



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 168 OF 2017

WAITHIRA KIMONDO ..... 1<sup>ST</sup> PLAINTIFF

JULIUS K KIMONDO..... 2<sup>ND</sup> PLAINTIFF

VS

VIGILLANT AUCTIONEERS..... 1<sup>ST</sup> DEFENDANT

KENYA INDUSTRIAL ESTATES LTD ..... 2<sup>ND</sup> DEFENDANT

MIXED SOFT PAPERS LTD..... 3<sup>RD</sup> DEFENDANT

RULING

1. This is a ruling in respect to the Preliminary Objection as filed by the 2<sup>nd</sup> Defendant dated 28/11/18 on grounds that: -
  - a. That the Honourable Court has no jurisdiction to hear and determine this matter as the 2<sup>nd</sup> Defendant was not served with summons contrary to Order 5 rule 2 of the Civil Procedure rules.
  - b. That the suit is frivolous, vexatious and an abuse of Court process.
  - c. That the suit is incompetent and bad in law.
2. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not oppose the application and neither did they file any responses.
3. The Plaintiff opposed the Preliminary Objection through an affidavit dated 17/1/19 sworn by the 2<sup>nd</sup> Plaintiff who deposes that the issues raised in the Preliminary Objection had been raised before in this suit vide an application dated 23/6/08 which application was dismissed by this court. That the summons against the 2<sup>nd</sup> Defendant was indeed taken out as per the annexed copy. The Plaintiffs fault the 2<sup>nd</sup> Defendant for failing to heed the advice of the Court to concentrate on the merits of the case and avoid side shows. It prayed for the Preliminary Objection to be dismissed. The Plaintiffs contend that the Preliminary Objection is an attempt to frustrate and delay the hearing of this case.
4. The 2<sup>nd</sup> Defendant submits that the failure on the part of the Plaintiffs to take out and serve the summons on the 2<sup>nd</sup> Defendant since the date of filing the suit on 13/4/06 to date the period within which the said summons would have been filed has since lapsed and the suit abated thereof. That this Court therefore lacks jurisdiction to determine an abated suit. They contend the matters raised satisfy the essential elements of a Preliminary Objection as was explained in the classic case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors (1989) EA 696**.
5. That the Preliminary Objection raises a point of law that prescribes a mandatory process to be followed by all parties that institute suits which the Plaintiffs herein have failed to comply in regard to **Order 5 rule (1)**.
6. That the 2<sup>nd</sup> Defendant it being a corporation incorporated as such in 1997 ought to have been served with the Court summons in either of the ways prescribed in the rules but was never done. They claim that position is further evidenced in the failure on the part of the Plaintiffs to file any affidavit of service detailing how the summons that were apparently taken out in respect to the 2<sup>nd</sup> Defendant was done.
7. The 2<sup>nd</sup> Defendant further submits that the rules of evidence are very clear and the burden of proof lies squarely on the person who alleges, this is so under Section 107, 108 and 109 of the Evidence Act. That the Plaintiff alleges to have taken out summons in respect to the 2<sup>nd</sup> Defendant, the Plaintiffs were then bound to effect service of the said summons on the 2<sup>nd</sup> Defendant in either of the modes prescribed in

law and thereafter file a return of service in Court evidencing the same. Failure to file an affidavit of service shows that no service was ever done on the 2nd Defendant. That owing to that failure to file and serve summons the suit abates under order 5 rule 6 of the Civil Procedure Rules.

8. The 2<sup>nd</sup> Defendant has cited the case of **M.B. Automobiles Vs Kampala Bus Service (1966) EA 480** where it was held that the failure to file a return of service is tantamount to no service as was held in case of **Laban Kariuki Wambugu & 68 others Vs Hon. Kihika civil case No. 161 of 2002**.

9. The 2<sup>nd</sup> Plaintiff submits that the issues raised in the Preliminary Objection have already been determined by this Court on the application dated 23/6/08. That the Defendants should be stopped from reopening the issue. That the Plaintiffs demonstrated that the 2<sup>nd</sup> Defendant had been served with summons. That the 2<sup>nd</sup> Defendant is bringing the Preliminary Objection too late in the day after the matter has already been confirmed for hearing. That the pending suit has well-articulated issues of fraud perpetuated by the 2<sup>nd</sup> Defendant and it would be unfair to lock out the Plaintiff from accessing to justice. That the Court has already issued injunction orders after being satisfied that the suit is proper.

10. The ruling dismissing the application is of 23/6/08 is not in file to verify reasons given by the Court thereof.

11. The only issue for determination in this Preliminary Objection is whether failure to issue and serve summons to enter appearance upon the 2<sup>nd</sup> Defendant is fatal to the Plaintiffs' claim against the 2<sup>nd</sup> Defendant.

12. The Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined what a Preliminary Objection is. Equally in the case of **Oraro vs. Mbaja(2005) I KLR 141** Ojwang, J the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point .....Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence .....

13. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

14. That said, the matter falls within procedural law. Issuance of summons to enter appearance is governed by Order 5 Rule 1 which states 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.

(6) 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**”.

15. From the record this suit was filed on the 13/4/2006. There are photostat copies of summons on record dated the 13 /4/2006. There is no affidavit of service to show that the 2nd Defendant was served with the summons. The 2nd Plaintiff has alluded to the said copy of summons to enter appearance as evidence of service. With due respect this Court disagrees with the 2nd Plaintiff. It would appear that the Plaintiff on 18/4/06 caused the service of the Notice of Motion dated the 13/4/06 and the interim orders on the Defendants and omitted the Plaintiff.

16. Order 5 rule 6 states that the summons must be collected within 30 days of issue or notification whichever is later, failing which the suit shall abate. The summons to enter appearance were issued on the 13/4/2006 and therefore lapsed on the 13/5/2006. The Plaintiff did not take steps to extend the summons as provided by the procedural law or at all.

17. That notwithstanding, the conduct of the 2<sup>nd</sup> Defendant Applicant is pivotal to look at in determining this Preliminary Objection;

a. Upon service of the Notice of Motion and orders stated above, the 2<sup>nd</sup> Defendant filed a Notice of appointment through the firm

of J F Omwoyo Advocate, replying affidavit and a preliminary objection on the 18/4/2006 challenging the affidavit of the 2<sup>nd</sup> Plaintiff attached to the Notice of Motion of 13/4/2006.

b. On the 8/7/2006, it filed a Notice of Motion seeking orders that the suit against it be struck out.

c. On the 16/4/2008 filed a change of Advocates to Moerwa Omwoyo & Co Advocates.

d. On the 24/9/2013, it changed advocates to Osoro Chege Kibathi & Co Advocates.

e. On 5/2/2014, it filed a Notice of Motion seeking orders that the suit against the 2<sup>nd</sup> Defendant be dismissed for want of prosecution.

f. On the 12/9/2018 filed, its list of issues numbering 4 issues together with the pretrial questionnaire dated the 11/9/2018, which they wanted the Court to determine.

g. On the 3/9/18, they were served with the pretrial bundle of the Plaintiffs which they acknowledged on even date. See date stamped mention notice dated 29/8/18.

h. On the 1/10/18 the parties appeared before the Court for pretrial conference. The Plaintiffs and the 2<sup>nd</sup> Defendant were represented by Messrs Mbuthia Advocate H/B for Mr. Gachomo Advocate and Mr. Kimani Advocate H/B for Chege Advocates respectively. Mr. Mbuthia for the Plaintiffs informed the Court that the Plaintiffs have complied with order 11 and sought a hearing date. Mr. Kimani on the other hand readily pronounced that the 2<sup>nd</sup> Defendant has complied too. By consent the matter was marked ready for hearing and the hearing date was fixed for 5/11/18. The Court ordered pretrial closed. The Plaintiffs were ordered to serve the 1<sup>st</sup> and 3<sup>rd</sup> Defendants with the hearing notice.

i. Come the 29/11/18 Mr. Gachomo Advocate informed the Court that he was ready to proceed with the hearing with one witness. Ms. Mathanji Advocate H/B for Mr. Juma Advocate for the 2<sup>nd</sup> Defendant had filed a Preliminary Objection, which ought to be heard first. It is this Preliminary objection, which is the subject of this ruling.

18. The question the Court would want answered despite the procedural mishap in respect to service of summons, was the 2<sup>nd</sup> Defendant aware of the case facing it in Court? I ask so because the 2<sup>nd</sup> Defendant drew issues and filed them on the 11/9/2018. Issues emanate from the pleadings of the parties. My perusal of the issues are germane to the suit in Court.

19. Further in its Pretrial questionnaire dated the 11/9/18 the 2<sup>nd</sup> Defendant stated under para 3 that it has given full disclosure of the documents to the other party. This must be referring to the documents relevant to the case at hand. At para 7, it disclosed that there was no need for interrogatories. This answer can only be given if the party knew the case before it. Para 21 it categorically affirmed that it had prepared a bundle of documents for trial together with a case summary. Surely can a party do this if he is unaware of the case?

20. From the preceding two paras this Court concludes that the 2<sup>nd</sup> Defendant was aware of the case before it notwithstanding that the summons were not effected. The Court has outlined its active involvement and participation in the case throughout the record.

21. In specific, despite the procedural defects in service of summons, the 2<sup>nd</sup> Defendant on 11/9/18 elected by consent to proceed with the matter for hearing in the form it is. It elected by consent to have the matter certified for hearing and fixed a hearing date. It exercised its right to have the matter proceed for hearing undefended. Parties are the masters of their cases. They retain the right to conduct their cases as they please but within the procedural law of the land. It is within the right of a party to have its case heard without filing a defence and or adducing evidence. In either way, their right to be heard is intact.

22. It is the finding of this Court that the 2<sup>nd</sup> Defendant had notice of the case in whatever form as early as 2006. On the 11/9/18, by consent it closed the arena of preliminaries, interrogatories and pretrial conference and set the ship sailing into the high seas of hearing. It cannot be allowed to steer the ship to the shore. It is too late in the day.

23. The Court notes the 2<sup>nd</sup> Defendant did file various applications cited in para 17 b and e, which applications are similar in substance to the instant application. There is no reason proffered by the 2<sup>nd</sup> Defendant for this conduct. The Court finds the actions of the 2<sup>nd</sup> Defendant in filing multiple applications and failing to prosecute them an abuse of the process of the court. The applications pending on record dated the 8/7/06 and 5/2/14 be and are hereby struck out.

24. From the circumstances of this case, the 2<sup>nd</sup> Defendant has not shown any prejudice that it is likely to suffer if the case proceeds to full hearing as it has acquiesced by deed and conduct.

25. The purpose of summons to enter appearance therefore is primarily to notify the Defendant and or invite them to defend the suit, and the 2<sup>nd</sup> Defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and nearly 10 years having elapsed since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 2<sup>nd</sup> Defendant has actively been participating in the suit.

26. That being the case, the 2<sup>nd</sup> Defendant's submission that summons to enter appearance is what invites the Defendant to submit to the jurisdiction of the court, while that is absolutely correct, but it did submit itself to the jurisdiction of the Court by full and active

participation in the proceedings, hence the claim that the suit is a nullity has absolutely no merit. Further, the 2<sup>nd</sup> Defendant has not demonstrated how its participation in these proceedings without being served with summons to enter appearance has been prejudicial to it.

27. I consider that what the 2<sup>nd</sup> Defendant seeks to defeat this suit and hence defeat justice for the Plaintiffs is what the overriding objectives of the Civil Procedure Act and Rules as well as Article 159(2) (d) of the Constitution, that justice shall be administered without undue regard to procedural technicalities, were intended to cure. To dismiss this suit in the circumstances that I have described herein in detail is unforgivable in this new constitutional dispensation and will be to deny justice for the Plaintiff's contrary to Article 48 of the Constitution and therefore oust them from the judgment seat of justice as well as to deny them a right to a hearing and fair trial espoused in Article 50(1) of the Constitution. Courts of law ought not to do injustice to the parties.

28. The Court notes that the Plaintiff is not without blame. It failed to serve the Defendants with summons to enter appearance, which is the genesis of the procedural quagmire the parties have found themselves in.

29. Exercising my discretion, I grant leave to the Defendants to file their defence and serve within 14 days from the date of this ruling and fix the matter for hearing expeditiously.

30. The Preliminary Objection is disallowed.

31. Costs shall be in favour of the Plaintiffs.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 11<sup>TH</sup> DAY OF APRIL, 2019.**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kirui HB for Gachomo for the 1<sup>st</sup> – 2<sup>nd</sup> Plaintiffs/Respondents

1<sup>st</sup> Defendant/Respondent – Absent

T M Njoroge HB for Juma for the 2<sup>nd</sup> Defendant/Respondent

3<sup>rd</sup> Defendant/Respondent – Absent

Kuiyaki and Njeri, Court Assistants