



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 610 OF 2015

ERNEST NGUGI KARUGA.....1ST PLAINTIFF

JANE NJERI GEORGE.....2ND PLAINTIFF

VERSUS

JAMES MBUGUA MACHARIA.....1ST DEFENDANT

ROSE WAITHERA GITAHI.....2ND DEFENDANT

RULING

1. There are two applications coming up for determination. The notice of motion dated 23rd May 2019 is brought under order 24 rule 3(2), order 5 rule 1 and 2, order 2 rule 15, of the Civil Procedure Rules 2010, sections 1A, 1B and 3A of the Civil Procedure Act (CAP 21) Laws of Kenya and all enabling provisions of the law.

2. It seeks orders:-

- 1. That the suit be struck out for failure to extract and serve summons to enter appearance upon the defendants.***
- 2. That further and/or in the alternative to prayer 1 above a declaration do issue that the suit by the 1st plaintiff has abated.***
- 3. That the costs of this application and the suit be awarded to the defendants.***

3. It is supported by the affidavit of James Mbugua Macharia the 1st defendant/applicant sworn on the 23rd May 2019.

4. The application is opposed. There are grounds of opposition filed by the 2nd plaintiff/respondent dated 27th January 2020.

5. The Notice of Motion dated 24th May 2019 is brought under orders 5 rule 2 and 51 rule 1 of the Civil Procedure Rules and 2 Section 3A of the Civil Procedure Act.)

6. It seeks orders:-

- 1. That the honourable court be pleased to order for the issuance of fresh summons to enter appearance against the defendants herein.***
- 2. That the costs of this application be provided for.***

7. The grounds are on the face of the application and are set out in paragraphs (a) to (f).

8. The application is supported by the affidavit of Haggai Okeyo, Advocate of the plaintiffs/applicants sworn on the 24th May 2019.

9. It appears this application is not opposed. On the 28th January 2020, the defendants/respondents sought and were granted leave to put in their grounds of opposition within 14 days. By the time of writing this ruling there are no grounds of opposition on record.

10. On the 28th January 2020 the court directed that the two applications be heard together. It also directed that the parties do file and exchange written submissions in respect of the two applications.

The Plaintiffs/submissions

11. They are dated 24th April 2020. They raise three issues for determination;

(a) Whether the suit should be struck out for failure to extract and serve summons to enter appearance and whether the same should be issued as per the application dated 24th May 2019.

(b) Whether the suit by the 1st plaintiff has abated.

(c) Generally whether the applications should be granted as prayed.

12. The delay in extracting and serving the summons to enter appearance was not inordinate but was as a result of the circumstances explained and the defendant was aware of the suit.

13. They have put forward the case of **Mary Wariara Mbugua vs Chase Bank Kenya Ltd [2018] eKLR**. The plaintiffs/applicants ought to be given an opportunity to be heard as the unfortunate circumstances behind the delay to extract summons to enter appearance are genuine, innocent and excusable. They have also put forward the case of **Maheshkumar Chhotabhai Patel & Another vs Bank of India & 3 Others [2014] eKLR**.

14. Parties ought to be heard on substantive claim/justice as provided for under Article 159 (2) of the Constitution of Kenya 2010, as opposed to being locked out of the seat of justice on procedural technicalities. They have relied on the cases of **Githere vs Kimungu 1976-85 EA 101**; **Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2013] eKLR**; **Stephen Boro Gitiha vs Family Finance Building Society & 3 Others [2009] eKLR**; **Kenya Commercial Bank Limited vs Kenya Planters Cooperative Union [2010] eKLR**; **Philip Chemwolo vs Another vs Augustine Kubede [1982 -88] KAR 103**. They pray that the notice motion dated 24th May 2019 be allowed and that of 23rd May 2019 be dismissed.

15. The suit against the 1st plaintiff has not abated as the cause of action survived the 1st plaintiff's death. The 2nd plaintiff is one of the administrators of the 1st plaintiffs deceased estate pursuant to interim grant issued in Kiambu High Court P & A cause No 36/2019. The 2nd plaintiff ought to be allowed to prosecute the matter both in her individual right as the 2nd plaintiff and on behalf of the estate of the deceased.

16. The court is clothed with jurisdiction to extend the time for substitution from time to time when good reasons are advanced under order 24 rule 3 of the Civil Procedure Rules. They have put forward the case of **Mboya Nzulwa vs Kenya Power & Lighting Co. Ltd [2005] eKLR**; **Kiai Mbaki & 2 Others vs Gichuhi Macharia & Another [2015] eKLR**; **Tana & Athi Rivers Development Authority vs Jeremiah Kimigo Mwakio & 3 Others [2015] eKLR**; **Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**.

17. The court ought to grant the plaintiffs an opportunity for their case to be heard on merits. The defendants have not shown what prejudice they stand to suffer if this suit is allowed to proceed on its merits. They pray that the notice of motion dated 23rd May 2019 be dismissed and the one dated 24th May 2019 be allowed.

The Defendant's Submissions

18. They are dated 3rd August 2020. They raise two issues for determination:-

(i) Whether the suit should be struck out for failure to extract and serve summons to enter appearance.

(ii) Whether the suit by the 1st plaintiff has abated.

19. They have relied on order 5, rule 1(1) and (5) of the Civil Procedure Rules, 2010 and the case of **Tana Trading Limited vs National Cereal & Produce Board [2015] eKLR**. This suit was filed in 2015. The plaintiff is yet to serve summons to enter appearance upon the defendant five (5) years after the filing of this suit. The long delay is inconsistent with the mandatory provisions of order 5 rule 1(1) and (5) of the Civil Procedure Rules, 2010. They have put forward the case of **Mobile Kitale Service Station vs Mobil Oil Kenya Ltd & Another [2004] eKLR**; **Anthony Wechuli Odwisa vs Alfred Khisa Munyanganyi [2006] eKLR**. They pray that the suit be declared incompetent for failure by the plaintiffs to extract and service summons to enter appearance.

20. This suit has abated upon the death of the 1st plaintiff. The 2nd plaintiff was introduced to this suit by an amended plaint dated 14th July 2015. No application for joinder of parties enjoining the 2nd plaintiff to this suit has ever been made. They relied on order 1 rule 10 of the Civil Procedure Rules and the cases of **Temple Point Resort Limited vs Accredo AG & 5 Others [2018] eKLR**; **Kiarie Waweru Kiarie vs Moses Kanyiru & 2 Others (2018) eKLR**.

21. The 2nd plaintiff does not have the *locus standi* to seek any reliefs against the defendants over the suit property. There is no privity between the 2nd plaintiff and the defendants. The suit property did not form part of the matrimonial property hence did not require consent.

They have put forward the case of **Jaletahi African Adventures Limited & Another vs Christopher Michael Lacklay [2017] eKLR**. The suit by the 1st plaintiff has abated because the 2nd plaintiff has not made an application to be enjoined in this suit as a plaintiff and that she lacks the *locus standi* to seek for reliefs against the defendants over the suit property. They pray that the plaintiff's Notice of Motion dated 24th May 2019 be dismissed and the defendants notice of motion dated 23rd May 2019 be allowed.

22. I have considered the two applications, the affidavits in support and the responses. I have considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

(i) Whether the suit should be struck out for failure to extract and serve summons to enter appearance.

(ii) Whether the suit by the 1st plaintiff has abated.

(iii) Who should bear costs of this application?

23. **Order 5 rule 1** of the Civil Procedure Rules 2010 provides that:-

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”

24. I have gone through the court record. On 30th June 2015, the 1st plaintiff filed this suit against the defendants seeking a permanent injunction and general damages for trespass among other prayers. He also filed a notice of motion dated 30th June 2015 seeking temporary injunction against the said defendants. On the 10th July 2015 the defendants filed a replying affidavit dated 10th July 2015 and a preliminary objection dated 9th July 2015. The defendants participated in the application which culminated in the ruling dated 30th January 2019.

25. From 10th July 2015, the defendants were aware of the existence of this suit. In the case of **Mary Wariara Mbugua vs Chase Bank Kenya Ltd [2018] eKLR** it was held thus:-

“It is therefore a mandatory requirement that summons be served in the manner stipulated above and failure to serve the suit abates. However, this presumes that the defendant has not entered appearance and/or participated in the proceedings. In the instant case, the defendant entered appearance vide the notice of appointment of an advocate dated 9th November 2015 and filed in court on 11th November 2015. Thereafter they participated in the hearing of the notice of motion dated 22nd October 2015. If the suit therefore abated as they have submitted, due to non-service of the summons within 30 days as argued, then there is no suit within which they have filed this application.....”

In the given circumstances, I find that the applicants by conduct of actively participating in this matter led all sundry to believe that they are fully informed of the matter and were ready to proceed with the same. The striking gout of the suit at this state for want of extraction and service of summons will not be in the interest of justice. Even if the court were to hold that there has been failure on the part of the respondent, parties having come this far, it will only be in the interest of justice to order that the summons be exacted and served. On that ground I will not allow prayer (1) of the application.”

26. It is not in dispute that the plaintiffs failed to extract summons enter appearance. The same was not intentional. They did not intend to disregard the rules of procedure. I find that no prejudice will be occasioned to the defendants if these orders as granted they can be compensated by way of costs. In the case of **Philip Chemwolo & Another vs Augustine Kubede [1982]-88] KAR 103**, the court held that:-

“Blunder 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 heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. This court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

I am satisfied that the explanation given by the plaintiff as to the failure to extract summons to enter appearance in time warrants this court to exercise its discretion in her favour.

27. It is not in dispute that as at 23rd November 2017 the defendants were made aware that the 1st plaintiff had passed on. The 2nd plaintiff intimated that she would be proceeding with the case. There is evidence that the 2nd plaintiff is one of the administrators of the Estate of the 1st plaintiff pursuant to a grant issued in Kiambu High Court P & A Cause No 36 of 2019. I am also aware that this court has jurisdiction to extend time for substitution when good reasons are given under order 24 rule 3 of the Civil Procedure Rules.

28. I find that the plaintiff's suit ought to be heard in merits. I rely on the case of **Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others [2013] eKLR**.

“The right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the Rule of Law. This is why every if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality”.

29. In conclusion, I find no merit in the defendants notice of motion dated 23rd May 2019 and the same is dismissed with no orders as to

costs. The notice of motion dated 24th May 2019 is allowed in the following terms.

(a) That the plaintiff/applicant will extract and serve summons to enter appearance upon the defendants/respondents within fourteen (14) days from the date of this ruling.

(b) That the defendants/applicants will thereafter file a statement of defence within the stipulated period under the law.

(c) That the plaintiff/applicant do expedite compliance with pretrial directions within three (3) months from the date of this ruling.

(d) That the defendants/applicants will have costs of the application.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of March 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

MS Kimani for the plaintiffs

No appearance for the defendants

Phyllis – Court Assistant