



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 949 OF 2014

DANSON NDEGWA Suing as the Chairman of

JACOB CHEGE DRIVE NEIGHBOURS ASSOCIATION...PLAINTIFF

VERSUS

RAPHAEL ANSELMINA RUGGIERI

TERESA CARELLA

DAVIDINA PAPPALAROLO Sued as the officials of

THE DAUGHTERS OF ST. ANNE.....DEFENDANTS

RULING

The Defendants filed the application dated 18/9/2019 seeking to have this suit dismissed for the Plaintiff's failure to; take out and serve summons to enter appearance upon the Defendants; comply with the court order of 25/7/2018 to take out and serve summons to enter appearance upon the Defendants; and, failure to take steps to prosecute the suit for more than a year. The Defendants contended that the suit had been overtaken by events.

The application was made on the grounds that the validity of the summons which were issued on 28/8/2014 was not extended before they expired and that on 25/7/2018 the court ordered the Plaintiff to serve the summons within 30 days which the Plaintiff failed to do. The other ground was that the suit had been overtaken by events since the Plaintiff sought an injunction in its amended plaint filed on 22/7/2014 to restrain the Defendants from interfering with the Plaintiff's access road serving land reference numbers 1160/347 and 348 and also restrain the Defendants from constructing a school within the environs of the suit premises yet in fact the Defendant had already constructed the road and the school which became operational in January 2015.

The application is supported by the affidavit of Leonard Anyonje who deponed that the school and already been constructed and attached photographs showing the construction. He attached an affidavit sworn by Sister Birikti Tewoldebrehan Hagos on 17/9/2014 in which she deponed that the Defendants obtained the necessary approvals from the National Environment Management Authority and deponed that the school for under privileged children was to be opened in January 2015. She averred that the Nairobi City Council had assisted in the construction of the road to the suit premises which by then had been completed.

Joseph Njenga Kiarie the advocate having conduct of this matter on behalf of the Plaintiff swore the replying affidavit in opposition to the application. He averred that contrary to the Defendants' contention, summons to enter appearance were issued by this court on 28/8/2014 and served on the Defendants together with the plaint but that they declined to sign. He annexed a copy of the summons to enter appearance issued on 28/8/2014. He deponed that the advocate in his firm who previously handled this matter erroneously filed the application dated 5/2/2018 seeking issuance of fresh summons under the mistaken belief that the initial summons issued on 28/8/2014 expired before being served on the Defendants. He deponed that after this court issued orders directing the Plaintiff to take out fresh summons and serve upon the Defendant, the advocate realized on perusing the court file that the initial summons had been issued on 28/8/2014 and actually served on the Defendants personally. He added that based on this realization, the advocate did not take out other summons as directed by the court on 5/2/2018.

He urged that this matter was last in court on 26/1/2020 for the hearing of the Defendants' application dated 18/9/2019 when the court directed the Plaintiff's advocate to put in a formal application to cease acting for the Plaintiff. He averred that the failure to prosecute the matter from 23/3/2020 was occasioned by the fact that the Honourable Chief Justice issued a press release directing that court activities would be scaled down throughout the country to prevent further spread of the covid-19 or the corona virus. He averred that his efforts to access the registry to take a date for prosecution of the application to cease acting which he filed on 5/3/2020 proved futile. He explained that

upon service of that application on the Plaintiff the Plaintiff explained that he had not been in communication with the advocates because he was bereaved and expressed his interest in prosecuting the matter. He urged the court to allow the Plaintiff to prosecute his matter since he had a valid claim against the Defendants.

The issue for determination is whether the court should grant the orders sought in the application and dismiss the suit. The court notes from the record that a ruling was delivered by the Deputy Registrar on 25/7/2018 allowing the Plaintiff to take out summons to enter appearance and serve them on the Defendants within 30 days.

The court has perused the file and found that summons to enter appearance were issued on 28/8/2014 without any indication that service was ever effected on the Defendants as the Plaintiff's advocate claimed in his replying affidavit. The advocate ought to have attached an affidavit of service confirming that indeed the summons to enter appearance were served on the Defendants. Upon discovery that the summons had been served before they expired, the Plaintiff's advocate could have written to the court clarifying this issue and informed the Defendants that indeed service was effected in 2014 or whichever date the Plaintiff claims that it was done. The Defendants' contention that this suit has been overtaken by events since the road was constructed and the school is operational was not controverted by the Plaintiff. This is what the Plaintiff sought to restrain the Defendants from doing in the amended plaint and there is therefore nothing to go to trial.

The firm of Joseph Kiarie and Company Advocates have not withdrawn the application they filed on 5/3/2020 seeking to cease acting for the Plaintiff for lack of instructions. The Plaintiff has lost interest in the suit.

The application dated 18/9/2019 is allowed in terms of prayers 3 and 4.

Delivered virtually at Nairobi this 31st day of May 2021.

K. BOR

JUDGE

In the presence of: -

Ms. S. Nelima holding brief for Mr. J. Kiarie for the Plaintiff

Mr. Leonard Anyonje for the Defendants

Mr. V. Owuor- Court Assistant