



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 68 OF 2016

BIRONGO FARMERS CO-OPERATIVE SOCIETY LTD....PLAINTIFF

VERSUS

ABEL MORANG'A ONGWACHO.....1ST DEFENDANT

PATRICK MOKAYA NYANGWESO.....2ND DEFENDANT

JAMES MAKORI KIBAGENDI.....3RD DEFENDANT

ANAH NYAKERARIO OTWOMA.....4TH DEFENDANT

THE LAND REGISTRAR, KISII COUNTY.....5TH DEFENDANT

RULING

1. The court on 11th December 2018 adjourned this matter which had been fixed for hearing on that date and on 13TH December 2018 on the ground that the 2nd, 3rd and 4th defendants had been given “**too short**” a notice to be able to prepare and proceed with the trial. Their advocate had only been served with a hearing notice the previous day. The court noting that the suit involved numerous members of the public through their Co-operative Society fixed the suit for hearing on 4th and 5th March 2019 and directed other matters fixed for hearing on that date to be removed from the cause list to pave the way for hearing of this suit.

2. Before the date scheduled for hearing the 2nd, 3rd and 4th defendants on 10th January 2019 filed a Notice of Preliminary Objection predicated under Order 5 Rule 6 and cited the following grounds in support thereof:-

- 1. That the suit against the 2nd, 3rd and 4th defendants has abated since summons to enter appearance have never been served.**
- 2. The summons were issued by the court on 24th March 2016 and were collected on 3rd May 2016 from court and handed over to the process server by the advocate for the plaintiff after they had abated.**
- 3. The application for substituted service was filed in court on 25th May 2016 after the said summons had abated.**
- 4. The advertisement on the Daily Nation Newspaper dated 16th June, 2016 purported to serve pleadings and the application with exclusion of summons had no consequences since the same abated on 23rd April 2016.**
- 5. The costs of the preliminary objection be provided for.**

3. The 2nd, 3rd and 4th defendants on 26th February and 28th February 2019 filed a list and a supplementary list of authorities in support of the preliminary objection. On 1st March 2019 the plaintiff's advocates filed grounds of opposition to the preliminary objection thus:-

- 1. Service was properly done and effected on the defendants.**
- 2. Substantive justice takes precedence over procedural requirements.**
- 3. The objection lacks legal basis and is unmerited.**

4. The parties advocates made brief submission before me on 4th March 2019. Mr. Moindi advocate for the 2nd, 3rd and 4th defendants submitted that the summons issued in this matter were not collected for service within 30 days from the date of issue as required under Order 5 Rule 6 of the Civil Procedure Rules and therefore the same abated on expiry of 30 days and with them the suit against the 2nd, 3rd and 4th defendants. He submitted the court lacks the jurisdiction to entertain the suit the same having abated on account of service of summons to enter appearance. He argued that not even the order for service by way of substituted service could salvage the suit. Mr. Moindi relied on the authorities filed in support of the preliminary objection and emphasized that the plaintiff could not seek refuge under Article 159 of the Constitution and/or Sections 1A, 1B and 3A of the Civil Procedure Act which generally enjoin the court to administer substantive justice and not to be shackled by procedural technicalities where justice demands.

5. For his part Mr. Ochoki advocate for the plaintiff took the position that the preliminary objection was misconceived. He maintained that the summons to enter appearance were issued and collected on 24th March 2016 and not on 3rd May 2016 as suggested by the 2nd, 3rd and 4th defendant's counsel. He stated that all the summons were collected on 24th March 2016 and that the 1st defendant was served on the same date and he entered appearance the same day. Mr. Ochoki took the position that a summons having been issued remains valid for a period of 12 months from the date of issue and he consequently submitted that the summons against the defendants having been issued on 24th March 2016, they were valid as at the time the plaintiff applied for substituted service upon the defendants in May 2016.

6. I have set out the rival contentions by the parties and now revert to the facts and the applicable law to determine the sustainability or otherwise of the preliminary objection raised by the 2nd, 3rd and 4th defendants herein. At the outset, I must observe that a party has the right to raise a preliminary objection at any stage in the proceedings before trial has opened. Where the objection is such as one that goes to challenge the jurisdiction of the court to entertain the suit, such objection should be determined at the earliest opportunity to avoid the situation where the court engages in a lengthy trial only at the end to come to the determination that it lacked jurisdiction or the suit was for some other reason unmaintainable. In the present matter, the defendants contend the suit against them had abated and if that is true, then there would be no suit to try against the 2nd, 3rd and 4th defendants. But is that the case in this matter; and are the said defendants entitled to take the preliminary objection that they have taken?

