



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL SUIT 37 OF 2012**

**KENYA INDUSTRIAL ESTATES LTD.....PLAINTIFF**

**VERSUS**

**MOHAMED ABDALLA**

**ALI ABDALLA.....DEFENDANTS**

**RULING**

1. The plaintiff's application filed on 9<sup>th</sup> March, 2012 is primarily brought under Order 40 rule 1, 2 and 4 of the Civil Procedure Rules. For purposes of this ruling only prayer 3 is relevant. It seeks that:

***“Pending the hearing and determination of this suit, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants and/or agents or otherwise howsoever be restrained from trespassing onto and disrupting the plaintiff's construction of a coconut factory/plant on its property Title Number Malindi Municipality Plot No. 37.”***

2. The grounds upon which the application is based, and as further expanded in the supporting affidavit of Joseph K. Tele are as follows:

***(i) The plaintiff/applicant is the owner of property title number Malindi Municipality Plot No. 37 (hereinafter “the suit property”)***

***(ii) Since 24<sup>th</sup> January, 2012 to date the defendants by themselves and servants and/or agents have been trespassing the suit property and violently disrupting the plaintiff's construction works and grinding them to a halt.***

***(iii) The disruption of the works aforesaid and the consequential grinding them to a halt will greatly prejudice the plaintiff by causing it irreparable harm and colossal losses.***

***(iv) The plaintiff has so far expended a capital outlay amounting to Kenya Shillings Three Million three hundred and twenty eight thousand nine hundred and twenty one (kshs. 3,328,921/-) which sum stands to be lost or wasted should the project stall due to the defendants' offending acts.***

***(v) If the defendants' attempt to or continue to trespass onto the plaintiff's property title number Malindi Municipality Plot NO. 37 and disrupt its development of a coconut factory/plant project worth over Kenya shillings twenty eight million two hundred and eighty two thousand five hundred and forty eight twelve cents (Kshs. 28,282,548.12) the object of this application and the suit will be rendered nugatory.***

**(vi) The defendants had undertaken not to interfere with the Plaintiff's quiet enjoyment of the suit property.**

3. At the hearing of the application the defendants raised a preliminary objection couched in the manner below:

**(i) The action has never commenced, the plaintiff having failed to comply with the requirements of Order 5 rule 1 Civil Procedure Rules.**

**(ii) In the alternative and without prejudice to the foregoing, there is no lis pendence by reason of failure by the plaintiff to serve summons in accordance with the law or at all.**

**(iii) Further in the alternative and without prejudice to the foregoing the action has abated the plaintiff having failed to extract and serve summons to enter appearance upon the defendants.**

The Preliminary Objection had been filed on 10<sup>th</sup> May, 2012. The court ordered the Preliminary Objection and the application to be heard together on 25<sup>th</sup> June, 2012.

4. Mr. Nyamweya for the applicant argued the application in accordance with the filed papers. In response to the Preliminary Objection he urged the court to consider the overriding objective in Section 1B of the Civil Procedure Act to ensure the just and expeditious disposal of the matter. He invoked the provisions of Section 159 (2) (b) of the Constitution in persuading the court to overlook procedural technicalities.

5. For his part Mr. Ole Kina urged the court to find that there is no suit pending as the applicants had failed to extract and serve summons as required to do under Order 5 rule 1 of the Civil Procedure Rules. For this proposition he cited the decision of Ouko J in **Malindi HCC 77 of 2005 DuttoMaria Lucia vs Maurizio Ricotti**. Having noted that summons to enter appearance had subsequent to the Preliminary Objection been filed, Mr. ole Kina asked the court to have them struck out for want of service and indeed the entire suit. His contention was that Article 159(2) (b) of the Constitution is not intended to defeat established rules of procedure but to counter clear issues of a technical nature. Mr. Nyamweya in reply urged the court to distinguish this case from the authority cited as summons had since been extracted and served, and secondly that the former decision was made prior to the coming into force of the present constitution. And that at any rate, the procedural defect had been cured through extraction and service of summons to enter appearance.

6. Having considered the rival arguments made before me and the material presented I take the following view of this matter. The plaintiff was obligated to file summons to enter appearance alongside the plaint and to collect the summons within 30 days of issue thereof or notification thereon (see Order 5 rule 1-6 of the Civil Procedure Rules). Clearly, the applicant in this case did not comply with the first requirement above and was only spurred to compliant action by the respondent's notice of Preliminary Objection. From the record the summons were extracted and served about two months since the filing of the suit.

7. Although Order 5 rule 1(1) (3) and (5) of the Civil Procedure Rules are couched in mandatory terms, I am not persuaded that the effect of a breach thereto is to render the suit non-existent, as urged by Mr. ole Kina. In my view all the relevant rules in Order 5 Civil Procedure Rules must be read as a whole in order to appreciate these particular rules, so that we do not force a stretched interpretation or purport. As an example, Order 5 Rule 2(6) of the Civil Procedure Rules provides specifically what should happen in situations where a party has failed to collect "for service within thirty days of issue or notification" summons to enter appearance. The suit shall abate in those circumstances. Similarly, under Order 5 rule 2(7) of the Civil Procedure Rules where summons have expired before the application for extension of their validity is made, the court may dismiss the suit without notice. Yet the corresponding rule with respect to the time of validity of summons to enter appearance is in mandatory terms (See Order 5 rule 2(1)).

8. To my mind it is evident from these examples:

1. That if it was the intention of the makers of the rules to provide for the automatic abatement of suits in cases where summons to enter appearance are not filed with the plaint and extracted for service, they could have so provided.

And secondly, that it does not follow automatically that the breach of any of these rules, without the express provision thereto, must lead to the most extreme consequence, in this case the rendering of the suit a nullity. The court has discretion in the matter. At any rate the respondents have now complied with the rules by extracting and serving summons to enter appearance up on the respondents.

9. In so doing they were within the time limitations provided in Order 5 rule 2 of the Civil Procedure Rules. In other words, even though their action has effectively pre-empted the Preliminary Objection there is no time bar to the same. In my view the respondent has not thereby been prejudiced in a manner not compensatable by costs. The facts of this case therefore distinguish it from the **Dutta Maria Lucia Case** which was cited by the respondents.

10. Therefore, my considered view is that the preliminary Objection is not merited. The respondents' answer to the plaintiff's application was hinged on the said Preliminary Objection. No replying affidavit or grounds were filed and in opposition to the application. Hence the depositions contained in the supporting affidavit of Joseph K. Tele are not controverted. Upon an examination of the said affidavit and annexures thereto, I am satisfied that the application before me musters the threshold outlined in **Giella vs Cassman Brown & Co.** with respect to the grant of an interim injunction I do therefore allow prayer 3 of the said application. However, costs will not follow the event. The respondents will not shoulder the burden of costs in respect of the said application.

Delivered and signed this 3<sup>rd</sup> day of September, 2012 in the presence of Ms Oyugi holding brief for Mr. ole Kina for respondent.

Applicant – No appearance.

Court Clerk – Leah, Evans.

**C. W. Meoli**  
**JUDGE**