



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO 189 OF 2018

(Formerly Machakos ELC No. 334 of 2012)

CATHERINE WAMBUI WARUINGE.....PLAINTIFF

VERSUS

RETIE ENE SAMERA MUTEMPERIA.....1ST DEFENDANT

DAVID LEKENI SEMERA.....2ND DEFENDANT

SAMWEL SITOYIA SEMERA.....3RD DEFENDANT

JULIUS SAIMI SEMERA.....4TH DEFENDANT

JOHN SEMERA.....5TH DEFENDANT

SAITOTI SEMERA.....6TH DEFENDANT

RULING

What is before court for determination are the Defendants' Notice of Motion application dated the 2nd December, 2019 and the 2nd and 3rd Defendants' Notice of Motion application dated the 5th December, 2019. In the application dated the 2nd December, 2019, they seek for a stay of proceedings; for the suit to be declared to have abated and be struck out or dismissed. While in the application dated the 5th December, 2019, the 2nd and 3rd Defendants seek for orders to set aside the proceedings dated the 22nd October, 2019; recall the Plaintiff for cross examination and for the suit to be dismissed with costs. The application dated the 2nd December, 2019 is supported by the affidavit of SAMWEL SITOYIA LEMERA and ALFRED NYANDIEKA while the application dated the 5th December, 2019 is supported by the affidavit of JASON ONDABU.

In the affidavit of SAMWEL SITOYIA SEMERA he highlights the proceedings of 22nd October, 2019 and contends that Mr. Nyabena informed him that he was not aware of the hearing date. He claims summons to enter appearance were not served upon any of the Defendants, matter proceeded ex parte on 22nd October, 2019 and no defence was filed by the Defendants. He insists this suit is groundless, frivolous, vexatious and an abuse of the court process. Further, that the same has abated.

In the affidavit of ALFRED NYANDIEKA Advocate, he confirms that the hearing notice of 22nd October, 2019 was not brought to his attention. He reiterates that this matter proceeded for hearing ex parte on 22nd October, 2019; No summons to enter appearance were ever served upon the Defendants; there is no defence on record and there is an order of filing submissions and mention scheduled on 5th December, 2019 for taking a judgement date.

In the affidavit for JASON ONDABU who is an advocate handling the matter for the 2nd and 3rd Defendants, he claims the matter proceeded for hearing without the court confirming whether pre trial conference had been done and certifying the same ready for hearing. Further, that the Plaintiff filed the Statement and Bundle of Documents on 22nd October, 2019 on the day the matter was scheduled for hearing. He denies that the 2nd and 3rd Defendants were served with the said documents nor the summons to enter appearance. He seeks for the proceedings of the 22nd October, 2019 to be set aside and Plaintiff recalled for further cross examination.

The Plaintiff opposed the two applications and filed a replying affidavit sworn by CATHERINE WAMBUI WARUINGE where she confirms Alfred Nyandieka had been on record in this matter in the past but he no longer is. Further, he was not then acting for the Defendants but only for 2nd and 3rd Defendants. She explains that the firm of Ondabu & Co. Advocates were then appointed by the 2nd and

3rd Defendants in place of Nyandieka & Associates, which firm filed a Notice of Change of Advocates on 11th December, 2014. She insists the Notice of Motion dated the 2nd December, 2019 is drawn by the firm of Nyabena Alfred & Co. Advocates who are strangers to this suit. Further, the supporting affidavit of Samwel Sitoyia Semera is a nullity as it is drawn by a firm of advocates that are not on record for him as well as the 2nd Defendant. He contends that a process server Victor Mulanga served the Plaintiff and other pleadings upon all the Defendants on 6th September, 2012 and on 12th September, 2012, the firm of Nyandieka & Associates and Nyabena Nyakundi entered an unconditional appearance for all the Defendants. Further, that for the seven (7) years during the pendency of the suit, they have never raised an issue that they have never been served with summons to enter appearance. She explains that her advocate served the hearing notice upon Ondabu Advocate whose brief was held by Ms Maina on 22nd October, 2019. Further, that along filing the Plaintiff on 4th September, 2012, she filed a List of Witnesses, List of Documents and Witness Statements. In addition, she filed an application on 4th September, 2012 wherein she annexed several documents. She reaffirms that all documents were served upon the Defendants on 6th September, 2012.

On 5th December, 2019, the Court directed the Plaintiff to file her Replying Affidavits in respect to the two applications after which parties were to exchange written submissions to canvass the same. I note to date, it is only the Plaintiff who has filed her submissions.

Analysis and Determination

Upon consideration of the Notice of Motion Applications dated the 2nd December, 2019 and 5th December, 2019 including the rivalling affidavits and submissions, the following are the issues for determination:

- Whether this suit has abated for failure by the Plaintiff to extract summons to enter appearance and serve the same upon the Defendants.
- Whether this suit should be struck out or dismissed with costs.
- Whether the proceedings of 22nd October, 2019 should be set aside and the Plaintiff recalled for cross examination.

As to whether this suit has abated for failure by the Plaintiff to extract summons to enter appearance and serve the same upon the Defendants.

The Defendants claim this suit has abated for failure by the Plaintiff to extract summons to enter appearance and serve the same upon them. They however admit that they were served with the Plaintiff, Chamber Summons and some documents. From the court records, I note a process server named Victor Mulanga stated at paragraph 2 of his affidavit of service sworn on 10th September, 2012 as follows: *on 6th September, 2012, I received from Sane & Company Advocates six copies of Notice of Motion Application under Certificate of Urgency, List of Witnesses, List of Documents, Statement and Plaintiff all dated 4th September, 2012 with instructions to serve the same upon the Defendants herein, who reside at Kisaju Location within Kajiado District.*

He further confirms at paragraph 3 of his affidavit that on 6th September, 2012, he served the 4th and 5th Defendants while on the 7th September, 2012, he served the 1st, 2nd, 3rd and 5th Defendants respectively. From the Court records, on 11th September, 2012 the firm of Nyandieka & Associates came on record for the 2nd and 3rd Defendants while on 12th September, 2012, the firm of Nyabena Nyakundi & Company Advocates filed a Notice of Appointment of Advocates for the 1st, 4th, 5th and 6th Defendants respectively. Further, the firm of Ondabu & Co Advocates filed a Notice of Change of Advocates for the 2nd and 3rd Defendants dated the 11th December, 2014. I note the Defendants continued to appear severally before court and for seven (7) years, they never raised the issue that the summons to enter appearance were never served upon them.

In the case of **Ochola Kamili Holdings Ltd V Guardian Bank Ltd (2018) eKLR**, the Judge while dealing with a similar issue held that: **Further to the above, assuming that summons were not served together with a copy of the plaintiff and other documents were served, the defendant by having appeared before the trial Judge for an application for injunction two (2) times and having taken part in the proceedings and having been armed with a copy of the plaintiff, I find defendant cannot claim that it was not aware of the nature of the claim facing it and cannot further be heard to say the suit has abated as it did not have copy of the summons served.**

Further, in the case of **Board of Trustees of African Independent Pentecostal Church of Africa Church V Peter Mungai Kimani & 12 Others (2016) eKLR**, the Judge held that: **Even assuming that the summons to enter appearance as issued on 3rd October, 2014 were not served as alleged, but that as the record clearly shows, the defendants did file the Memorandum of Appearance dated 8th October 2014, the question is, would the suit herein have abated by the time this preliminary objection was filed? To answer that question, it is important to first set out the purpose of summons to enter appearance. 40. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. If a defendant files a Memorandum of Appearance, it is deemed to have had due notice of the institution of such suit. In this case, therefore, the defendant having filed Memorandum of Appearance on 5th October 2014 signifying their intention to defend the suit they are deemed to have had notice of institution of such suit and therefore their purported disowning of their Memorandum of Appearance and the explanation thereof falls flat on its face and must be rejected. Further, the filing of notice of appointment of advocates subsequently filed was of no consequence. It is irrelevant and a technical gimmick or theatrical maneuver intended to defeat the ends of justice which technicality is abhorred by Article 159(2) (d) of the Constitution.**

See also the case of **Equatorial Commercial Bank Limited v Mohansons (K) Limited [2012] eKLR** where the Court of Appeal held that a suit cannot abate where a Defendant has participated in the proceedings but later claims summons to enter appearance was not served on it.

I note indeed the Plaintiff was served upon all the Defendants but the unsigned summons to enter appearance are still in the court file. However, the Defendants had proceeded in 2012 to enter an appearance including filing of replying affidavits and participated in the

proceedings herein for over a period of seven (7) years. I opine that the purpose of a summons to enter appearance is to make the opposing party aware of a suit against it. In a situation where a Defendant proceeds to enter an Appearance as in this instance, it is clear, he was aware of the suit. It is my considered view that the Defendants are not being candid and simply seek to delay the determination of this suit. Based on the facts as present while associating myself with the decisions cited above, I find that the Defendants actions demonstrated that they had waived their rights to challenge the fact that they had not been served with summons to enter appearance. Further, since they entered appearance in 2012 and have always been aware of this suit, I do not foresee the necessity of serving them again. In the circumstances, I will decline to hold that the suit has abated for failure by the Plaintiff to extract summons to enter appearance and serve them.

As to whether this suit should be struck out or dismissed with costs.

The Defendants sought for the Plaintiff's suit to be struck out or dismissed as summons to enter appearance was not served upon them; no pre trial conference was undertaken before the suit was certified ready for hearing, hence the suit is frivolous. Order 2 Rule 15 (1) (b) & (d) provides the parameters where a suit can be struck out. Further, from a reading of Order 11 of the Civil Procedure Rules, pre trial conference is undertaken where all parties have filed pleadings and from perusal of Rule 1, the Court is granted the discretion to exempt any suit from this requirement. However, from the averments in the defendants' affidavits and their failure to file Defences to controvert the averments in the Plaint, and in line with the provisions of Order 11 above, I find that pre trial conference was not necessary as there were no pleadings to rebut the Plaintiff's claim which would require directions in respect to hearing. I further find the Defendants have not the threshold set for striking out or dismissal of a suit and will decline to do so.

As to whether the proceedings of 22nd October, 2019 should be set aside and the Plaintiff recalled for cross examination. I note on 22nd October, 2019, Mr Ondabu's brief was held by Ms Maina who sought for an adjournment which was declined. Further, in the supporting affidavit of SAMWEL SITOYIA SEMERA and ALFRED NYANDIEKA, they both admit that Mr. Nyabena was not aware of the hearing date. However, upon perusal of the court file, in the affidavit sworn by the Process server, he was indeed served for the hearing of 22nd October, 2019. Mr Ondabu has contended that the suit was premature as it had never been set for pre trial. From the court file, there was no defence, witness statements nor documents on record for the Defendants. Further, it is only the Plaintiff who had filed her List of Witnesses and Documents contemporaneously with the Plaint. Since the Defendants have failed to controvert the averments in the Plaint and noting that they were aware of the date of hearing but failed to participate, I find that they have waived their right to recall the Plaintiff for cross examination and will decline to do so.

It is against the foregoing that I find the two notices of motion applications dated the 2nd December, 2019 and 5th December, 2019 unmerited and will proceed to dismiss them with costs to the Plaintiff.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF JUNE, 2021.

CHRISTINE OCHIENG

JUDGE