7. The courts in considering what constitutes a valid preliminary objection have relied on the Court of Appeal decision in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] E.A 696** which has rightfully been referred to as the "**locus classicus**" on the subject of preliminary objections. In the case, Law JA stated as follows:-

"so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

In the same case **Sir Charles Newbold, P.** while expressing his view as to what constitutes a preliminary objection stated as follows:-

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

8. In the premises, a preliminary objection in order to succeed must be on a pure point of law; the facts on which it is based should not be disputed so as to require to be ascertained and/or should not be inviting the exercise of judicial discretion.

9. In the present matter, the 2nd, 3rd and 4th defendants contend that the summons to enter appearance were collected on 3rd May 2016 while they were issued by the court on 24th March 2016 as per the signed copies on the court file. The plaintiff however avers that the summons were collected from the court the same day they were signed and that is how service was effected on the 1st defendant on 24th March 2016. The court record shows that all the summons to enter appearance for all the defendants were signed and issued on 24th March 2016. The 1st defendant was apparently served on the same day and duly filed a memorandum of appearance on the same day (24th March 2016) through the law firm of G. M. Nyambati & Co. Advocates. The plaintiff on 25th May 2016 filed a Notice of Motion dated 17th May 2016 seeking to be granted leave to effect service of the summons to enter appearance together with the plaint on the 2nd, 3rd and 4th defendants by way of substituted service as efforts to serve summons upon them directly had proved futile. In support of the application for substituted service, an affidavit of service by one **Elijah Gekonge Nyangau** was annexed as "**SNN01**" where he deposed that he received copies of the court documents on 3rd May 2016 from the firm of Ochoki & Co. Advocates for service on the defendants. The process server explained that despite making several attempts he did not manage to effect service on the 2nd, 3rd and 4th defendants. The plaintiff was granted leave to effect service on the defendants by way of advertisement in the Daily Nation Newspaper. The 2nd, 3rd and 4th defendants after service was effected upon them entered appearance through the law firm of **Mogire & Co. Advocates** vide a Memorandum of appearance dated 30th June 2016 filed in court on 1st July 2016. The newspaper advertisement required the defendants to enter appearance within 15 days of service by way of substituted service.

10. Simultaneously with filing the Memorandum of appearance, the 2nd, 3rd and 4th defendants filed a Notice of Preliminary Objection on the ground that the court lacked the jurisdiction to entertain the dispute between members of Birongo Co-operative Society Ltd. The court heard and disallowed the preliminary objection vide a ruling delivered on 16th December 2016. The 2nd, 3rd and 4th defendants from the record never filed any defence although they have participated in these proceedings since filing their memorandum of appearance. The court as per the record has given directions to the parties to comply with Order 11 of the Civil Procedure Rules which the 2nd, 3rd and 4th defendants never complied with.

11. The explanation Mr. Moindi offered for not filing any defence was that they were never served with summons and further he argued the

summons herein having not been collected from the date of issue within 30 days they lapsed and the suit against the defendants abated. If I understood him properly it was his position that the summons had to be collected and served within 30 days from the date of issue. In the instant case he stated the summons were collected on 3rd May 2016 after they were issued on 24th March 2016 though he offered no evidence that indeed they were collected from the court on 3rd May 2016 and not 24th March 2016 as claimed by the plaintiff's advocates. The defendants counsel in arguing the preliminary objection placed reliance on Order 5 Rule 6 of the Civil Procedure Rules although from the gist of his submission he must have meant Order 5 Rule (1) (6) which provides thus:-

“Every summons, except where the court is to effect service, shall be collected for service within thirty days of issuance or notification, whichever is later, failing which the suit shall abate.”

This provision has to be read in conjunction with Order 5 (1), (2), (3), (4) and (5) which provides as follows:-

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

(2) Every 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 subrule (2) of this rule.

