



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 64 OF 2014

YAHYA SWABIR BWANAMAHADHI.....1ST PLAINTIFF

MAHADI SWABIRI MAHADHI.....2ND PLAINTIFF

=VERSUS=

MOHAMED ALWI.....1ST DEFENDANT/APPLICANT

INSPECTOR GENERAL.....2ND DEFENDANT

THE OFFICER COMMANDING KIPINI POLICE STATION (OCS).....3RD DEFENDANT

R U L I N G

Introduction

1. What is before me is the 1st Defendant's Notice of Preliminary Objection dated 6th May 2014. The Defendant has objected to the Plaintiffs' suit *in limine* on the grounds that the Plaintiffs failed to serve Summons to Enter Appearance as required under Order 5 Rule 1 of the Civil Procedure Rules; that the failure by the Plaintiffs to file and serve the summons would mean that the entire suit cannot commence and that in the circumstances the service of the Plaintiff upon the Defendant is premature.

2. The Defendants have prayed that the suit should be struck out.

Submissions

3. The 1st Defendant's counsel submitted that although the Plaintiff filed the suit on 7th April 2014, he did not file Summons accompanying the Plaintiff. Consequently, it was submitted, the Plaintiff contravened Order 5 Rule 1(1) of the Civil Procedure Rules and as such, no Summons could issue and none could be served.

4. Counsel submitted that the Notice of Motion and Plaintiff by themselves do not constitute a suit capable of being served and service thereof was void and should be set aside. Counsel relied on the cases of *Grace Wairimu Mungai Vs Catherine Njambi Muya (2014) e KLR* and *Karandeep Singh Dhilian & Another Vs Nteppes Enterprises Limited & Another (2010) e KLR* to buttress his argument.

5. On the other hand, the Plaintiff's counsel submitted that pursuant to the provisions of Order 5 Rule 1 of the Civil Procedure Rules, a suit ought to be in existence before summons could issue. Once a Plaintiff has been filed, it was submitted, the suit exists independent of the issuance of Summons.

6. Counsel relied on the provisions of Order 5 Rule 6 and submitted that Summons are supposed to be filed and issued within 30 days of filing the suit.

7. Counsel submitted that the issues raised by the Defendant/Applicant are of a technical nature and not of jurisdiction; that the Applicant having complied with the provisions of section 19 of the Civil Procedure Act and Order 3 Rule 1 of the Civil Procedure Rules, he has properly instituted the suit and that the Applicants have since filed and served the Summons to Enter Appearance.

Analysis

8. The Plaintiff commenced this suit by way of a Plaintiff dated 7th April 2014 and filed on the same day.

9. As happens in almost all land matters, the Plaintiffs also filed an application seeking for a temporary order of injunction on the same day.

10. According to the Affidavit of Service of Khamis Adida Kombo, the 1st Defendant was served with the Certificate of Urgency, Notice of Motion and Supporting Affidavit on 7th April 2014, the same day that the suit was filed. It is therefore not in dispute that the Summons to Enter Appearance and the Plaintiff were not served upon the 1st Defendant on 7th April 2014.

11. Notwithstanding lack of service of the Plaintiff and the Summons to Enter Appearance, the firm of Muli and Ole Kina Advocates filed a Memorandum of Appearance, a Defence and the current Notice of Preliminary Objection on behalf of the 1st Defendant on 7th May 2014. The 1st Defendant also filed a Repeating Affidavit in respect to the Plaintiff's Application for injunction on the same day.

12. Section 19 of the Civil Procedure Act provides that every suit shall be instituted in such a manner as may be prescribed in the Rules. Section 20 further provides that where a suit has been duly instituted, the Defendant shall be served in the manner prescribed in the Rules and shall enter appearance and answer the claim.

13. Order 3 Rule 1(1) of the Civil Procedure Rules provides that every suit shall be instituted by presenting a Plaintiff to court, or in such a manner as may be prescribed. Once a suit has been filed, Order 5 Rule 1 of the Civil Procedure Rules provides that Summons shall issue to the Defendant ordering him to appear within the time specified therein. The Rule states as follows:

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”

14. It therefore follows that Order 3 Rule 1 (1) as read together with Order 5 Rule 1(1) on the Civil Procedure Rules presupposes that a suit, in this case a Plaintiff, can be validly instituted without summons. Summons are only issued after the Plaintiff has been filed for the purpose of ordering the Defendant to appear and answer to the claim.

15. However, while summoning the Defendant, the Defendant must be served with the Plaintiff also. Order 5 Rule 1 (3) of the Civil Procedure Rules provides as follows:

“Every summons shall be accompanied by a copy of the Plaintiff.”

16. However, Order 3 Rule 1 (1) and Order 5 Rule 1(1) seems to contradict Order 5 Rule 1(5) which provides that every Summons is to be prepared by the Plaintiff or his advocate and filed with the Plaintiff.

17. On the on the other hand, Order 5 Rule 1 (2) and (6) provides that summons can only be collected for service by the Plaintiff after it has been signed either by a Judge or an officer appointed by the Judge but in any event within thirty days of issuance or notification failure of which the suit shall be abate.
18. If the signed summons are collected by the Plaintiff within 30 days of issuance or notification, it remains valid in the first instance for twelve months and the court may extend the validity of the summons from time to time if satisfied that it is just to do so.
19. The above provisions of the law leads to only once conclusion, that is, that the Defendant can only respond to a suit once he has been served with the summons duly signed together with the Plaintiff.
20. Where a Defendant is served with an Application without signed summons and a Plaintiff, he will not be under any obligation to respond to the Application because the suit would not have been brought to his attention.
21. That is true even where an Application is filed under a Certificate of Urgency and interim orders are issued as against the Defendant. Order 40 Rule 4(3) provides that where the court grants an ex-parte injunction, the applicant shall within three days from the date of issue of the order serve the order, the application and pleadings on the party sought to be restrained. In this case, a pleading shall include a Plaintiff and Summons.
22. I have already stated that where a Defendant is not served with the signed summons together with the Plaintiff, he is not obligated to file any response to any pleadings, including an application that is served upon him. If the Summons are collected by the Plaintiff or his advocate within thirty days from the date of issue or notification, and they remain valid, the suit and any Application on record shall subsist notwithstanding the non-service.
23. A Defendant who has not been served with summons has the option of responding to the allegations raised in the suit and any application if he finds out, by whichever means, that he has been sued or wait until he is served with summons together with the Plaintiff before he can file any response.
24. Consequently, I do not agree, with respect, with the 1st Defendant's Advocates submissions that the pending Application should be struck out because the Plaintiff did not serve the 1st Defendant with the summons as at the time the Application was served upon him. All the 1st Defendant was supposed to do, in my view, was to ignore the Application and await the service of the Summons and the Plaintiff upon him before he could respond to it.
25. I have not been told that the Plaintiffs did not collect the Summons for service within thirty days from the date of issue for this court to order that the suit has abated pursuant to the provisions of Order 5 Rule 1 (6) of the Civil Procedure Rules. I have also not been told that the summons, a copy of which is on record, is no longer valid and cannot be served upon the Defendants.
26. For those reasons, I disallow the 1st Defendant's Notice of Preliminary Objection dated 6th May 2014 with no order as to costs.

Dated and delivered in Malindi this 5th day of **September**, 2014.

O. A. Angote

Judge