



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC NUMBER 212 OF 2015

ELEPHANT OILS MILLS.....PLAINTIFF

VERSUS

STEPHEN NJENGA NJOROGE.....1ST DEFENDANT

MAVJI KARSAN HIRANI.....2ND DEFENDANT

MWANALIMA MWINYIKAI.....3RD DEFENDANT

SALIM ALI NYAWA.....4TH DEFENDANT

KWALE COUNTY LAND REGISTRAR.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. This is a ruling in respect to the application dated 24th August 2020 by the 3rd and 4th defendants and supported by the affidavit of Joyce Chesaro, that sought the following orders:-

a) That this honorable court be pleased to grant leave to the 3rd and 4th defendants to serve the summons to enter appearance and amended written statement of defence and counterclaim upon the 1st defendant herein by way of substituted service.

b) That there be reissue of summons to enter appearance to the amended written statement of defence and counterclaim for service upon the 1st defendant.

c) That the said summons and amended written statement of defence and counterclaim to be served upon the 1st defendant by way sending by registered post to his last known postal address being P.O BOX 7578 Nairobi and advertising through the daily newspaper preferably Standard newspaper and/or affixing the same attached with a copy of the amended written statement of defence and counterclaim on the notice board of Mombasa Law Courts Land and Environment Civil Registry.

d) That costs of this application be provided for.

2. The 3rd and 4th defendants who are the applicants here in, filed an amended statement of defence and counterclaim dated 24th January 2020. They sought the services of a process server to effect service on the 1st defendant. That the said process server has been unable to trace the 1st defendant and the applicants adduced evidence to prove non service on the 1st defendant.

3. The plaintiff filed grounds of opposition dated 15th September 2020 in opposing the application. That the amended statement of defence and counterclaim had been filed out of time and without leave of court. More so the amended defence and counterclaim is irregular, defective and it's against the plaintiff only and not against the 1st defendant. The grounds further adduced that the 1st defendant had already been served with summons to enter appearance with the amended plaint by the plaintiff as directed by this court.

4. The 2nd defendant filed a notice of preliminary objection and a replying affidavit both dated 17th September 2020 in opposing the application. The 2nd defendant opposed the application on the grounds that; there is no provision in law for the applicants to issue summons in respect to the counterclaim, that the claim the applicants have against the 1st defendant can be raised in a separate action without

prejudicing the other parties.

5. That the applicants responded to the 2nd defendant's replying affidavit vide a supplementary affidavit sworn by the 3rd defendant as well as a response to notice of preliminary objection. The applicants stated that the plaintiff is the one who filed an amended plaint and served the applicants. That the applicants are entitled by law to also amend their defence if they so wish including the 1st defendant. That the plaintiff has not stated reasons why the 1st defendant should not be served with the amended defence and counterclaim.

6. The 5th and 6th defendants did not oppose the application.

7. The application was canvassed by way of written submissions. The plaintiff filed its written submissions on 4th November 2021. The plaintiff submitted to court that the application is an abuse of court process and it should be struck out. That the plaintiff already served the 1st defendant by way of substituted service provided by Order 5 of the Civil Procedure Rules but he has failed to enter appearance. That Order 5 does not provide for Summons to enter appearance to issue with a Counterclaim. That the amended defence and counterclaim has been filed without leave of court and default judgement has already been entered against the 1st defendant.

8. The applicants filed their written submissions on 24th November 2020 and submitted that the 1st defendant is a party to the suit and has a legal right to be heard and failure to serve him will shut him out of the hearing. That the defence and counterclaim filed on 9th June 2017 couldn't be served upon the 1st defendant as his whereabouts were unknown. That the court ought to grant the orders sought in the application. The applicants relied on the following authorities;

i. ELC No 12 of 2014 Kaniki Ndathi V John Njuki and 10 others

ii. HCCC No 107 of 2011 Simon Gichangi Mugo V Dr Pierre Asabi and 2 others.

9. I have considered the application, the notice of preliminary objection, replying affidavit in opposing it and the response to the same as well as the submissions in support and the submissions opposing the same and I have this issue to determine;

Whether leave should be granted to the 3rd and 4th to serve the 1st defendant with their amended defence and counterclaim by way of substituted service.

10. The law on amendment of pleadings is provided by Order 8 of the Civil Procedure Rules. Rule 2 provides a defendant with the right to amend his defence after being served with an amended plaint. It has not been disputed by the plaintiff that it filed an amended plaint on 2nd October 2019. The amendment triggered Order 8 which in turn led to the 3rd and 4th defendants to file their amended defence and counterclaim on 4th February 2020.

11. Order 5 Rule 17 (1) of the Civil Procedure Rules 2010 provides for the law on substituted service. The law allows Court to grant leave to a party to serve by substituted service if it's satisfied that for any reason the summons cannot be served in accordance to the Order 5. Sub rule 4 provides substituted service by advertisement as prayed for herein by the applicants.

12. This court on 13th October 2015 granted the plaintiff leave to serve summons to the 1st, 2nd, 3rd and 4th defendants by advertisement in one local daily newspaper and such substituted service which shall be deemed as proper service. The plaintiff went ahead to place an advert on the Daily Nation on 12th April 2016 and filed an affidavit of service to that effect.

13. The plaintiff has not disputed in court that it has benefited from the same process that the 3rd and 4th defendants are praying for. The plaintiff was granted orders to serve the defendants by way of substituted service. It's in the interest of justice that the applicants be granted the same prayers too.

14. In the interest of justice and for court to determine all the issues herein, the 1st defendant should be served with the 3rd and 4th defendants' amended defence and counterclaim. The 1st defendant despite not entering appearance and having interlocutory judgement entered against him, he has a right to be served with the amended pleadings.

15. The 3rd and 4th defendants filed an affidavit of service dated 12th October 2020 confirming that service had been effected on the defendants with the exception of the 1st defendant. They also filed an affidavit non-service dated 6th February 2020. The affidavit states that the process server could not locate the 1st defendant to effect service on him. That the efforts to trace the 1st defendant for service on the amended defence and counterclaim had been futile.

16. Order 5 rule 1 provides for the issuance of summons to a defendant to enter appearance and file defence. Summons have already been issued to all defendants herein including the 1st defendant by the plaintiff. The counterclaim in the amended defence is towards the plaintiff and not the 1st defendant.

17. Order 5 Rule 3 states that every summons shall be accompanied by a plaint. The rules are silent on summons accompanying a counterclaim, however the power to issue summons extends to reissuing. Therefore, there is nothing that stops this court from exercising its discretion to reissue summons. Nonetheless, the applicants on a balance of probabilities have not proved to this court why it should reissue summons to accompany a counterclaim.

18. I find the application dated 24th August 2020 to have merit and I allow it to the following extent:-

a) The applicants are granted leave to serve upon the 1st defendant with the amended defence and counterclaim dated 24th January 2020 way of substituted service by advertising in one local daily newspaper with national wide circulation.

b) Cost shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 3RD DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE