



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC NO. 462 OF 2012**

**JAMES MUKURIA NJOROGE.....PLAINTIFF**

**VERSUS**

**JOSEPH MURAYA GACHUHI.....1<sup>ST</sup> DEFENDANT**

**JORETH LIMITED.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**RULING**

This ruling is in respect of the applications dated 6 /2/ 2018 and 12 /2/2018.

The 1<sup>st</sup> Defendant filed the application dated 6 /2/ 2018 under Order 5 Rule 1, Order 16 Rule 5 and Order 17 Rule (2) (3) of the Civil Procedure Rules seeking orders that the Plaintiff's suit be struck out and that the costs of the suit should be borne by the Plaintiff. The application was based on grounds that over 5 years have lapsed since the suit was filed and no summons have been issued or served on the 1<sup>st</sup> Defendant, thus the Plaintiff's suit has abated for breaching Order 5 Rule 1(6) of the Civil Procedure Rules and that the delay is an abuse of the court process.

The application was supported by the 1<sup>st</sup> Defendant's supporting affidavit, who reiterated the grounds on the face of the application and deponed that the Plaintiff was aware all along that summons to enter appearance were neither extracted nor issued but he failed to extract summons.

Counsel for the Plaintiff swore a replying affidavit in opposition to the application. He deponed that when he discovered that summons in this matter had not been issued, he wrote to the Deputy Registrar of this court requesting the court to sign and issue summons to enter appearance. He annexed a copy the letter dated 4/7/2017. He further deponed that it is the duty of the court to sign and issue summons to enter appearance.

The court has considered the application, affidavits together with annexures and the submissions filed by the parties. This suit was brought by the Plaintiff in person under certificate of urgency dated 31/7/2012. On 1/8/2018, when this matter came up in court for the first time, the firm of Kimani Charagu & Co. Advocates had come on record for the Plaintiff. The court issued interim orders pending hearing of the application dated 31/7/2012, which was eventually disposed of by way of written submissions and a ruling given on 19/5/2014 dismissing the Plaintiff's application. Being dissatisfied with the ruling, the Plaintiff lodged **Civil Application No. 120 of 2014**. The Court of Appeal's ruling given on 18/12/2014 was in the Plaintiff's favour.

Parties did not take any steps until 21/8/2017, when the court issued a mention notice for 23/10/2017. By the time the matter came up for mention on 23/10/2017, the Plaintiff had written the letter dated 4/7/2017 to the Deputy Registrar of this court, requesting that summons to enter appearance in this matter be signed by the court since they had never been signed since the case was filed in 2012. The Deputy Registrar indicated that the summons would be signed on application by the Plaintiff. When the matter came up in court on 20/2/2018, both parties had filed two separate applications, the instant one having been filed by the 1<sup>st</sup> Defendant.

The firm of Chege Wainana & Co. came on record for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 13/8/2012. The summons to enter appearance in the court file were presented by Kimani Charagu & Co. Advocates, who were on record for the Plaintiff as at 1/8/2012. The court finds that the Plaintiff complied with the provisions of Order 5 Rule 3 (5) which stipulates that 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.

Those summons which are still in the file, were never signed in accordance with Rule 3(2) of the Civil Procedure Rules, nor were they served upon the 1<sup>st</sup> Defendant. Nonetheless, the 1<sup>st</sup> Defendant filed a Notice of Appointment of Advocates and proceeded to file a defence. The 1<sup>st</sup> Defendant filed the notice of appointment of advocates on being served with the application for injunction together with a copy of the plaint

to protect his interest in the matter. The application for injunction was argued all the way to the Court of Appeal.

Whereas it is the duty of the Plaintiff to file summons together with the plaint while instituting suit, the issuance and signing of summons is the duty of the court, which also directs the Defendant to appear within the time specified therein.

Order 5 rule 1 (6) provides that every summons except where the court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate. That means that summons can only be collected for service if they are issued or a notification is sent to the Plaintiff. In this case, the summons to enter appearance were neither issued nor was a notification given to the Plaintiff despite the summons being filed together with the plaint. Therefore, this suit could not have abated since the summons have not been issued for collection for service. Summons only becomes valid for service when it is signed, sealed and issued to the Plaintiff to go and effect service on the Defendant. The summons that accompanied the plaint when it was filed are not invalid, since they were never signed or issued for service.

The court has considered the authorities filed by the 1<sup>st</sup> Defendant and notes that the facts in those cases are different from those in the instant suit. The purpose of issuing summons to enter appearance is to notify the Defendant that a suit has been filed against him and invite him to defend the suit. In this case the 1<sup>st</sup> Defendant has been participating actively in the proceedings, even at the Court of Appeal. This is the seventh year since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1<sup>st</sup> Defendant has all along been aware of the suit and participated in the suit.

The purpose for which summons are issued have been served, the 1<sup>st</sup> Defendant is actively participating in the suit. The application dated 6/2/2018 is dismissed with costs to the Plaintiff.

The second application dated 12/2/2018 was brought by the Plaintiff pursuant to Order 5 Rules 1 and 2 of the Civil Procedure Act seeking orders that the court do sign, seal and issue summons to enter appearance against the Defendants herein which were filed together with the plaint, and costs of the application. The application was based on grounds that summons to enter appearance in this suit have never been issued by the court and consequently have never been served upon the Defendants.

The application was supported by the supporting Affidavit of Mr. Mugo Kamau, advocate seized of the matter on behalf of the Plaintiff. He deponed that after realising that the summons were not issued in this matter, he wrote to the Deputy Registrar of this court requesting the court to sign and issue the Plaintiff with the summons to enter appearance. The Deputy Registrar then listed this suit for mention and directed that an application be made and heard by the judge. The application was opposed by the 1<sup>st</sup> Defendant through his replying affidavit in which he deponed that the Plaintiff has never extracted summons to enter appearance and as such, the suit has abated by operation of the law.

The application was filed two days after the 1<sup>st</sup> Defendant filed the application dated 6/2/2018. Both applications deal with the issue of summons. The court has already made a finding that the summons in this case were not invalid since they had not been issued. In the circumstances, the court finds that the purpose of issuing summons has been served and the application dated 12/2/2018 is therefore spent.

Parties are directed to comply with pre-trial requirements under Order 11 so that the matter can proceed for hearing without further delay.

Dated and delivered at Nairobi this 4<sup>th</sup> day of April 2019

**K.BOR**

JUDGE

**In the presence of: -**

C. Mugo for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendants