



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC SUIT NO. 197 OF 2017

TERRAZO ENTERPRISES LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

HELENA NJERI MBUGUA.....DEFENDANT/APPLICANT

RULING

1. This is a ruling in respect of a Notice of Motion dated 24th October 2018. The application is brought by the Defendant/Applicant and it seeks striking out of the Plaintiff/Respondent's suit. The Applicant contends that summons to enter appearance were not served in accordance with the Civil Procedure Rules.

2. The Respondent opposed the Applicant's application based on a replying affidavit sworn on 17th June 2019. Whereas the Respondent concedes that summons were not served in time, it contends that non service of summons in time was due to an inadvertent mistake by its lawyers. The Respondent argues that the purpose of summons to enter appearance is to alert the opposite party of the existence of a case and that in the instant case, the Applicant appeared and participated in an interlocutory application which the Respondent had filed .

3. The Respondent therefore argues that the present application is an abuse of the process of the court as non-service on time has not prejudiced the Applicant. The Respondent further argues that Article 159 of the Constitution discourages emphasis on procedural technicalities.

4. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties herein. The only issue for determination is whether the Respondent's suit should be struck out on grounds of non-service of summons to enter appearance in time.

5. The suit herein was filed on 23rd March 2017. The Applicant's advocates filed a Notice of Appointment of Advocates on 25th April 2017. The Applicant's advocates participated in an interlocutory application which had been filed by the Respondent. A ruling on the application was delivered on 5th February 2018. The matter was referred to the Deputy Registrar for Pre-trial but the Applicant's advocates appear to have not been attending until when they filed the present application.

6. The Respondent does not deny the fact that the summons to enter appearance were not served in time. The summons were served later on 31st May 2018. As at the time of service of summons, the Applicant's advocates were already aware of the suit. The purpose of serving summons to enter appearance is to alert a party that there is a suit filed. If that party gets to know of the existence of the suit and participates in the same as in this case, it will be unfair for the party to later come and file an application seeking to strike out the suit for non-service. This was the holding in the case of **Tropical Foods International & another Vs Eastern and Southern African Trade and Development Bank & another (2017)** where Justice Tuiyot stated as follows:-

“ The purpose of the issue of summons is for the Defendant to appear within the time specified therein. It also serves to give notice of the existence of a suit against a Defendant. If therefore the Defendant gets notice of the suit by other means other than the summons and participates in subsequent proceedings, then the Defendant should not complain of the non-service of the summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant. In the Matter before me, the 2nd Defendant was made aware of the suit through service of the Plaint and the application for injunction. The 2nd Defendant has actively participated in the subsequent proceedings and up to the point of filing the current application has not raised the issue of non-service of summons. In addition nowhere in the application does the 2nd Defendant say that these state of affairs has prejudiced its position”.

7. What happened in **Tropical Foods International case (Supra)** is exactly what happened in this case. The Applicant does not say what prejudice non service of summons has caused her. The concern of the court is to administer substantive as opposed to technical justice. This

is what the Court of Appeal emphasised on in the case of **Martha Wangari Karua Vs Independent Electoral & Boundaries Commissions and 3 Others 2018 eKLR** where they quoted the Judgement of Justice Ouko in the case of **Nicholas Kiptoo Arap Salat Vs Independent Electoral & Boundaries Commission & 6 Others (2013) eKLR** where the Judge said that in as much as procedures should be followed , the procedures should not be followed to the extent that they cause injustice to parties.

8. In the circumstances of this case, I do not agree with the decisions relied on by the Applicant in her submissions. Non service of summons did not cause any prejudice on the part of the Applicant. I therefore do not find any merit in this application which is dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 7th day of May 2020.

E.O.OBAGA

JUDGE

In the virtual Presence of:-

Mr Mikwa for Plaintiff/Respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE