



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 99 OF 2016

JOYCE MWIKALI MUTINDA.....PLAINTIFF

VERSUS

KWETU SACCO SOCIETY LIMITED.....1ST DEFENDANT

JOHN KATAMA NZIOKI.....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 22nd October, 2018, the Defendants have sought for the following orders:

- a. That the 1st and 2nd Defendants' respective Statement of Defence filed in court on the 25th April, 2018 be and are hereby deemed to be validly on record and duly served.*
- b. That in the alternative to prayer 1 and 2 above, the suit against the 1st and 2nd Defendants be struck out with costs for failure by the Plaintiff to extract and serve Summons to Enter Appearance.*
- c. That the costs of this Application abide the outcome of the suit.*

2. The Application is supported by the Affidavit of the Defendants' advocate who has deponed that in view of the reliefs sought in the Plaint, no interlocutory Judgment could in law be validly entered; that the Judgment that was entered herein is a nullity in law; that the Plaintiff has never extracted Summons to Enter Appearance and that the long delay in extracting Summons is inconsistent with the mandatory provisions of Order 5 Rule 1(1) and (5) of the Civil Procedure Rules.

3. In response, the Plaintiff deponed that there was no interlocutory Judgment that was entered in this matter; that the matter is scheduled to come up for formal proof; that the Defendants did not file any Statement of Defence within time and that the Defendants have not properly invoked the relevant provisions of the law.

4. The Plaintiff finally deponed that the Defendants were served with the extracted Summons to Enter Appearance; that the Defendants are attempting to sneak in the record the Statements of Defence and that the Application should be dismissed. Both parties filed submissions which I have considered.

5. In his submissions, the Defendants' advocate acknowledged that there was no interlocutory Judgment on record. According to counsel, the court should grant him prayer number 2 only. The said prayer reads as follows:

“2. That the 1st and 2nd Defendants' respective Statement of Defence filed in court on the 25th April, 2018 be and are hereby deemed to be validly on record and duly served.”

6. This suit was commenced by way of a Plaint dated 2nd September, 2016 and filed on 5th September, 2016. Together with the Plaint, the Plaintiff filed an Application dated 2nd September, 2016 seeking for injunctive orders.

7. The record shows that the Defendants' advocate filed a Notice of Appointment on 8th June, 2017. However, it was not until 25th April, 2018 that the Defendants filed a Defence.

8. The Defendants' advocate has deponed that the late filing of the Defence was occasioned by the non-extraction of the Summons and that

in fact, the Defendants have never been served with the Summons to Enter Appearance.

9. In response, the Plaintiff deponed that Summons to Enter Appearance were duly served on the Defendants. The Plaintiff annexed on her Affidavit the copy of the Summons dated 3rd October, 2016 together with the Affidavit of Service.

10. In the Affidavit of Service, the process-server deponed on how he served the 1st Defendant with the Summons to Enter Appearance on 2nd June, 2017. The Defendants did not seek the leave of the court to cross-examine the process-server on his Affidavit of Service. Indeed, the Defendants' advocate could have only have filed the Notice of Appointment on 20th June, 2017 because his clients had been served with the court documents herein.

11. Although the evidence before me shows that the Defendants were served with the Summons to Enter Appearance, I shall exercise my discretion in favour of the Defendants and allow the Defences that were filed out of time on record. This is because the Plaintiff has not shown the prejudice that will be occasioned with the late filing of the said Defences that cannot be compensated in costs, if at all.

12. For those reasons, I allow the Application dated 22nd October, 2018 as follows:

a. The 1st and 2nd Defendants' Statements of Defences filed on 25th April, 2018 be and are hereby deemed to be validly on record and served.

b. Each party to pay his/its own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE