



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 24 OF 2013**

**IMPACT PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**LUCAS OWITI.....1<sup>ST</sup> DEFENDANT**

**LEW THORZELIUS GOGO MTEPE.....2<sup>ND</sup> DEFENDANT**

**CLEOPHAS BICHANGA NYAMETA .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in relation to two applications, one filed by the 3<sup>rd</sup> Defendant and the other by the Plaintiff herein.
2. By the First Application dated 25<sup>th</sup> April, 2018, Cleophas Bichanga Nyameta (*the 3<sup>rd</sup> Defendant*) prays for an order that this suit, and especially as against himself, be dismissed for inaction on account of want of validity and service of summonses to enter appearance on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
3. The first application is supported by an affidavit sworn by the 3<sup>rd</sup> Defendant and *is premised on the grounds that:*
  - (i) *The Plaintiff instituted the suit on 15<sup>th</sup> October, 2013;*
  - (ii) *The 3<sup>rd</sup> Defendant entered appearance and filed a Statement of Defence on 25<sup>th</sup> June, 2014;*
  - (iii) *The Plaintiff has not served any papers on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the result that the pleadings have never been closed and the suit is unlikely to get ready for hearing any time soon;*
  - (iv) *The plaintiff has not filed any affidavit to demonstrate what effort at service has been made, or at all;*
  - (v) *The Plaintiff has never applied for an order of extension of validity of summonses since 2014 when they ceased to have validity by effluxion of time; nor has it issued and collected for service either original or concurrent summonses to enter appearance with the result that the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants may have abated by dint of **Order 5 Rule 1(2) (5) and (6) and Rule 2(2) and 7 of the Civil Procedure Rules, 2010;***
  - (vi) *Without service of summons on all the Defendants, the fixing of a hearing date is a null and void step to avoid the imminent dismissal of the suit by the court suo moto under **Order 5 Rule 2(1) and Order 17 Rule 2(1), (2) and (3);** and*
  - (vii) *The setting down of this suit for hearing on 9<sup>th</sup> May, 2018 is an abuse of the court process, and the court is invited to invoke its inherent jurisdiction and dismiss the same.*
4. But by a Replying Affidavit sworn by its Advocate G. N. Gakuo and filed herein on 30<sup>th</sup> May, 2018, Messrs Impact Properties Limited (the Plaintiff) aver that the 3<sup>rd</sup> Defendant upon entering appearance in protest on 16<sup>th</sup> December, 2013 did file an application on 15<sup>th</sup> January, 2014 seeking to have his name struck off the suit as a defendant. The Plaintiff further avers that the court delivered a Ruling on 6<sup>th</sup> June, 2014 dismissing the 3<sup>rd</sup> Defendant's application with costs.

5. The Plaintiff avers further that all along they were under the impression that summons to enter appearance had been served upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and that by the time they realized that was not the case, the summons had already expired. The Plaintiff asserts that on 23<sup>rd</sup> November, 2016, they wrote to the Deputy Registrar requiring assistance to trace the court file to enable them take steps to prosecute the matter.

6. The Plaintiff avers further that on 24<sup>th</sup> October, 2017 they again wrote to the Deputy Registrar requiring assistance to trace the court file. On numerous occasions thereafter between 1<sup>st</sup> December, 2017 and 20<sup>th</sup> February, 2018 they visited the court registry numerous times but the court file could not be traced. The file was only traced on 22<sup>nd</sup> February, 2018.

7. In conclusion, the Plaintiff avers that it has remained industrious and diligent in pursuit of this matter and urges the court not to shut it out of these proceedings.

8. About a year after responding to the 3<sup>rd</sup> Defendant's application, the Plaintiff filed a Chamber Summons application dated 12<sup>th</sup> September, 2019 (*the second Application*) seeking leave to serve summons and the Plaint upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by way of substituted service through an advertisement in a local daily newspaper.

9. The second Application which is supported by an affidavit sworn again by G. N. Gakuo, the Advocate for the Plaintiff, is premised on the grounds:

(i) *That the Plaintiff has not been able to personally effect service upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendant since their whereabouts are unknown.*

(ii) *That the Plaintiff herein has established that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein have no known office at all;*

(iii) *That it is imperative that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be served with the summons and the Plaint herein by way of substituted service since the Plaintiff has no record of the physical address of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants; and*

(iv) *That in the circumstances it is only fair and just that the Plaintiff be allowed to serve the summons by way of substituted service.*

10. The application is however also opposed. By his Grounds of Opposition dated 2<sup>nd</sup> March, 2021, Cleophas Bichanga Nyameta (*the 3<sup>rd</sup> Defendant*) opposes the application on the grounds that;

1. *The Applicant's application belatedly served on the 3<sup>rd</sup> Defendants counsel on 2<sup>nd</sup> March, 2021, does not show what efforts at personal service, if any were made to trace the unserved Defendants;*

2. *There is no evidence when the summonses to enter appearance issued in October, 2013 for service on the unserved Defendants, were collected from court;*

3. *The suit abated by dint of **Order 5 rule 1(6)** on 30<sup>th</sup> November, 2012 and it has not been revived yet;*

4. *The Applicant is guilty of inordinate delay in bringing the present application and prosecuting its action and the court ought to decline peremptorily any entreaties to exercise its discretion in favour of the Applicant;*

5. *In any event, the suit ought to have been dismissed in 2015, by dint of **Order 5 rule 2(7)**;*

6. *The summonses to enter appearance reportedly re-issued on 22<sup>nd</sup> July, 2020 but not exhibited as part of the supplementary affidavit served on the 3<sup>rd</sup> Defendant are a nullity for breach of the Rules of the court. Indeed, it was unjust for the registry to re-issue summonses to enter appearance rather than extend the validity of the 2013 summonses (for reasons explainable in an affidavit);*

7. *The application made in September, 2019 cannot be good for purposes of service of both expired and invalid summonses to enter appearance; and*

8. *This is a clear case of an indolent Plaintiff.*

11. I have perused and considered the two applications and the respective responses thereto. I have equally considered the oral submissions as made before me by the Learned Advocates for the parties.

12. The legal framework on dismissal of a suit for want of prosecution is provided at **Order 17 rule 2 of the Civil Procedure Rules** as follows:

**“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.”**

13. Arising from the foregoing, it is evident that under the said framework, the court may *suo moto* or on the application of a party dismiss a suit for want of prosecution. The guiding criteria for such dismissal has been the subject of various judicial pronouncements. In **Ivita –vs- Kyumbu (1984) KLR 441**, the Court opined thus:

**“The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay.”**

14. In **Mwangi & Kimenyi -vs- Attorney General and Another**, Civil Suit Misc. Application No. 720 of 2009, the court restated the test as follows:

**“1. When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties – the Plaintiff, the Defendant and any other third party or interested party in the suit lest justice should be placed too far away from the parties.**

**2. Invariably what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues:**

**(1) Whether the delay has been intentional and contumelious;**

**(2) Whether the delay or conduct of the Plaintiff amounts to an abuse of the court;**

**(3) Whether the delay is inordinate and inexcusable;**

**(4) Whether the delay is one that gives rise to a substantial risk to a fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the defendant; and**

**(5) What prejudice will the dismissal cause to the Plaintiff.**

**By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties.”**

15. The Plaintiff herein commenced this suit against the three Defendants on 15<sup>th</sup> October, 2013 seeking a declaration that the Defendant had breached their contractual obligations and for a refund of Kshs.10,370,000/- said to have been paid to the Defendants pursuant to an agreement of sale in which the 3<sup>rd</sup> Defendant acted as an Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

16. As it turned out, the Plaintiffs were yet to serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with summons to enter appearance when the 3<sup>rd</sup> Defendant instituted the First Application for dismissal of the suit on 25<sup>th</sup> April, 2018. The 3<sup>rd</sup> Defendant avers that the Plaintiff has not demonstrated any efforts taken to serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the suit papers and or taken any steps to fix the matter for hearing many years down the line.

17. The Plaintiff on its part contends that since September, 2016, they were unable to trace the court file to enable them take any steps herein and hence the delay. In support of that position, the Plaintiff has annexed various letters addressed to the Deputy Registrar of this Court requesting for an intervention to help locate the Court file which had gone missing.

18. On 30<sup>th</sup> October, 2017, the Deputy Registrar in response to a letter addressed to the Court dated 23<sup>rd</sup> October, 2017 did confirm that the file was available and was coming up for the hearing of an application on 31<sup>st</sup> October, 2017.

19. My perusal of the record herein did not however reveal if indeed the matter came to court for an application on the said date. What was clear to me was that the court file had been missing at some point and directions had been given that the file be kept under lock and key.

20. I have carefully gone through the supporting affidavit of the 3<sup>rd</sup> Defendant to the First Application. I could not find anywhere in which he cites any prejudice suffered by himself as a result of the delay. At paragraphs 10 and 11 of the affidavit, he concedes to have acted for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who purported to be directors of Ms. Vros Produce Limited and in a position to enter into a sale agreement with the Plaintiff.

21. In the circumstances herein, I am persuaded that the Plaintiff is likely to suffer greater prejudice if the suit were dismissed without the parties being heard.

22. Indeed by filing the Second Application seeking to have the said 1<sup>st</sup> and 2<sup>nd</sup> Defendants served by way of substituted service, the Plaintiff has demonstrated that they are ready to take steps to prosecute the matter. The 3<sup>rd</sup> Defendant himself had already been served with summons to enter and has entered appearance and filed a Statement of Defence. I am not persuaded that he stands to suffer any prejudice if

the other Defendants are served in the manner proposed by the Plaintiff. The issue of the validity of summons issued can only in my view be raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and not the 3<sup>rd</sup> Defendant who was already validly served.

23. In the premises, I find no basis for the First Application as filed herein by the 3<sup>rd</sup> Defendant. It is dismissed with no order as to costs.

24. I am however persuaded that there is merit in the Plaintiff's Second Application. I allow the same and hereby direct that the advertisement be done within 21 days from today.

25. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall have 21 days after the date of service to enter appearance and file their defence.

26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 2ND DAY OF DECEMBER, 2021 VIA MICROSOFT TEAMS.**

**IN THE PRESENCE OF:**

**MR. GAKUO FOR THE PLAINTIFF**

**NO APPEARANCE FOR S. M. KIMANI FOR THE DEFENDANTS**

**COURT ASSISTANT - WARIO**

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**J. O. OLOLA**

**JUDGE**