



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 589 OF 2017

NGEI RIVER BANK SCHEME SELF HELP GROUP

(suing through its officials: Joseph Ochieng Odongo,

Vitalis Opondo Midigo & Titus Gatitu Kariuki.....PLAINTIFFS

VERSUS

RAMJI RATNA & COMPANY LIMITED.....1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 18th September 2017 brought under Order 8 rule 5, order 51 rule 1 of the Civil Procedure rules Sections 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:-

(a) Spent.

(b) Spent.

(c) Spent.

(d) That pending the hearing and determination of this application and this suit the defendants/respondents, their servants and/agents, assigns or otherwise howsoever be restrained from trespassing, entering upon or remaining on or in any way interfering with all that parcel of land being LR No's NAIROBI/BLOCK 72/2971, 2972, 2973, 3974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 22986, 2987, 2988, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3077, 3077, 3078, 3079, 3080 and 3081 Lang'ata.

(e) That the costs of this Application be awarded to the plaintiffs/applicants

3. The grounds are on the face of the application and are set out in paragraphs 1 to 16.

4. The application is supported by the affidavit of Vitalis Opondo Midigo, Chairman of the plaintiff, sworn on the 18th September 2017.

5. The application is opposed. There is a replying affidavit sworn by Thomas Gacoki, Assistant Director of Survey with the 2nd defendant/respondent sworn on the 14th November 2017.

6. After filing of this suit and the application herein, it appears the plaintiffs lost interest in the matter. They have never appeared in court dispute notices issued to them.

7. While this matter was pending ruling the 2nd defendant/respondent filed the notice of motion dated 18th March 2019 brought under Order 5 Rule 1(6) Order 51 Rule 1, 2 and 4 of the Civil procedure Rules, Sections 1A, 1B and 3A Cap 21 Laws of Kenya.

8. It seeks orders:-

(i) That his honourable court be pleased to declare that the suit herein has abated for failure to serve summons to enter appearance.

(ii) That the suit be struck out.

(iii) That costs of this application be borne by the plaintiffs.

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

(a) That this claim was filed in court on 20th September 2017.

(b) That since the filing of the suit, the plaintiff has not served summons to enter appearance on the defendants contrary to Order 5 rule 1(6) of the Civil Procedure Rules, 2010.

(c) That the suit therein has abated in accordance with order 5 rule 1(6) of the Civil Procedure Rules.

(d) That consequently this suit should be struck out with costs.

10. The application is supported by the affidavit of Cecilia Wangui Muhoro advocate for the 2nd defendant/respondent sworn on the 18th March 2019.

11. I have considered the notice of motion dated 18th March 2019 together with the affidavit in support. Order 5 rule 1 (2) of the Civil Procedure Rules provides that:-

“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”

“Rule 1 (6) provides that

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

12. As stated earlier it appears the plaintiffs lost interest in this suit soon after filing. The summons to enter appearance had not been served on the defendants. This is contrary to order 5 rule 1 of the Civil Procedure Rules.

Order 5 rule 1(6) is set in mandatory terms. Failure to collect summons to enter appearance within thirty days means the suit shall abate. I find that the suit herein has abated for failure to serve summons to enter appearance upon the defendants. Consequently, it means the notice of motion dated 18th September 2017 has no legs to stand on and it is struck out.

13. I find merit in the notice of motion dated 18th March 2019. It raises issues of law which are undisputed. The application is hereby allowed in the following terms:-

(a) That a declaration be and is hereby issued that the suit herein has abated for failure to serve summons to enter appearance.

(b) That the suit herein be and is hereby struck out.

(c) That the costs be borne by the plaintiffs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 25TH day of APRIL 2019.

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L. KOMINGOI

JUDGE

In the presence of:

.....Advocate for the Plaintiffs

.....Advocate for the Defendants

.....Court Assistant