



**Ngome & 4 others (All suing on behalf of themselves and the other members of Moonlight Self Help Group) v Macdonald and 55 others (Environment & Land Case 53 of 2018) [2022] KEELC 14719 (KLR) (11 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14719 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 53 OF 2018**

**MAO ODENY, J**

**NOVEMBER 11, 2022**

**IN THE MATTER OF LAND PARCEL NOS: 313/2, 313/3, 336, 337, 464, 473, 494, 495, 1090-1099, 1598, 1600-1627, 1881-1883, 547,500 - 506, 1035, 1036, 3015-3074,5318-5375/III/MN [AND ALL SUBDIVISIONS CREATED FROM 313{2}, 313{3}/III/MN THE MOTHER TITLES**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 123 HECTARES OF THE ABOVE PARCELS OF LAND BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**JACKSON MWANGOME NGOME ..... 1<sup>ST</sup> PLAINTIFF  
ELIAS CHANGA ..... 2<sup>ND</sup> PLAINTIFF  
HASSAN HAMIS HASSAN ..... 3<sup>RD</sup> PLAINTIFF  
FUAD SAID ..... 4<sup>TH</sup> PLAINTIFF  
PRISCA CHIPANDE ..... 5<sup>TH</sup> PLAINTIFF  
ALL SUING ON BEHALF OF THEMSELVES AND THE OTHER MEMBERS OF  
MOONLIGHT SELF HELP GROUP**

**AND**

**ROBIN STAURT MACDONALD AND 55 OTHERS ..... DEFENDANT**

**RULING**

1. The Plaintiffs instituted this suit on 14<sup>th</sup> March 2018 by way of Originating Summons where they sought orders that inter alia that they be declared bona fide owners of the land parcel Nos: 313/2,



313/3, 336, 337, 464, 473, 494, 495, 1090-1099, 1598, 1600-1627, 1881-1883, 547,500-506, 1035, 1036, 3015-3074,5318-5375/III/MN (and all subdivisions created from 313(2), 313(3)/III/MN all situated at Barani, Kikambala within Kilifi County (the suit properties), by virtue of adverse possession; and a mandatory injunction against the Defendants over the suit properties pending the hearing and determination of this suit.

2. On 3<sup>rd</sup> September 2021, the 29<sup>th</sup>, 30<sup>th</sup>, 37<sup>th</sup>, 46<sup>th</sup> 47<sup>th</sup>, 48<sup>th</sup> and 49<sup>th</sup> Defendants filed a Notice of Motion seeking to strike out the Originating Summons on the ground that the summons had expired as at the time the same were served by way of substituted service. On 30<sup>th</sup> September 2021 the 6<sup>th</sup>, 24<sup>th</sup>, 43<sup>rd</sup>, 54<sup>th</sup> and 55<sup>th</sup> Defendants filed a similar application premised on the same grounds.
3. The 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> Defendants (Nahis Moosa Umar, Uhsam Nahid Moosa and Imran Nahid Moosa) filed another application dated 25<sup>th</sup> October 2021 seeking orders to strike out the suit against them for not disclosing any reasonable cause of action. To these Defendants, they did not own any of the mentioned suit properties and that no evidence has been placed to show that they have any interest in any of the suit properties.
4. The Plaintiffs moved the Court once more vide a Notice of Motion application dated 22<sup>nd</sup> October 2021 under Order 5 rule 2 (1) (2) of the Civil Procedure Rules and Articles 50, 21,22,23,48,159, and 259 for orders *inter alia*, that the court be pleased to extend time within which summons to enter appearance ought to have been served and that the summons served to the Defendants be deemed as properly served within time.
5. On 25<sup>th</sup> October 2021, this Court directed that all the pending applications be determined together. Parties were also directed to file their respective responses to the relevant applications.
6. Counsel agreed to canvas the applications by way of written submissions which were duly filed.

### **Plaintiffs' Submissions**

7. Counsel submitted that upon filing the Originating Summons dated 14<sup>th</sup> March, 2018 the Plaintiffs tried to trace the Defendants so as to effect service of summons without any success and that the court gave an order dated 20<sup>th</sup> February, 2019 whereby the Plaintiffs were granted leave to serve the Defendants by way of substituted service but the Plaintiff could not raise funds to do so. Further that Plaintiffs had to look for money from 2019 to March, 2021 whereby they managed to serve the summons by substituted service on 15<sup>th</sup> March, 2021.
8. It was counsel's submission that the failure to get funds to pay for the substituted service advert was beyond the control of the Plaintiffs but that the Plaintiffs have a genuine grievance which ought to be heard by the court. Counsel further submitted that upon being served with the summons, the Defendants entered appearance and started using the police to evict the Plaintiffs and applied for the case to be struck out on the ground that summons were served out of time.
9. Counsel identified the following issues for determination; -
  - a. Whether the time within which summons to enter appearance ought to be extended and the same be deemed as properly served within time.
  - b. Whether the applications for striking the Originating Summons are merited in the circumstances of this case.
  - c. Whether the court should maintain the existing status quo pertaining to the suit property pending the determination of the suit.



10. On the first issue of extension of time, counsel relied on Order 50 rule 6 of the [Civil Procedure Rules](#), and submitted that enlargement of time can be granted even where the application is made after the expiration of the validity period as long as a party demonstrates plausible reasons to enlarge time.
11. Counsel relied on the cases of [Jonathan Kaposhi v Colleta Mbatha Maweu & 4 others](#) [2021] eKLR; [EACC v Shaibu Hamisi Mgandi & another; Commissioner of Lands \(Interested Party\)](#) [2020] eKLR; and [KCB v Ann Kajuju](#).
12. Further, counsel submitted that since the Defendants have already entered appearance, there were estopped from challenging the issue of service of summons and relied on the case of [Morrigan Mercantile Co. Limited v Twitchings](#) [1976] 1 QB 225 cited in [John Mburu v Consolidated Bank of Kenya](#) [2015] eKLR.
13. On the issue whether the status quo of the suit properties should be maintained, counsel submitted that since the suit is one seeking orders of adverse possession, the Defendants should be restrained from interfering with the properties and cited the cases of [Carol Silcock v Kassim Sharrif Mohamed](#) [2013] eKLR; [Ukingoni Farm Limited v Ngendalel Koiyo Farm Ltd](#) [2015] eKLR.
14. Counsel urged the court to dismiss the application with costs and order for status quo to be maintained.

#### **29th, 30th, 37th, 46th 47th, 48th And 49th Defendants' Submissions**

15. In support of the Defendants' application dated 3<sup>rd</sup> September 2021 and in response to the Plaintiff's application dated 22<sup>nd</sup> October 2021, the 29<sup>th</sup>, 30<sup>th</sup>, 37<sup>th</sup>, 46<sup>th</sup> 47<sup>th</sup>, 48<sup>th</sup> and 49<sup>th</sup> Defendants' counsel submitted that Order 5 of the Civil Procedure Rules provides that summons are valid for 12 months in the first instance and that a court may extend such validity from time to time. That where no application has been made to extend such validity, the court may without notice dismiss the suit at the expiry of 24 months.
16. Counsel further submitted that such application for extension must however be made within the life of the original summons and relied on the cases of [John Chigoya Njogu & another v James Fredrick Miriuki & others](#) ELC No. 667 of 2013 [2021] eKLR; and [Elegant Colour Labs Nairobi Limited v Housing Finance Company \[K\] LTD & others](#) [2010] eKLR.
17. With regards to the Plaintiffs' application dated 29<sup>th</sup> September 2021, counsel submitted that the prayers sought therein are too vague and lacking in specifics but general unfounded allegations against the Defendants and cited the case of [Giella v Cassman Brown Co. Limited](#) [1973] EA 358, and that the plaintiffs have not met the conditions for grant of injunctions.

#### **28th and 31st Defendants' Submission**

18. Counsel for the 28<sup>th</sup> and 31<sup>st</sup> Defendants submitted an order of injunction cannot issue to the Plaintiffs as they have failed to satisfy the conditions.
19. On the application to extend the summons counsel submitted that the application for extension had to be filed before the summons expired and relied on the cases of [Josphat Kamau Gatimu & 5 others v Peter Gatimu Kanyonyo & 8 others](#) in ELC No. 125 of 2016; and in [Udaykumar Chandulal Rajani & 3 others v Charles Thaiti](#) Civil Appeal No. 85 of 1996 [1997] eKLR.

#### **53rd Defendants Submissions**

20. This Defendant like the aforementioned Defendants was of the view that an application for extension of summons could only be made while the original summons was still valid. Reliance was placed on



the cases of *Elegant Color Labs Nairobi Limited v Housing Finance Company [K] Limited & 2 others* [2010] eKLR cited in Civil Appeal No. 25 of 2019 *Brenda Karanja v Mweki Dominic* [2021] eKLR; and *Zakaria Somi Nganga v Kenya Commercial Bank Limited & 3 others* [2008] eKLR.

