

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 175 OF 2014

SAGALA RANCHERS LIMITED.....PLAINTIFF

-VERSUS-

IZERA ENTERPRISES LIMITED.....1ST DEFENDANT

GITONGA WAMBUGU KARIUKI.....2ND DEFENDANT

RULING

1. The defendant has raised a preliminary objection to the suit herein on two limbs. First, that there is no suit as summons were not taken out within 30 days and or within 24 months from the date of filing of the suit. The second objection is that this suit is res judicata ELC case No 210 of 2013. Consequently the defendant urged the Court to strike out the suit. The plaintiff opposed the preliminary objection stating that it does not meet the threshold set out in the case of **Mukisa Biscuits vs West End Distributors**. That the summons can be extended and further the case No 210 of 2013 was determined on its merits.

2. Mr Gikandi advocate submitted that ELC No 210 of 2013 was dismissed based on the grounds set therein i.e. that the replying affidavit was sworn without board resolution authorizing the deponent to do so on behalf of the company. As correctly rebutted by Mr Kurgat advocate, that suit was dismissed on a technicality and not on its merit. My understanding of the law is that the provisions of section 7 of the Civil Procedure Act applies only where the suit is heard and determined on its merit. Therefore there being consensus that ELC No 210 of 2013 was struck out in the manner stated cannot bar the subsequent suit under the doctrine of res judicata. On this point, I find the preliminary objection as misplaced and disallow it.

3. On the issuance of the summons, I note from the record that the suit was filed on 14th July 2014 and summons issued on 29th February 2016. Order 5 rule 1 (2) require that summons should be sealed by the Court without delay and may in any event not more than thirty days from the date of filing of suit. Rule 1 (6) require summons to be collected for service within thirty days of issuance failing which the suit shall abate.

Order 5 rule 2 (1) gives validity of summons as twelve months beginning from date of its issue. The dame provides for renewal of the summons for a further 12 months.

4. The rules thus provide for validity of summons from the date of issue. Under order 5 rule 1 (3), it states that every summons shall be accompanied by a copy of the plaint. Under sub-rule 2, the summons ought to be signed/sealed 30 days from the date of filing of suit. From the copy of the summons in the Court file, it appears there were summons which were filed together with the plaint. There are handwritten notes made by the deputy registrar dated 15th & 17th September 2014 addressed to the executive officer to explain why the plaint was assessed at Kshs 12,000= when the value of the property was stated at Kshs 10 Million in the plaint. On account of these comments, I draw an inference that the deputy registrar was hesitant to sign the summons because she suspected under-assessment of court fees.

5. The executive officer replied on 16.9.2014 that the plaintiff's advocate had carried the copy of the plaint where the assessment was recorded. The plaintiff's advocate also wrote vide their letter dated 12.11.2014 and received by the Court on 13.11.14 explaining why they felt the assessment as done was proper. In the last paragraph of this letter Mr Kibe Mungai wrote thus, ***"In light of the foregoing, we humbly request that the summons lodged at your registry be urgently sealed for us to serve the same upon the defendants."*** The letter was copied to Hon. E. T Mwamunga. The sealed summons are also indicated to have been collected is not indicated. The failure to sign the summons within the 30 days was thus not a mistake of the plaintiff but administrative process of the Court. He cannot be punished for such.

6. Once the summons were issued, the plaintiff was required to attempt to serve the same the summons soon enough and before the expiry of the summons. Order 5 rule 2 also allow for renewal of the summons after its expiry. There is no provision that is fatal to the suit where the summons is not served upon the defendant as is pleaded in the preliminary objection. Given that the summons issued on 29th February 2016 expired on 28th February 2017 does not mean the same cannot be extended. In the case of **D. T Dobie (K) vs Muchaina (1982) I** it was held that a suit should only be struck out where it is so hopeless that even an amendment cannot cure the defect. In the instant, the defect can easily be cured by extending the life of the summons. For this reason, I find the preliminary objection as premature and without merit. Premature because the defendant not having been served has no right to apply to dismiss the suit. In the alternative the defendant having filed appearance by the notice of appointment of advocate filed, the requirement for service of summons is cured. On the account of the issuance & service of summons found to be premature and lacking in merit for reasons given, I also dismiss this limb of the objection.

7. The upshot of my decision is that the preliminary objection dated 24th January 2018 is hereby dismissed in its entirety with costs in the cause.

Dated, signed & delivered at Mombasa this 25th May 2018

A. OMOLLO

JUDGE