



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC SUIT NO. 1153 OF 2016**

**GIATHI KIEYA.....PLAINTIFF**

**VERSUS**

**COUNTY COMMISSIONER KIAMBU.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KIAMBU COUNTY.....2<sup>ND</sup> DEFENDANT**

**MECY WAIRIMU.....3<sup>RD</sup> DEFENDANT**

**SUSAN MURUGI.....4<sup>TH</sup> DEFENDANT**

**BETH WANJIKU.....5<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff brought his suit against the defendants on 21<sup>st</sup> September, 2016 seeking a single prayer namely, that the 2<sup>nd</sup> defendant be directed to remove the restriction that has been placed on the parcel of land known as Limuru/Bibirioni/2586 (“the suit property”). From the record, it appears that a part from the summons to enter appearances which were taken out on 28<sup>th</sup> April, 2017 for service upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff did not take out any other summons to enter appearance. This means that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants were not served with summons to enter appearance.

On 24<sup>th</sup> October, 2016, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants entered appearance notwithstanding the fact that they had not been served with summons to enter appearance as aforesaid. They thereafter filed a joint statement of defence on 10<sup>th</sup> November, 2016 in which they denied the plaintiff’s claim in its entirety. In their defence, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have averred that the restrictions which the plaintiff is complaining about were placed on the title of the suit property at the request of their late mother to stop the plaintiff from disposing off the suit property which is the only family land and leaving the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants and their siblings homeless. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have averred that the said restrictions were lawfully placed against the title of the suit property and that the plaintiff had instituted a similar suit at the lower court in Limuru which is pending.

What is now before me is the plaintiff’s Notice of Motion application dated 31<sup>st</sup> March, 2017 in which the plaintiff has sought orders that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants’ statement of defence be struck out and judgment be entered for the plaintiff as prayed in the plaint. The application which is supported by the affidavit of the plaintiff is brought on the grounds that the defence by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants is scandalous, frivolous and vexatious. The plaintiff has contended further that the said defence is a mere denial and raises no triable issues. The plaintiff has also contended that the defence was filed out of time and as such inadmissible.

The plaintiff’s application was opposed by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants through a replying affidavit sworn by the 4<sup>th</sup> defendant on 5<sup>th</sup> May, 2017. The application was argued orally on 17<sup>th</sup> January, 2018. I have considered the application and the affidavit filed in opposition thereto by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. I have noted from a copy of the certificate of official search dated 1<sup>st</sup> November, 2016 that there are a total of three (3) restrictions registered against the title of the suit property the last of which was registered on 11<sup>th</sup> December, 2015 pending the outcome of Limuru SPMCC No. 69 of 2015. The first two (2) restrictions were registered on 7<sup>th</sup> July, 2011 and 28<sup>th</sup> January, 2015 following letters that were written to the 2<sup>nd</sup> defendant by the District Officer of the area where the suit property is situated. The plaintiff has not denied that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are his daughters. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants have contended that the restrictions aforesaid were placed by their deceased mother to stop the plaintiff who is alleged to be an alcoholic from selling the suit property which is the only family land. Whether or not the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants instigated the registration of the said restrictions is a triable issue. The same

applies to whether the said restrictions are valid. In the circumstances, I am not in agreement with the plaintiff that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants' defence filed herein is frivolous and vexatious or that it raises no triable issues.

On whether the defence was filed out of time, I agree that that is the case. This cannot however warrant the striking out of the said defence in the circumstances of this case. As I have mentioned earlier, the plaintiff did not take out summons to enter appearance for service upon the defendants within the prescribed time. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants who were not served with summons to enter appearance were not obliged to enter appearance or file defence. Having entered appearance and filed a defence, I can see no basis upon which the plaintiff who failed to take out summons and whose suit should have been struck out for want of summons can seek the striking out of the defence by the defendants who filed a defence without having been served with summons.

For the foregoing reasons, I find no merit in the Notice of Motion dated 31<sup>st</sup> March, 2017. The application is dismissed with costs.

**Delivered and Dated at Nairobi this 11 day of October 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

The Plaintiff in person

N/A for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Ms. Nyandwaro h/b for Ms. Muhuhu for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

Catherine Court Assistant