

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL SUIT NO. 283 OF 2015

NAFTALY KAHARE.....PLAINTIFF

VERSUS

GEOFREY KATSOLE.....1ST DEFENDANT

NAIROBI CITY COUNCIL....2ND DEFENDANT

RULING

Through the application dated 17/04/2018, the 2nd Defendant seeks to have the suit dismissed for the Plaintiff's failure to serve summons upon it. The application is made on the grounds set out on the face of the application and the supporting affidavit of Violet Oyagi, the 2nd Defendant's acting Director, Legal Affairs sworn on 17/04/2018. This suit was filed on 09/04/2015 contemporaneously with an application filed under certificate of urgency, which application was heard and determined. She deponed that since the inception of this suit, summons have never been served upon it.

The application was opposed by the Plaintiff's replying affidavit sworn on 02/11/2018 by Mwagonah Emmanuel Mwagambo, counsel representing the Plaintiff in this matter. He admitted that the Plaintiff failed to serve the 2nd Defendant with summons to enter appearance but maintained that the failure was inadvertent and was occasioned by an administrative oversight. He deponed that the Plaintiff has been attending court diligently for the hearing of the application and pre-trial conference and therefore he should not be considered to have been negligent in prosecuting the matter. He further deponed that that the Plaintiff is prepared to serve the summons upon the Defendants and to abide by any condition given by the court.

The court has considered the application together with the response. Order 5 Rule (1) (5) (6) of Civil Procedure Rules provides that every summons shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate, except where the court is to effect service. The Plaintiff admitted that he did not serve summons on the 2nd Defendant. However, he annexed an affidavit of service confirming that the 2nd Defendant was served with the plaint and application dated 09/04/2015 which was heard *inter partes* and determined.

In the court's view, the purpose of summons is to give notice of the existence of the suit to the party sued so that he can participate in the proceedings. The 2nd Defendant appeared in court and participated in the hearing of the application dated 09/05/2015 and was therefore aware of the claim facing it. The purpose for which summons to enter appearance are served has been overtaken by events in this suit.

The court declines to grant the orders sought in the application dated 17/4/2018 and directs the Plaintiff to serve the 1st Defendant with summons to enter appearance within 14 days. The 2nd Defendant is awarded costs of the application.

Dated and delivered at Nairobi this 20th day of November 2019

K.BOR

JUDGE

In the presence of: -

Mr. G.Gathemia holding brief for Mr. Mwagambo for the Plaintiff

Mr. Isaac Odhiambo for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 1st Defendant