Mwangi & 2 others v Catherine Wangui Mwangi & Samuel Maina Njaria (Trustees of Casavale Enterprise) & another (Environment & Land Case 348 of 2015) [2022] KEELC 14611 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14611 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 348 OF 2015

OA ANGOTE, J

NOVEMBER 3, 2022

BETWEEN

MARY MBAIKA MWANGI ..... 1ST PLAINTIFF

LABAN NDWIGA MUKANDI ..... 2ND PLAINTIFF

CHRISTOPHER KAGUNDA KIAMA ..... 3RD PLAINTIFF

AND

CATHERINE WANGUI MWANGI & SAMUEL MAINA NJARIA (TRUSTEES OF CASAVALE ENTERPRISE) ..... 1ST DEFENDANT

DRUMVALE FARMERS CO-OPERATIVE SOCIETY ..... 2ND DEFENDANT

RULING

1. Before this court for determination are two applications. The first application was filed by the 1st Defendant on 19th February 2021, seeking for the following orders:

    a. That this honourable court be pleased to dismiss the suit herewith for want of summons to enter appearance.

    b. That in the alternative to prayer (a) above, this Honourable Court be pleased to dismiss this suit for want of prosecution since 2016.

    c. That the costs for this application be borne by the Plaintiffs/ Respondents.

2. This application is based on the grounds on the face of it and on the Supporting Affidavit sworn by the 1st Defendant's Advocate who averred that the Plaintiffs have never served the 1st Defendant/Applicant with summons to enter appearance and that the 1st Defendant has never been given a chance to enter a Memorandum of Appearance and to defend the suit.

3. It was the 1st Defendant's advocate's deposition that the suit was filed simultaneously with an interlocutory injunction, with the 1st Defendant only being served with the application dated 30th April 2015; that they filed a Notice of Appointment dated 28th May 2015 and a Replying Affidavit dated 25th June 2015 in response to the application and that the application was later dismissed by a Ruling dated 26th September 2016. Since then, it was deponed, the Plaintiffs have never taken steps to prosecute this matter.

4. It was deponed that this court served the parties with a mention notice and the matter was fixed for mention before the Deputy Registrar on 10th December 2019, when the Plaintiff's advocate sought time to seek instruction from his clients; that the Plaintiffs thereafter failed to appear on 9th March 2020 and 18th August 2020; that the court gave a further mention date for 1st October 2020 and that the Plaintiffs' inordinate delay to prosecute the suit and to serve summons led the 1st Defendant to believe that they were no longer keen on prosecuting the matter.

5. The second application is by the Plaintiffs dated 17th June 2021. Through this application, the Plaintiffs have sought for the following reliefs:-

    a. Spent

    b. That this Honourable Court be pleased to issue summons to enter appearance to the Plaintiffs/ Applicants and or be pleased to extend time within which the Deputy Registrar of the Court is to sign, seal and issue the said Summons to enter appearance thereof.

    c. That this Honourable Court be pleased to make any other order it may consider appropriate under the circumstances so as to meet the end of justice in the matter

    d. That costs of the application be provided for.

6. The grounds upon which this application is premised are that the Plaintiffs filed the suit with copies of summons to enter appearance but the same were never signed or sealed and are still in the Court file; that the suit was filed with a Notice of Motion application which took one year and seven months to determine and that that was the reason for the delay in signing, sealing and issuance of the Summons.

7. It was deponed that on 26th May 2016, the 1st Defendant requested copies of pleadings, witness statements and list of documents which were supplied and enabled them to substantively respond to the Notice of Motion and that after the delivery of the Ruling on 16th September 2016, it was for the Court to fix the matter for pre-trial directions.

8. It was deponed that the Plaintiffs have been disinterested in prosecuting this suit since 2016 and no justifiable reason has been given for the inordinate delay to extract and serve summons to the Defendants. The 1st Defendant urged that it would be prejudicial to allow the Plaintiffs' application as it has been over five years since any step was taken to prosecute the suit.

Submissions

9. The 1st Defendant submitted that the Plaintiffs' suit should be dismissed as summons were never issued and served upon the Defendants as per the Rules set out in the Civil Procedure Rules and that the Plaintiffs have not offered a justifiable reason for the inordinate delay. The 1st Defendant relied on Order 5 Rule 2(7) of the *Civil Procedure Rules* and the case of *Tana Trading Limited vs National Cereals and Produce Board* [2014] eKLR where the court stated that failure to serve process goes to the root of proper procedure in litigation.

10. In the alternative, the 1st Defendant sought that the suit be dismissed for want of prosecution since the matter has never been fixed for hearing since 2016. They relied on Order 17 Rule 2 of the *Civil Procedure Rules* and the case of *Nzoia Sugar Company Limited vs West Kenya Sugar Limited* [2020] eKLR.

11. On the Plaintiffs' application for the court to issue Summons or extend the time for the Deputy Registrar to issue the summons, the 1st Defendant submitted that service of Summons is a fundamental procedure under Order 6 Rule 1 of the *Civil Procedure Rules* and that one can only enter appearance after being served with the summons.

12. The Plaintiffs relied on the cases of *Lee Mwathi Kimani vs National Social Security Fund & Another* [2014], where the court emphasized that service of summons is a vital step in initiating litigation, and *John Chigoya Njogu & another vs James Fredrick Muriuki & 3 others* eKLR, where the court stated that extension of summons can only be done before expiry of the original summons.

13. The 2nd Defendant submitted that the Plaintiffs' application was frivolous and lacked merit as they were guilty of indolence and unreasonable delay. He urged that this suit has abated for failure by the Plaintiffs to serve and renew the original summons in their lifetime.

14. It was submitted that summons could not be extended as they were "dead". They relied on the cases of *Zakaria Somi Nganga vs Kenya Commercial Bank Limited & 3 others* [2008] eKLR, *Udaykumar Chandulal Rajani & 4 others vs Charles Thaithi and Julius Njoroge Muira vs Harrison Kiambuthi Mburu* [2011] eKLR.

15. It was the Plaintiffs' submission that they complied with the provisions of Order 5 Rule 3(5) of the *Civil Procedure Rules*. They urged that the mistake and oversight of the issuing authority may have been occasioned by the interlocutory application that took long to conclude.

16. They relied on the case of *Paulina Wanza Maingi vs Diamond Trust Bank Ltd & Others* HCCC No. 603 of 2009 where the court held that whereas the duty of the Plaintiff is to file summons together with the Plaint, issuance and signing of the summons is the duty of the court.

17. They submitted that the Defendants have not demonstrated the prejudice they will suffer having appointed an Advocate on 29th May 2015 and having actively participated in the proceedings. Further, it was submitted that the Plaintiffs are not indolent in the prosecution of this suit.

Analysis and Determination

18. Having considered the applications by the Plaintiff and the 1st Defendant, the filed responses and submissions, the issues that arise for determination by this court are:

    i. Whether this court should dismiss this suit for want of summons to enter appearance

    ii. Whether this court should dismiss this suit for want of prosecution

    iii. Whether this court should issue summons to enter appearance to the Plaintiffs/ Applicants and or extend time for the issuance of the same.

19. The undisputed facts in this matter are that the Plaintiffs commenced this suit on 30th April 2015 by filing a Plaint, summons to enter appearance, verifying affidavit, list of documents, list of witnesses, witness statements as well as a Notice of Motion application. The 1st Defendant has asserted that it was only served with the Notice of Motion following which the firm of Mugambi Imanyara & Company

Advocates filed a notice to enter appearance on 28th May 2015. The Defendants participated in the hearing of the Notice of Motion application which was determined on 26th September 2016.

20. It is not contended that the Summons to Enter Appearance were neither signed, sealed nor served. The Defendants have argued that this failure and oversight goes to the root of proper procedure and the suit should be dismissed. On their part, the Plaintiffs have acquiesced to this error but have pleaded that this was an inadvertent mistake due to the length of time it took to determine the application.

21. The 1st Defendant has also argued that this suit should be dismissed for want of prosecution because after the delivery of Ruling by this court in 2016, the Plaintiffs failed to pursue their case. It was submitted that it is only after this court issued a mention notice that the Plaintiffs sought to prosecute the matter.

22. Order 5 of the *Civil Procedure Rules* is the applicable law governing the issuance of summons and extension of the same. Order 5 Rule 2 provides as follows:-

    (1) A summons (other than 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 un-expired at the date of issue of the concurrent summons.

    (2) Where a 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."

23. Order 6 Rule 1 of the *Civil Procedure Rules* provides that one can only enter appearance after being served with Summons to enter appearance, and not before. As indicated in *Paulina Wanza Maingi vs Diamond Trust Bank Limited & Another* [2015] eKLR, there are two schools of thought as to whether failure to issue and serve summons is fatal to a Plaintiff's suit.

24. The first school of thought opines that failure to file and serve summons goes to the root of the suit and renders the Plaintiff's suit invalid. This position was up held by the Court of Appeal in *Udaykumar Chandulal Rajani & 3 Others vs Charles Thaithi*[1991]eKLR and by this court in *Lee Mwathi Kimani vs National Social Security Fund & another* [2014] eKLR and *Zakaria Somi Nganga vs Kenya Commercial Bank Ltd & 3 others* [2008] eKLR.