#### **41st And 42Nd Defendant's Submissions**

21. Similarly, counsel for the 41<sup>st</sup> and 42<sup>nd</sup> Defendants argued that there was no valid summons to be extended and relied on the case of *Udaykumar Chandulal Rajani & 3 others v Charles Thaitbi* [*supra*].
22. As for the application dated 29<sup>th</sup> September, 2021, counsel submitted that the application was spent.

#### **6th, 20th, 24th, 43rd, 54th, And 55th Defendants Submissions**

23. Counsel cited Order 5 rule 1 of the *Civil Procedure Rules* and the case of *Brenda Karanja v Mweki Dominic* [2021] eKLR, and submitted that the Originating Summons was defective as the Plaintiffs purported to effect service upon the Defendants on summons which had already expired.
24. On whether the Plaintiffs were entitled to the orders of temporary injunction, counsel submitted that the Plaintiffs have failed to meet the criteria established in *Giella v Cassman Brown* [*supra*].
25. Counsel further relied on the case of *Elegant Color Labs Nairobi Limited v Housing Finance Company [K] Limited & 2 others* [*supra*], the Defendants submitted that the Plaintiff's act could not be regularized by filing an application for extension of summons.

#### **Analysis and Determination**

26. I have considered the applications, responses and submissions by the respective parties and find that the following are the issues for determination.
  - a. Whether this court can extend time required for service of summons at this stage.
  - b. Whether the Originating Summons can be struck out for failure to serve valid summons.
  - c. Whether there is a reasonable cause of action against the 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> Defendants.
  - d. Whether a mandatory injunction may be issued at this stage.
27. It is not in dispute that the summons to enter appearance were issued on 14<sup>th</sup> March 2018 and served on 15<sup>th</sup> March 2021 by way of substituted service; approximately 2 years from when the same lapsed.
28. Order 5 rule 2 of the *Civil Procedure Rules* provides as follows: -
  2. Duration and renewal of summons (Order 5, rule 2.)
    1. A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.
    2. Where summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so
    3. Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.



4. Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.
  5. An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.
  6. As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.
  7. Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.
29. It is trite that summons to enter appearance shall be valid in the first instance for twelve months and the court has discretion to extend the validity of summons from time to time if satisfied it is just to do so.
30. There are two schools of thought on the question whether expired summons to enter appearance can be revived through an application such as the Plaintiffs' application dated 22<sup>nd</sup> October 2021. On the one hand, the decisions cited by the Defendants represent the school of thought that such summons cannot be revived. On the other hand, the decisions cited by the Plaintiffs represent the opposite view.
31. The provisions of Order 5 rule 2 were explained in the case of [\*Kale Foundation v Alpharma Limited & another\*](#) [2021] eKLR which I have quoted extensively to capture the gist of Order 5 rule 2 as follows: -
- “ 11. To my mind, the provisions of Order 5 Rule 2 are couched in permissive terms so far as the time within which to apply is concerned and the only apparent time limitation in the Rule is found in subrule 7 which states
- “Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”
- Reading that subrule together with subrules 1 and 2, it appears that whether or not an application has been made to extend the life of the summons, the suit does not become liable for dismissal after 12 months (which is the period of validity of original summons) but only after 24 months have lapsed since issuance of the original summons.
12. And even then, the permissive phrase used is that the court “may without notice dismiss the suit”. Therefore, read together the rules appear to anticipate that a suit may well continue to subsist outside the 24 months since issuance of original summons, even where no application in terms of sub-rule 2 has been made. And that a plaintiff in such a case could potentially apply, subject to subrules 5 and 6 and the general rules on extension of time, for the extension of summons “and the court may extend the validity of the summons from time to time if satisfied it is just to do so.” In sum, the provisions give a wide discretion to the court.
13. It appears to this court that the trial court read the provisions of Order 5 Rule 2 of the [\*Civil Procedure Rules\*](#) in a rather technical manner and applied



them more strictly than the language of the Rule itself anticipates. This court while hastening to affirm that the rules of procedure serve a purpose and ought to be complied with, agrees with the Appellant's assertion that such a technical approach appears to run afoul of the command in Article 159(2) (d) of the Constitution for courts to eschew undue regard to technicalities. In this instance, the lower court appears to have effectively constricted its otherwise wide discretion donated under Order 5 Rule 2.

