



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1408 OF 2016

MARGARET WANGARI NJERI.....PLAINTIFF

VERUS

GRACE WAMBUI.....1ST DEFENDANT

NJONGA INVESTMENT CO. LIMITED.....3RD DEFENDANT

RULING

1. This is the notice of motion dated 16th July 2019 brought under section 3A of Chapter 21, Laws of Kenya and Article 159 (2) (d) of the Constitution of Kenya, 2010.

2. It seeks orders:-

1. That leave be granted to the plaintiff to extract, file and serve summons to enter appearance out of time.

2. That costs be in the cause.

3. The grounds are on the face of the application and are:-

a. That this suit was instituted under certificate of urgency on 15th November, 2016 when the plaint was filed devoid of summons to enter appearance.

b. That despite service of the application dated 14th November, 2016 together with a restraining order upon the 1st defendant, the defendant did not abide by the said order necessitating contempt of court proceedings that were filed on 20th December 2016.

c. That it is only on 28th January, 2019 that a ruling for both applications were determined.

d. That failure to extract the said summons was not deliberate but an oversight in view of the circumstances heretofore stated.

e. That the plaintiff is exceedingly keen and anxious to have her day in court.

f. That it would be draconian to strike out her case in view of the foregoing.

g. That the matter has also largely been in nudge's chambers awaiting ruling hence summons could not be extracted.

h. That no prejudice will be occasioned to the defendant if the application is allowed.

4. The application is supported by the affidavit of Margaret Wambui Njeri, the plaintiff/applicant herein sworn on the 16th July 2019.

5. The application is opposed. There are grounds of opposition filed by the 1st defendant dated 17th February 2020. They are:-

a. The application is misconceived, frivolous, vexatious, in bad faith and devoid of any merit.

b. The orders sought under the application are based on a grave misconception of the law and fact.

c. The failure by the plaintiff to extract summons is inconsistent with the mandatory provisions of order 5 rule 1(1) and (5) of the Civil Procedure Rules and the failure to observe rules of procedure as set out therein is fatal as the suit never commenced and remained still born.

d. The application is an attempt by the applicant to circumvent and defeat the 1st defendant's application seeking to have the suit struck out for being in contravention of the mandatory provisions of order 5 rule 1(3) of the Civil Procedure Rules stipulates that every summons shall be accompanied by a copy of the plaint.

e. The application is tantamount to trifling with the court and is an abuse of the process of this honorable court.

6. On the 6th July 2020 the court with the consent of the parties directed that the application be canvassed by way of written submissions.

7. It is the plaintiff's/applicant's submissions that the matter has been pending at interlocutory stage and the file has been in various judge's chambers hence the summons could not be extracted. It would be draconian for the suit to be dismissed for want of summons to enter appearance as is envisaged by Article 159(2)(d) of the Constitution of Kenya, 2010.

8. Further that no prejudice will be occasioned to the respondents if the orders are granted. She prays that the application be allowed.

9. It is the 1st defendant's/respondent's submissions that it is now three years since the suit was filed yet the plaintiff has never extracted or served the summons. That this application is an attempt to circumvent and defeat the 1st defendant's application seeking to have the suit struck out for being devoid of the mandatory provisions stipulated in the civil procedure code.

10. There is no excusable mistake and/or compelling reasons presented before the court to warrant the orders sought. The maxim of equity states that equity aids the vigilant and not the indolent. The plaintiffs seeking a remedy for their indolence is bad in law and an afterthought. The suit is incurably defective as the plaintiff has failed to extract and serve the defendants with any summons to enter appearance which has made it impossible for the defendant to respond to the suit through a defence.

11. Order 5 rule 1 of the Civil Procedure Rules, places an obligation on the plaintiff to ensure that summons are prepared and signed by the court and thereafter be served on the defendants. She has put forward the cases of **Leonard Njogu vs Barclays Bank of Kenya & Another [2014] eKLR; Grace Wairimu Mungai vs Catherine Njambi Muya [2014] eKLR.**

12. She prays that the application be dismissed with costs for being incurably defective and bad in law.

13. I have considered the notice of motion and the affidavit of in support. I have considered the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination is whether this application is merited.

14. **Order 5 rule 1** of the Civil Procedure Rules provides that:-

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

2. very summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

3. Every summons shall be accompanied by a copy of the plaint.

4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.

6. Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.

It is clear that the above provision is set in mandatory terms.

15. I have considered the circumstances of this case. I find that the plaintiff/applicant has given the reason for the delay in extracting the summons to enter appearance.

16. I find that it is in the interest of justice that the plaintiff/applicant herein is given a chance to prosecute her case.

17. No prejudice will be occasioned to the defendant if the suit goes to full hearing.

18. Accordingly, I find merit in this application and grant the orders sought namely:-

a. That leave is hereby granted to the plaintiff/applicant to extract, file and serve summons to enter appearance out of time.

b. That the said summons to enter appearance be extracted, filed and served within thirty (30) days from the date of the this ruling. In default, the plaint dated 14th November 2016 shall stand struck out and the suit dismissed for want of prosecution.

c. That costs of this application be borne by the plaintiff/applicant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 3rd day of December 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Steve – Court Clerk