Order 5 Rule 2 (1) provides for validity period of summons thus:

2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

12. The determination of the preliminary objection turns on the interpretation of the above legal provisions and when it is found the summons were collected from the court. I have intimated herein above that although the defendants assert the plaintiff collected the summons on 3rd May 2016 there is no evidence to support that assertion. It is the process server who collected the documents from the firm of Ochoki & Co. Advocates on 3rd May 2016 for service upon the defendants suggesting the summons and the other documents must have been collected from the court by the firm earlier. The plaintiff's advocate's assertion that the summons were collected when they were signed on 24th March 2016 has not been rebutted by any evidence. In all probability the summons must have accompanied the plaint which was filed on 18th March 2016 and were paid for as per the copy of the filing receipt No. 2753141 which has a charge of kshs. 250/= for issue of summons. The file was placed before the Judge on 18th March 2016 to give directions on the application for injunction filed under a certificate of urgency. The court granted an interim order and this order was extracted and issued on 24th March 2016 when it was signed. It is probable that the order and the summons were collected at the same time and upon the 1st defendant being served he entered appearance on the same day he was served (24th March 2016).

13. On the basis of the record and the evidence I find that the summons were issued and collected on 24th March 2016 and that in terms of Order 5 Rule 2 (1) these summons remained valid for a period of twelve months from the date of issue. With respect, I do not agree with Mr. Moindi advocate that the summons have to be issued, collected and served within a period of thirty days as he submitted. If that were to be the case there would have been no need for order 5 Rule 2(1) which provides that summons once issued remain valid for 12 months. Order 5 Rule 1 was intended to hasten and facilitate the issuance of summons and to avoid parties filing suits where no summons had not been prepared. Before the amendment of the Civil Procedure Rules in 2010 there was no requirement for a plaint to be filed together with summons and it used to take an inordinately long time to get summons prepared and issued by the court. At the time the plaintiff applied to serve the defendants by way of substituted service, the summons that had been issued were valid. The 2nd, 3rd and 4th defendants upon entering appearance in response to the advertisement were obligated to file their defence if they desired to defend the suit. The plaintiff's application for leave to serve the defendants by way of substituted service was made under Order 5 Rule 17 which is applicable where a party is unable to serve summons personally on the defendant(s). Order 5 Rule 17 (1) provides as follows:-

17. (1) Where the court is satisfied that for any reason the summons cannot be served in accordance with any of the preceding rules of this Order, the court may on application order the summons to be served by affixing a copy thereof in some conspicuous place in the court-house, and also upon some conspicuous part of the house, if any, in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit.

14. Having found that the summons were collected within time and were therefore valid at the time the plaintiff applied for service, it follows that the defendants preliminary objection must fail. The preliminary objection as has turned out was founded on facts which were not agreed as relates to when the summons were collected. Further the preliminary objection in my view was predicated on a misconception of the law that summons once issued must be collected and served within thirty days of the date of issue. The correct position is that summons are valid

for a period of twelve months from the date of issue and can be served anytime before the expiry of twelve months and substituted service is one of the methods through which service can be effected.

15. The defendant's counsel referred me to several authorities to support his preliminary objection but with tremendous respect, the authorities have no application in the circumstances of the present case. The authorities related to situations where summons had either expired as a matter of fact and/or the period fixed for taking of a certain action had expired. As I have found, that is not the position in the present matter as the summons were valid when the order for substituted service was granted.

16. The upshot is that the preliminary objection is devoid of any merit and I order the same dismissed. As concerns costs occasioned by this preliminary objection, I take note that the taking of the preliminary objection aborted the hearing of the suit that had been scheduled for two clear days and that the adjournment of the hearing must have occasioned the plaintiff costs. In the premises, I award costs of the preliminary objection to the plaintiff which I assess at kshs. 10,000/= payable to the plaintiff within the next 30 days from the date of this ruling.

RULING DATED, SIGNED and DELIVERED at KISII this 8TH DAY of MARCH 2019.

J. M. MUTUNGI

JUDGE

In the Presence of:

Mr. Nyasimi & Ochoki for the plaintiffs

Mr. Nyamacha for the 1st defendant

Mr. Nyamacha for the 2nd, 3rd and 4th defendants

N/A for the 5th defendant

Ruth Court Assistant

J. M. MUTUNGI

JUDGE