14. The Court has power under Section 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules to extend time for the doing of any act notwithstanding that the application for extension is made after the time for the doing of the act has lapsed. In the application before the lower court, the Appellant had in my view correctly invoked the provisions of Order 50 Rule 1 and included a prayer for extension of the time for applying. In the ruling appealed from, no direct reference was made to the general power of the court to extend time under section 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules, but the Court appeared to accept the reasons given for the delay in making the application.
15. This court is persuaded that under these provisions, the life of expired summons can be extended in proper cases. The provisions allowed the Appellant in this case the leeway to apply for the extension of time to apply for the extension of the life of the expired summons and the Appellant's motion ought to have been allowed as the lower court had been otherwise satisfied with the reasons given for the late application which reasons also logically applied to the actual prayer for extension of the validity of summons; the insured had not been traced within the period required to execute vital pleadings and witness statements to accompany the summons to enter appearance intended to be served. Indeed, the verifying affidavit and key witness statements on record by the date of the motion were executed by employees of Heritage Insurance Co. and not the Plaintiff in whose name the suit had been brought. It is evident that the lower court's failure to consider the merits of the prayer for extension of the validity of summons stemmed from an erroneous apprehension of its discretion under the rules."
32. Have the Plaintiffs justified the revival of the summons and to deem them as having been properly served? I find the reasons advanced by the Plaintiffs for the late service of the summons tenable for consideration of extension of validity of the summons. Besides, the Defendants already entered appearance in this matter and therefore the Plaintiffs should be accorded the right to be heard on merit. The Defendants will not suffer any prejudice if the summons served on them are deemed as having properly served.
33. On striking out of pleadings, the Court of Appeal in Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR had this to say: -

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the



court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.”

34. The 25<sup>th</sup>, 26<sup>th</sup> and 27<sup>th</sup> Defendants’ application seeking to strike out the Plaintiffs’ case against them was unprosecuted. The Defendants failed to file any submissions despite this court’s directions that the applications herein be heard by way of written submissions. The Defendants also have a recourse to costs if the case against them fails.
35. Similarly, I note that parties vehemently canvassed the Plaintiff’s application dated 29<sup>th</sup> September 2021. Looking at the prayers listed thereon, the Plaintiffs are seeking that status quo be maintained pending the hearing of the application; that pending the hearing and determination of the application, police officers be restrained from harassing the Plaintiffs; and that the court be pleased to give a hearing date of application dated 2<sup>nd</sup> May 2018. As it is, the application is spent at this stage as the orders sought were interlocutory in nature.
36. The Plaintiffs’ application dated 14<sup>th</sup> March 2018, sought inter alia, mandatory injunctions restraining the Defendants and their agents from destroying houses, threatening the Plaintiffs with evictions and harm and or trespassing onto the suit properties pending the hearing and determination of the suit.
37. It is settled that a mandatory injunction is different from a prohibitory injunction in the sense that while in a prohibitory injunction the Applicant must meet the principles set out in the case of *Giella v Cassman Brown & Co. Ltd (supra)* where the applicant must establish the existence of a prima facie case with high chances of success, and that he will suffer irreparable loss/damage which cannot be adequately compensated by an award of damages if the injunction is not granted, and further that the balance of convenience tilts in his favor.
38. In an application for a mandatory injunction an Applicant must in addition, establish the existence of special circumstances. Furthermore, an Applicant for mandatory injunction must prove his case on a standard higher than the standard in prohibitory injunctions.
39. In the case of *Kenya Breweries Ltd & Another v Washington O. Okeya* [2002] eKLR, the Court of Appeal stated as follows on mandatory injunctions: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
40. I have perused the Plaintiffs’ application and affidavit in support thereon. I am not satisfied that there are any special circumstances to grant a mandatory injunction at this stage. That notwithstanding, it is not disputed at this stage that the Plaintiffs are residents on the suit properties; their claim is for adverse possession. This being a land matter, it is prudent therefore that the status quo be maintained pending the hearing and determination of this suit on merits.
41. I therefore find no basis to strike out the Originating Summons dated 14<sup>th</sup> March 2018. The summons to enter appearance served upon the Defendants by way of substituted service is deemed as properly



served and Status quo of the suit properties be maintained pending the hearing and determination of the Originating Summons. Parties to fast track the hearing of this suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the *Public Order No. 2 of 2021* and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the *Civil Procedure Rules*.

