



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 96 OF 2010

MATASI MUTUKU

MUSYOKA MUTUKU ONESMUS (*Suing as the legal representatives for and on behalf of the Estate of MUTUKU MWITHI (deceased)*).....**PLAINTIFFS**

VERSUS

SYOKIMAU FARM LIMITED.....**1ST DEFENDANT**

KAMWELI MWANGANGI KITUKU.....**2ND DEFENDANT**

RULING

1. In the Notice of Motion dated 8th April, 2019, the Plaintiffs have sought for the following orders:

a. That this Honourable Court be pleased to re-issue Summons to Enter Appearance for service upon the 2nd Defendant in this suit.

b. That the costs of this Application be in the cause.

2. The Application is supported by the Affidavit of the Plaintiffs' advocates who has deponed that this suit was filed by the firm of A.F. Kisebu & Company advocates on 20th May, 2010; that the proprietor of the said firm, Mr. A.F. Kisebu passed on and that the Summons to Enter Appearance was never served upon the 2nd Defendant by the firm of A.F. Kisebu advocates.

3. According to the Plaintiffs' advocate, the non-service of Summons upon the 2nd Defendant and the expiry of the same was caused by factors beyond the control of the Plaintiffs and that it is in the interest of justice that the Summons to Enter Appearance be re-issued for service upon the 2nd Defendant.

4. The Plaintiffs' Advocate filed by the firm of A.F Kisebu & Co. Advocates on 20th May, 2010. The record shows that the court issued to the Plaintiff Summons to Enter Appearance on 24th May, 2010. It would appear that the 1st Defendant was served with the Summons to Enter Appearance because it entered appearance through the firm of Malonza & Co. Advocates on 16th July, 2010.

5. The Plaintiffs' advocates has admitted that the 2nd Defendant has never been served with the Summons to Enter Appearance since the same was issued by the court on 24th May, 2010.

6. Order 5 Rule 2(1) of the Civil Procedure Rules provides as follows:

“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.”

7. The law provides that Summons to Enter Appearance shall remain valid for a period of twelve (12) months, and that the court may re-issue the Summons from time to time. The re-issuance of Summons by the court after the lapse of twelve (12) months can only be done if sufficient reasons are given by the Plaintiff as to why the said Summons were not served on a Defendant within the stipulated period of

twelve (12) months.

8. According to the Plaintiffs' advocate, the Summons to Enter Appearance has never been served on the 2nd Defendant because the Plaintiffs' initial advocate died. The Plaintiffs did not tell the court the year that the Plaintiffs' advocate died.

9. In any event, the record shows that the Plaintiffs' initial advocate, A.F. Kisebu (*may his soul rest in peace*) was replaced by the firm of Nzioki Mutua & Associates Advocates on 22nd November, 2011. That being the case, the said advocate should have ascertained the position of service of Summons on the 2nd Defendant immediately he took over the conduct of the matter on behalf of the Plaintiffs.

10. Indeed, neither an advocate in the firm of Nzioki Mutua & Associates Advocates nor the Plaintiffs have given any explanation why the Summons were never served on the 2nd Defendant since 22nd November, 2011 when the firm of Nzioki Mutua & Associates came on record.

11. Having not given a plausible explanation why the 2nd Defendant was never served with the Summons to Enter Appearance before the expiry of twelve (12) years, and in view of the fact that the Summons have remained unserved for more than eight (8) years, which I find to be an unreasonable delay, I decline to allow the Application.

12. For those reasons, the Notice of Motion dated 8th April, 2019 is dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE