

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 391 OF 2014

ROGAM INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

CANON ALUMINIUM FABRICATORS LIMITED.....1ST DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY....2ND DEFENDANT

RULING

The 1st Defendant filed the application dated 14/5/2019 seeking to have this suit dismissed for having abated or in the alternative, for want of prosecution. The application was made on the ground that the Plaintiff neither collected for service nor served summons to enter appearance and that the suit had therefore abated. The 1st Defendant averred that the Plaintiff had not taken any steps to prosecute the case since 6/11/2014 and relied on Order 17 Rule 2 (1) of the Civil Procedure Rules.

Parbat Lalji Dhanji, a director of the 1st Defendant swore the affidavit in support of the application. He deponed that the Plaintiff filed this suit on 28/3/2014 seeking a declaration that it had the right of possession of land reference number 20777 measuring approximately one acre. He deponed that when the matter came up in court on 22/7/2014 the Plaintiff informed the court that it intended to amend the plaint and the case was put down for mention on 6/11/2014. He averred that from 6/11/2014 to date the Plaintiff did not take any step to prosecute its case.

Evans Gitobu, a director of the Plaintiff swore the affidavit in opposition to the application. He deponed that according to Order 5 Rule 1 of the Civil Procedure Rules, the function of summons was to require a defendant to appear within a specified time but where a defendant got notice of a suit brought against him through other means and participated in the pleadings, then the delay in service of summons would not warrant dismissal of the suit. He averred that the Plaintiff amended its plaint to include the 2nd Defendant following the court's directions given on 22/7/2014. The amended plaint was filed on 16/7/2015. He cited Article 159 of the Constitution while urging the court not to allow the 1st Defendant's application.

Parties filed and exchanged submissions. The 1st Defendant submitted that failure to collect summons for service within 30 days of the issue would make the suit abate under Order 5 Rule 1 (6) of the Civil Procedure Rules. It submitted that for over six years the Plaintiff had not taken out summons to enter appearance for service on the Defendant. The 1st Defendant submitted that the Plaintiff had not given any reasons for its failure to prosecute this case since 2014.

The Plaintiff submitted that service of summons on the 1st Defendants was inadvertently left out but that that error did not warrant any prejudice against the 1st Defendant who had participated in the proceedings before the court. The Plaintiff submitted that the court had power to extend time for issuance and service of summons pursuant to Section 95 of the Civil Procedure Act and Order 50 Rule 6. The Plaintiff submitted that under Order 17 Rule 2 of the Civil Procedure Rules a suit qualified for dismissal for want of prosecution if no application was made and no steps were taken in the suit by either party for at least a year preceding the presentation of the application for dismissal of the suit. It submitted that the 1st Defendant's application did not satisfy that threshold and urged the court to dismiss the application.

The issue for determination is whether the court should dismiss the suit for want of prosecution as the 1st Defendant sought. The court notes that the firm of Nyamu & Nyamu Advocates filed the application dated 10/7/2019 seeking to cease acting for the Plaintiff. That application was allowed on 18/5/2020. The same firm filed a notice of appointment of advocates dated 9/2/2021 on behalf of the Plaintiff. There is no evidence that the amended plaint which was filed on 16/7/2015 was ever served on the 1st Defendant or that summons to enter appearance were extracted by the Plaintiff. The 2nd Defendant who was added to the suit when the amended plaint was filed on 16/7/2015 has never been served.

The court is persuaded that the Plaintiff lost interest in this matter and failed to prosecute it for more than a year. The suit is dismissed with costs to the 1st Defendant.

Delivered virtually at Nairobi this 5th day of July 2021.

K. BOR

JUDGE

In the presence of: -

No appearance for the Plaintiff and the 2nd Defendant

Mr. B. Makhandia holding brief for Mr. G. Thuita for the 1st Defendant

Mr. V. Owuor- Court Assistant