



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC. CASE NO. 146 OF 2017**

**MARTIN MUGO MATHENGE & 23 OTHERS.....PLAINTIFFS**

**VERSUS**

**HANNAH WAMBUI MWANGI .....1<sup>ST</sup> DEFENDANT**

**ELIZABETH WARUIRU MBUGUA.....2<sup>ND</sup> DEFENDANT**

**PRISCILLA ANGONGO .....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Applications before me are dated 4<sup>th</sup> September, 2018 and 3<sup>rd</sup> October, 2018. In the Notice of Motion dated 4<sup>th</sup> September, 2018, the 1<sup>st</sup> Defendant is seeking for the following orders:

**a. That this Honourable Court be pleased to award costs to the 1<sup>st</sup> Defendant as the suit has abated for want of service of summons to enter appearance.**

**b. That the Honourable Court do grant such other or further orders as it deems fit in the interest for justice.**

**c. That the costs of this Application and the suit be provided for.**

2. The Application is premised on the grounds that the suit was filed on 16<sup>th</sup> February, 2010; that the Plaintiffs failed to collect and serve the Defendants with Summons to Enter Appearance and that the failure by the Plaintiffs to serve summons upon the Defendants for more than one (1) year has hindered progress of the suit.

3. On the other hand, vide an Application dated 3<sup>rd</sup> October, 2018, the Plaintiffs are seeking for the following orders:

**a. That this Honourable Court be pleased to issue summons/re-issue summons or extend its validity for a further twelve (12) months in this suit.**

**b. That the cost for this Application be in the cause.**

4. The Plaintiffs' Application is premised on the grounds that this suit was filed in the year 2010; that the summons issued herein have already expired and that the Defendants will not be prejudiced in any way if the Application is allowed.

5. The Plaintiffs' advocate submitted that initially, the Plaintiffs were acting in person; that they inadvertently failed to take out summons; that this court has the powers of extending the validity of the summons and that Article 159 of the Constitution calls upon this court to dispense justice on merit and pay due regard to substantive justice other than procedural technicalities. Counsel relied on authorities which I have considered.

6. The 1<sup>st</sup> Defendant's advocate submitted that no reasonable explanation has been given for the delay or failure to extract and serve summons; that the suit has already abated and that the Plaintiffs have not sought to revive the suit. Counsel relied on numerous authorities which I have considered.

7. The record shows that the Plaintiffs filed this suit on 16<sup>th</sup> February, 2010 vide a Plaint of the same date. It is not in dispute that the

Plaintiffs never served the Defendants with the Summons to Enter Appearance.

8. Order 5 Rule 1(1) of the Civil Procedure Rules provides that when a suit has been filed, a summons shall issue to the Defendant ordering him to appear within the time specified therein. It is trite that a Defendant is not under any legal obligation to Enter Appearance and file a Defence unless and until he is served with Summons.

9. Order 5 Rule 1 (6) of the Civil Procedure Rules, provides as follows:

**“(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.”**

10. There is no evidence before me to show that after filing the Plaint herein, the Plaintiffs collected summons for service within thirty (30) days of issue or notification. Consequently, this suit abated by operation of the law after thirty (30) days.

11. Although the court has unfettered discretion to extend the validity of Summons, it can only extend the validity of the Summons that have been issued. There is no evidence to show that the Summons in this matter were ever issued in the first place. Consequently, there are no Summons warranting extension.

12. Furthermore, this suit having abated by operation of the law, the Plaintiffs should have had it revived first before seeking for an order extending the validity of the Summons. The Plaintiffs have not sought for such an order.

13. On the basis of the reasons I have given above, I do not find any merit in the Application by the Plaintiffs dated 3<sup>rd</sup> October, 2018. The Plaintiffs' Application dated 3<sup>rd</sup> October, 2018 is therefore dismissed with costs. The Defendants' Application dated 4<sup>th</sup> September, 2018 is allowed in terms of prayer numbers 1 and 3.

14. For avoidance of doubt, this suit is marked as having abated with costs to the Defendants.

**DATED AND SIGNED AT MACHAKOS THIS 12<sup>TH</sup> DAY OF JUNE, 2019.**

**O.A. ANGOTE**

**JUDGE**

**DATED, DELIVERED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF JUNE, 2019.**

**L. GACHERU**

**JUDGE**