25. The second school of thought holds the position that failure to issue and serve summons is not fatal unless prejudice is demonstrated or unless such failure goes to the root of the court's jurisdiction. This position was asserted by the Court of Appeal in *Equatorial Commercial Bank Ltd vs Moham Sons (K) Ltd* (2012) eKLR (cited in *Board of Trustee of African Independent Pentecostal Church of Africa vs Peter Mungai & 12 Others*, (206) and *Naji Bhai Prabhudas & Co. Ltd vs Standard Bank Ltd* (1986) EA (K) 670 and by this Court in *Ernest Ngugi Karuga & another vs James Mbugua Macharia & Another* [2021] eKLR and *Fredrick Kibet Chesire vs Raymond W. Bomett & 3 Others* [2006] eKLR).

26. This court is persuaded that the purpose of summons to enter appearance is to bring a suit to the attention of a Defendant and affording them the opportunity to enter appearance and file a Defence. Where, as in this case, the Defendant enters appearance and responds to the Plaintiff's application, this court must find that the Defendant was not prejudiced.

27. Further, by entering appearance, the Defendants have waived the right to object to the irregularities of non-issuance and non-service of summons. This was held by the Court of Appeal in the *Naji Bhai Prabhudas & Co. Ltd vs Standard Bank Ltd* (1986) EA (K) 670:

> "I consider that the Defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred to. I also consider that that in as much as these two irregularities have clearly not prejudiced the Defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of those irregularities and, accordingly, I would not set it aside."

28. To the extent that the Plaintiffs have filed an application for extension of time to serve the summons, and the Defendants having not shown the prejudice they will suffer if the time is enlarged and summons are extracted and served upon them, I decline to strike out the suit on the basis that summons to enter appearance have never been served on them.

29. The 1st Defendant has in the alternative prayed that this suit be dismissed for want of prosecution. Order 17 Rule 2 of the *Civil Procedure Rules* prescribes the law on dismissal for want of dismissal as follows:

> "2. Notice to show cause why suit should not be dismissed [Order 17, rule 2.]
>
> (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
>
> (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
>
> (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
>
> (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
>
> (5) A suit stands dismissed after two years where no step has been undertaken.
>
> (6) A party may apply to court after dismissal of a suit under this Order."

30. The locus classicus case of *Ivita vs Kyumba* [1984] KLR 441 espoused the test to be applied for dismissal of a suit for want of prosecution as follows:

> "The test applied by the courts in the application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

31. It is trite that dismissal of a suit before it is heard is a draconian act. A court must however consider the constitutional principle of expeditious justice, as prescribed by Gikonyo J. in *Fran Investments Limited vs G4S Security Services Limited* [2015] eKLR as follows:

> " This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial ''sword of the Damocles''. But that reality should be checked against yet another equally important constitutional demand that cases should be disposed of expeditiously, which is founded upon the old age adage and now an express constitutional principle of justice under Article 159 of *the Constitution*, that justice delayed is justice denied. Here I am reminded that justice is to all the parties and not only the Plaintiff."

32. In *George Gatere Kibata vs George Kuria Mwaura & another* [2017] eKLR the court rendered itself as follows:

> " The legal ramifications of the statutory threshold set out under Order 17 Rule 2 of the *Civil Procedure Rules* is that a suit qualifies to be dismissed for want of prosecution if no application has been made or no step has been taken in the suit by either party for at least one year preceding the presentation of the application seeking dismissal of the suit."

33. In this matter, the delay in prosecuting the suit was for a period of five years. The Defendants have argued that this delay has been inordinate. In determining whether such delay has been inordinate, this court is persuaded by the case of *Mwangi S. Kimenyi vs Attorney General & another* (2004) eKLR where the court considered what constitutes inordinate delay as follows:

> " There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...Therefore, inordinate delay for purposes of dismissal for want of prosecution should be one which is beyond acceptable limits in the prosecution of cases."

34. The Plaintiffs in this suit have failed to explain the delay of five years in prosecuting this matter following the ruling of this court declining to issue injunctive orders. This court can only conclude that after failing to secure temporary injunctive orders, the Plaintiffs lost interest in pursuing this suit. This court therefore finds that the delay was inordinate and the suit ought to be dismissed for want of prosecution.

35. For these reasons, this court partially allows the 1st Defendant's application dated 19th February 2021 and dismisses the suit for want of prosecution with costs to the Defendants.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 3RD DAY OF NOVEMBER, 2022

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Plaintiffs

Ms Muriithi for Imanyara for 1st Defendants

Mr Araw for Wachekane for 2nd Defendant

No appearance for Plaintiffs

Court Assistant - June

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