



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 1511 OF 2016**

**EDWIN K. NJAGI T/A E. K. NJAGI & CO. ADVOCATES.....PLAINTIFF**

**VERSUS**

**FIG TREE HOTEL LIMITED.....1<sup>ST</sup> DEFENDANT**

**LUCY WAIHERA MWANGI.....2<sup>ND</sup> DEFENDANT**

**JOHN IRUNGU GITHINJI.....3<sup>RD</sup> DEFENDANT**

**JULIUS KARIUKI MWANGI.....4<sup>TH</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendant filed the application dated 13/3/2019 seeking to have the suit against it struck out due to the Plaintiff's failure to extract and serve summons to enter appearance on the Defendants. The application was made on the grounds that the Plaintiff filed this suit on 2/12/2016 contemporaneously with an application for injunction that sought to restrain the 1<sup>st</sup> Defendant from disposing of land reference number 209/9510. The 1<sup>st</sup> Defendant claimed that the Plaintiff served it sometime in February 2017 with an undated and unsigned plaint together a verifying affidavit that was not signed, dated or commissioned by a Commissioner of Oaths. The 1<sup>st</sup> Defendant averred that it had not been served with summons to enter appearance for almost three years contrary to Order 5 of the Civil Procedure Rules. The 1<sup>st</sup> Defendant urged that the Plaintiff has not been keen to prosecute this suit.

The application was supported by the affidavit of Patrick Githinji Mwangi in which he deponed to what has transpired in the suit to date. He deponed that the suit remained inactive from 2/12/2016 until the court issued a notice to show cause on 27/7/2017. He contended that the suit had abated and that the Plaintiff had shown no interest in prosecuting his case.

The Plaintiff filed grounds of opposition urging that the 1<sup>st</sup> Defendant has already acknowledged the existence of the suit and has been actively participating in it. He contended that the 1<sup>st</sup> Defendant had not shown the prejudice it would suffer if the suit is sustained while on his part the Plaintiff stands to suffer irreparable loss if the suit is struck out.

The court notes that the Plaintiff filed an application on 15/1/2020 seeking to extract summons in respect of the Defendant. The application is made on the ground that the previous advocates on record for the Plaintiff inadvertently forgot to extract and serve summons upon the Defendants.

Parties argued the application on 22/1/2020. The 1<sup>st</sup> Defendant's advocate submitted that they have come to court severally but the Plaintiff had not extracted summons for service on the Defendants. The 1<sup>st</sup> Defendant's advocate added that the suit disclosed no cause of action against the 1<sup>st</sup> Defendant as the Plaintiff did not act for the 1<sup>st</sup> Defendant, he represented the 2<sup>nd</sup> to 4<sup>th</sup> Defendants in a different suit and taxed his bill of costs which forms the subject matter of this claim.

The Plaintiff's advocate objected to the addition of the prayer that the suit did not disclose any reasonable cause of action, as the prayer was not included in the application filed by the 1<sup>st</sup> Defendant. The Plaintiff submitted that the purpose for which summons are issued has already been served since the 1<sup>st</sup> Defendant has been actively participating in the suit. The Plaintiff argued that the application was calculated to delay the conclusion of the suit and added that the issue of summons came up too late. The Plaintiff argued that there was no provision in the Civil Procedure Act for striking out the suit owing to failure to serve summons. The Plaintiff urged that the error of the previous advocate who inadvertently failed to extract and serve summons should not be visited on the Plaintiff. The advocate stated that they had applied to court to extract and serve summons.

The 1<sup>st</sup> Defendants maintained that the Plaintiff's claim should be directed to the 2<sup>nd</sup> to 4<sup>th</sup> Defendants since the suit arose from taxation and an award of costs against these Defendants.

The court agrees with the Plaintiff that the 1<sup>st</sup> Defendant should have set out the grounds on which it was seeking to have the suit struck out besides the failure to extract and serve summons to enter appearance on the Defendants. This would have enabled the Plaintiff address the contention that the suit did not disclose a cause of action against the 1<sup>st</sup> Defendant instead of being ambushed at the hearing of the application.

It would be in the interest of justice to allow the Plaintiff to extract and serve summons on all the Defendants within 30 days of the date of this ruling after which the suit can proceed to be heard on merit.

The Defendants are aware of these proceedings and have been participating in them. The purpose for which summons to enter appearance are issued and served has already been served. The court declines to grant the orders sought in the application dated 13/3/2019.

Dated and delivered at Nairobi this 28<sup>th</sup> day of January 2020

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. Wilson Odongo for the Plaintiff

Ms. Muriithi for the 1<sup>st</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> to 4<sup>th</sup> Defendants