deposes that the Plaintiff filed the suit against him in 2016 but has never been served with summons to date and the said summons have since expired from the date they were issued hence invalid. He contends that the suit is incompetent, bad in law and ought to be struck out with costs.
3. The Plaintiff opposed the application by filing a replying affidavit dated the April 11, 2022, where she avers that her previous advocates on record when the suit was instituted, duly served the Defendant with summons to enter appearance hence the Application is misconceived and an abuse of the court process. She insists that the burden of proof of service therefore lies with the Defendant. She states that the Defendant has actively participated in the prosecution of all the Applications filed herein and has equally filed Applications and there is no provision in law for striking out a suit for failure to serve summons to enter appearance. Further, Pursuant to Article 159(d) of *the Constitution* dismissing this suit on such grounds would be defeating the wheels of justice. She reiterates that the purpose of extraction and service of summons is to inform a party that an action has been instituted and by filing



a Memorandum of Appearance, it led all and sundry to believe that the Defendant was fully informed of the matter and was ready to proceed with the same. She reaffirms that the Defendant would suffer no prejudice if the orders sought are denied and the suit proceeds for hearing.

4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits as well as the submissions, the only issue for determination is whether the Plaintiff herein should be struck off with costs.
6. The Defendant in his submissions reiterated his averments and insisted that there is no valid suit before the court since Summons to Enter Appearance were not served upon him. To buttress his arguments, he relied on the following decisions: *Mae Properties Ltd vs Davidson Ngini* (2005) eKLR; *Felix Dominic Muriungi v Kenya Commercial Bank* [2005] eKLR and *National Bank of Kenya Limited v Syntax Printers Limited & 2 Others* [2006] eKLR.
7. There was no record of the Plaintiff's submissions in the Court file.
8. The law relating to issuance and service of summons to enter appearance is contained in Order 5 Rule (5) of the *Civil Procedure Rules* which states that:

Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with Sub rule (2) of this Rule.”
9. Further, Order 5 Rule (1) (7) of the *Civil Procedure Rules* stipulates thus:

When no application has been made under Sub rule (2) the court may without notice dismiss the suit at the expiry of 24 months from the date of issue of the original summons.”
10. It is trite law that where no summons to enter appearance are served within twelve (12) months, the suit abates. However, the validity of summons can be extended where such summons are issued but not served within 12 months from the date of the first issue. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit.
11. In the case of *Equatorial Commercial Bank Ltd v Mohan Sons (K) Ltd* [2012] eKLR the Court of Appeal, while citing another Court of Appeal decision *Nanjibhai Prabhudas & Company Ltd v Standard Bank Ltd* [1968] EA (K) 670 stated thus:

... 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.”
12. While in *Nanjibhai Prabhudas & Company Ltd v Standard Bank Ltd* [1968] EA (K) 670 the Court of Appeal held, *inter alia* that:
 - a. Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.



- b. Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing.” Sir Charles Newbold at page 681 and 682 stated:

“The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High court; and it was not until at a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

13. In this instance, the Defendant filed a Memorandum of Appearance dated the August 8, 2016 on August 10, 2016. He further filed two Replying Affidavits dated the February 1, 2017 respectively to oppose the Plaintiff’s Application for injunction dated the September 1, 2016. The Defendant proceeded to file a Defence dated the August 24, 2016 and later a Notice of Change of Advocates dated the October 2, 2017. From this highlight, it is evident that the Defendant having filed the Memorandum of Appearance signified his intention to defend this suit and he is deemed to have had proper notice of its institution. It is my considered view that his purported disowning of the Memorandum of Appearance and other documents filed insisting that he was not served with Summons to enter appearance is a technical gimmick that is intended to defeat the ends of justice, which technicality is abhorred by Article 159(2) (d) of *the Constitution*. To my mind, I find that the aim of the summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the said summons.
14. In the circumstances, I find the Notice of Motion Application dated the January 25, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF NOVEMBER, 2022.

**CHRISTINE OCHIENG
JUDGE**

