



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.206 OF 2013**

**PAOLA TARLAZZI (*suing through his attorney and/or Agent*)**

**CARLA TARLAZZI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ROBERT CIAVOLELLA.....DEFENDANT/APPLICANT**

**R U L I N G**

1. What is before me is the Application filed by the Defendant dated 11<sup>th</sup> July, 2016. In the Application, the Defendant is seeking for the following reliefs:

**(a) THAT the Court be pleased to set aside all proceedings, and consequential order to any legal action undertaken in the suit or currently pending for determination.**

**(b) THAT the Court be pleased to declare that this suit is impotent and abated for failure by the Plaintiff to take out and serve Summons to the Defendant to enter appearance as contemplated by the rules.**

**(c) THAT upon such declaration as sought in paragraph 2 and 3 above, consequently the Court be pleased to strike out the suit in its entirety for being an abuse of the process of the court.**

**(d) THAT the court be pleased in the interim to stay the sale by Public Auction as advertised by the Plaintiff in the local dailies dated 4<sup>th</sup> July 2016 pending the hearing and determination of this Application.**

2. The Application is supported by the Affidavit of the Defendant who has deponed that the Plaintiff never bothered to serve him with Summons to Enter Appearance; that he instructed his advocate to act for him when he was served with the Notice of Motion, the Plaint and the list of documents and witness statements and that the Affidavit of service confirms that there was no service of the Summons to enter appearance upon the him.

3. The Defendant deponed that the failure by the Plaintiff to serve Summons upon him caused the Plaintiff's suit to abate and that the suit as it stands is an abuse of the court process.

4. In response, the Plaintiffs' Attorney, Carla Tarlazzi, deponed that Kihange & Co. Advocates are not

properly on record; that an Application for leave is required to sanction or change advocates after Judgment and that in any event, the current Application is expressly barred by Order 45 Rule 6 of the Civil Procedure Rules.

5. It is the Plaintiff's /Respondent's case that the current Application is res judicata; that the proposed failure to serve the Summons to Enter Appearance is an issue that the Judgment Debtor ought to have raised in the previous applications and that the Defendant's erstwhile advocates filed a Memorandum of Appearance on 28<sup>th</sup> November, 2013.

6. The Plaintiff's Attorney deponed that in his Affidavit dated 5<sup>th</sup> September, 2014, the Judgment debtor admitted that he had been served with Summons and that the Respondent is hell bent on scuttling the execution process at any cost without regard to the Plaintiff's interests.

7. In his Further Affidavit, the Defendant/Applicant the deponed that his right to legal representation does not cease just because his advocate did not seek the leave of the court to come on record; that Article 159(2)(d) of the Constitution and Order 2 Rule 14 of the Civil Procedure Rules provides that justice shall be administered without undue regard to procedural technicalities and that indeed the Deputy Registrar of this court has confirmed that Summons were extracted but were never served.

8. According to the Defendant/Applicant, the issues in the Plaint are purely commercial in nature and that as such, this court does not have jurisdiction to deal with the claim.

9. The Defendant's/Applicant's advocate submitted that this suit was filed on 18<sup>th</sup> November, 2013 and the Summons to Enter Appearance signed, sealed and issued on 20<sup>th</sup> November, 2013; that the Summons were collected and served upon the Defendant on 21<sup>st</sup> November 2013 and that all that happened within the prescribed period of 30 days.

10. The Plaintiff's advocate submitted that it was inadvertent on the part of the process server not to state that he served the Summons to Enter Appearance; that it was on the basis of the served Summons that the Defendant's advocate filed a Notice of Appointment and a Memorandum of Appearance and that the Defendant is on record admitting that he was served with Summons to Enter Appearance.

11. Counsel submitted that where a Defendant files a Memorandum of Appearance, he is deemed to have had due notice of the institution of a suit and that that is why Defendant all along participated in this suit.

### **Analysis and findings:**

12. This suit commenced by way of a Plaint dated 18<sup>th</sup> November, 2013. In the Plaint, the Plaintiff sought for an order of permanent injunction restraining the Defendant from selling or meddling in the properties known as villa numbers 7 and 8 situate on portion number 1371, Malindi.

13. The Plaintiff's second prayer was for an order for payment of Euros 130,000 and in the alternative the transfer in his names of villa numbers 7 and 8 on portion number 1371, Malindi.

14. The Defendant's advocate has now filed an Application in which he is seeking for an order setting aside all proceedings and consequential orders. The Defendant is also seeking for an order that the suit has abated for failure by the Plaintiff to take out and serve summons on the Defendant as contemplated by the Rules.

15. The Defendant has also prayed in the Application for the Notice of change of advocates to be deemed as filed "upon payment of the requisite fees".

16. Both the Plaintiff and the Defendant's advocate raised preliminary points of law in their submissions.

17. According to the Defendant's/Applicant's advocate, this court does not have the requisite jurisdiction

to deal with this suit. On the other hand, it was the Plaintiff's/Respondent's advocate submission that the Defendant's advocate is improperly on record because he did not seek the leave of the court before he filed his Notice of Change of Advocates contrary to the provisions of the law.

18. As I have already stated above, the Plaintiff's claim is for Euro 130,000 and in the alternative, for an order that the Defendant do transfer to him villa numbers 7 and 8 situate within portion number 1371 Malindi.

19. In the Plaintiff at paragraph 3, the Plaintiff averred as follows:-

**“The Plaintiff avers that the instant suit is premised on an agreement dated 27/9/2013 between the Plaintiff and the defendant for a debt of Euro 130,000 due and owing to the Plaintiff from the Defendant and villa numbers 7 and 8 on portion No.1371 Marine Park Malindi under the proprietorship of the Defendant in lieu of the debt.”**

20. It is not in dispute that on 1<sup>st</sup> September, 2014, this court entered default Judgment in favour of the Plaintiff. The Plaintiff is in the process of executing the said Judgment.

21. Before Judgment was entered on 1<sup>st</sup> September, 2014 and until 11<sup>th</sup> July, 2016 when the firm of Kihenga & Company Advocates came on record, the Defendant was represented by the firm of A.M. Omwancha & Company Advocates.

22. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:-

**“Where there is a change of advocates, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed such change or intentions to act in person shall not be effected without an order of the court-**

**(a) Upon an application with notice to all parties; or**

**(b) Upon a consent filed between the outgoing advocates and the proposed incoming advocates or party intending to act in person as the case may be.”**

23. Order 9 Rule 10 provides that an application under Rule 9 may be combined with other prayers provided the question of change of advocates or party intending to act in person shall be determined first.

24. The Defendant's advocate has not asked this court, in the present Application or at all, for leave to come on record on behalf of the Defendant after the entry of Judgment.

25. The Defendant's advocate has also not filed a consent between himself and the outgoing advocate allowing him to come on record.

26. All that the Defendant has done in the current Application is to ask this court to deem the Notice of Appointment that has been annexed on the Application as duly filed upon payment of fees.

27. It is therefore obvious that until now, the Defendant's current advocate is not properly before the court, and as a consequence, the Application dated 11<sup>th</sup> July, 2016 is a nullity.

28. The non-compliance with the provisions of the law cannot be said to be procedural technicalities contemplated under Article 159(2)(d) of the Constitution as argued by the Defendant's advocate.

29. I shall now turn to the merits of the Application.

30. The Defendant's Application is premised on the ground that the Plaintiff has never served him with Summons to enter appearance and that indeed the Affidavit of service of Samson Nyangene sworn on

27<sup>th</sup> November 2013 shows that the Defendant was never served with Summons to enter appearance.

31. I have perused the Affidavit of Service of Samson Nyangene in which he deponed as follows:-

**“3. THAT Mr. Nyakoe advocate gave me the following documents in duplicate and in original: Order dated 19<sup>th</sup> November, 2013, Notice of Motion, Supporting Affidavit, Certificate of Urgency, Complaint, Verifying Affidavit, list of documents, list of witnesses with instructions to effect service to Roberto Ciavolella the defendant/respondent.”**

32. These are the documents that the Defendant, according to the Affidavit, that the process server served on the Defendant on 21<sup>st</sup>, November 2013.

33. The Plaintiff's advocate submitted that the failure to include “Summons to enter appearance” in the affidavit of service by the process server as one of the documents that were served on the Defendant is an inadvertent mistake by the process server, and that in any case, the Defendant instructed counsel who entered appearance but failed to file a Defence.

34. The Court file shows that Summons to enter appearance were issued by this court on 20<sup>th</sup> November, 2013 and the same were received by Mr. Naftal of Nyakoe Macharia Advocates. It is therefore obvious that the Summons to enter appearance in this matter were not only issued by the court, but they were collected by the Plaintiff's advocate on the same day for service upon the Defendant.

35. The record further shows that on 28<sup>th</sup> November, 2013, the firm of Kanyi J and Company Advocates entered appearance on behalf of the Defendant by filing a Memorandum of Appearance. The said Memorandum of Appearance was duly served on the Plaintiff's advocate.

36. Other than the Memorandum of Appearance, the Defendant's advocate also filed a Notice of Appointment on the same day it filed the Memorandum of Appearance, together with the Replying Affidavit of the Defendant.

37. In addition to the Replying Affidavit that the Defendant filed on 28<sup>th</sup> November, 2013, the Defendant also filed an Application dated 17<sup>th</sup> February, 2014 in which he sought for the suit to be struck out for being frivolous, vexatious and scandalous.

38. After this court entered the default Judgment on 1<sup>st</sup> September, 2014, the Defendant filed an Application dated 5<sup>th</sup> September, 2014 in which he sought to set aside the said Judgment on numerous grounds, but not on the ground that he was not served with summons to enter appearance.

39. In fact, the first ground on which the Application was premised on stated as follows:-

**“That though the Defendant was served with the Complaint and Summons to enter appearance the earlier advocate being the firm of Kanyi J & Co. Advocates whom the Defendant appointed to represent him in this case filed a Memorandum of Appearance on the 28<sup>th</sup> November, 2013 but failed to file a statement of Defence within stipulated period.”**

40. At paragraph 2 of the Defendant's Supporting Affidavit sworn on 5<sup>th</sup> September, 2014, the Defendant deponed as follows:-

**2. “THAT after the Plaintiff filed the suit herein through his purported Attorney I was served with the Complaint and Summons to Enter Appearance.”**

**3. THAT though I was served with the Complaint and Summons to Enter Appearance the earlier advocate being the firm of Kanyi J & Company Advocate whom I appointed to represent me in this case filed a Memorandum of Appearance on the 28<sup>th</sup> November, 2013 but failed to file**

**a statement of Defence within stipulated period.”**

41. This court heard the Defendant's Application and dismissed it on 28<sup>th</sup> November, 2014. In the said Ruling, I stated as follows:-

**“It is not in dispute that the Defendant was served with Summons in this country. Indeed, the Defendant entered appearance after being served and subsequently defended an Application for contempt.”**

42. The Defendant having admitted on oath that he was served with Summons to Enter Appearance, and this court having found that indeed that was the case, it is mischievous on the part of the Defendant to now claim that he was not served with Summons to enter appearance after all.

43. As it has been held by the courts, a party is bound by his pleadings, and more-so his sworn Affidavit. The omission by the process server to depone that one of the documents he served on the Defendant was Summons to enter appearance cannot in itself be a reason for the Defendant to depart from his own sworn Affidavit in which he stated that he was served with Summons to enter appearance wherafter his advocate entered a Memorandum of Appearance but failed to file a Defence within the prescribed period.

44. Even assuming that the Defendant was not personally served, it is trite that if a Defendant files a Memorandum of Appearance in a suit, unless the same is filed under protest, he is deemed to have had due notice of the institution of such suit.

45. In this case, the Defendant's advocate filed a Memorandum of Appearance on 28<sup>th</sup> November, 2013 signifying his intention to defend the suit. In the case of **Equatorial Commercial Bank Ltd-Vs-Moham Sons (K) Ltd (2012) eKLR (cited in Board of Trustee of African Independedn Pentecostal Church of Africa Vs Peter Mungai & 12 Others, (206) and Naji Bhai Prabhudas & Co. Ltd Vs Standard Bank Ltd (1986) EA (K) 670**, the Court of Appeal held as follows:-

**“.....We definitely appreciate and agree that the subject and scope of Summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law....”**

46. In the Najibhali case (Supra) the Court of Appeal held as follows:-

**“I consider that the Defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred to. I also consider that that in as much as these two irregularities have clearly not prejudiced the Defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of those irregularities and, accordingly, I would not set it aside.”**

47. Indeed, Order 6 Rule 1 of the Civil Procedure Rules suggest that one can only enter appearance after being served with Summons to enter appearance, and not before.

48. In fact, after a Defendant files a Memorandum of Appearance in person or through his advocate, the time within which a Defence is to be filed starts running, and the issue of whether he has been served with Summons to enter appearance or not becomes inconsequential (See Order 7 Rule 1 of the Civil Procedure Rules).

49. In view of the proceedings and pleadings in this matter, the Defendant was not only served with Summons to enter appearance but also entered appearance. The Defendant cannot now turn around due to the impending execution of the Judgment and contradict his own Affidavit and documents.

50. It is for those reasons that I find the Application dated 11<sup>th</sup> July, 2016 to be unmeritorious and the same is dismissed with costs.

Dated, signed and delivered in Malindi this **14<sup>th</sup>** day of **November**, 2016.

**O. A. Angote**

**Judge**