



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 832 OF 2016

MARTIN LUTHER KING ANDATI.....PLAINTIFF

=VERSUS=

BANK OF AFRICA KENYA LTD & 3 OTHERS.....DEFENDANT

RULING

BACKGROUND.

1. This is a ruling in respect of a preliminary objection filed by the first defendant and a notice of motion filed by the third defendant. The first defendant seeks to have the plaintiff's suit struck out on the ground that no summons to enter appearance have been taken out or served upon the defendant. The third defendant seeks to have the plaintiff's suit dismissed for want of prosecution.
2. The plaintiff had secured a loan from the first defendant which he used to purchase an apartment at Kilimani area of Nairobi. The plaintiff took possession of the apartment but he was unable to complete payment of the loan. On instructions of the first defendant, the apartment was sold by the second defendant at a public auction. The apartment was purchased by the third defendant and a transfer duly made in his favour.
3. The apartment was sold at a public auction conducted on 28th October 2014. Transfer into the name of the third defendant was made on 5th June 2015. The plaintiff filed the present suit on 19th July 2016 in which he sought for a permanent injunction restraining the defendants from evicting him from the apartment, a declaration that the sale which took place on 28th October 2014 was null and void, cancellation of transfer in favour of third defendant and forfeiture of deposit made by third defendant before 28th November 2014.

THE PRELIMINARY OBJECTION

4. The first defendant contends that since the filing of this suit by the plaintiff, the plaintiff has neither taken out summons to enter appearance nor served the same upon the defendants. The first defendant therefore seeks striking out of the plaintiff's suit on this ground.
5. The first defendant's preliminary objection has been supported by the third defendant who is also seeking the dismissal of the plaintiff's suit for want of prosecution.

The objection to the preliminary objection.

6. The plaintiff has opposed the preliminary objection by the first defendant by arguing that failure to take out summons to enter appearance is a mere procedural technicality which can be cured under Article 159 of the Constitution; that the court should be guided by the overriding objective under Section 1A and 1B of the Civil Procedure Act and that as the defendants are now fully taking part in the proceedings in this case, non-service of summons to enter appearance cannot cause any prejudice on the part of the defendants. The plaintiff relied on the case of **Terry Wanjiku Kariuki Vs Equity Bank Limited and Another (2012) eKLR.**

The Notice of Motion dated 24th August 2017.

7. The third defendant contends that this suit was filed on 19th July 2016. The plaintiff contemporaneously filed an application under certificate of urgency which application was never prosecuted. There were no summons issued or served and that the plaintiff has not taken any steps with a view to prosecuting his case for a period of over one year.
8. The third defendant had filed *ELC suit No.61 of 2017 (OS)* against the plaintiff herein. The third defendant's attention was drawn to the

existence of this particular suit. He (third defendant) then instructed his advocates to enter appearance in this particular suit. The plaintiff has without any plausible reason failed to proceed with the present suit.

Plaintiff's Response to the Notice of Motion dated 24th August 2017.

9. The Plaintiff contends that he instructed his previous advocates to file the present suit. He also instructed the advocates to file an application together with the plaint. His advocates went to court but did not obtain any interim orders. The advocates advised him that they were to take further steps in the suit. He took the word of his advocates and thought that they were going to take care of his interest. He was later served with pleadings in *ELC 61 of 2017 (OS)*. This is when he got concern about this case. He appointed his present advocates who upon perusal of this case found out that his previous advocates had not taken any step since filing of the suit.

10. The Plaintiff who has since been evicted from the apartment blames his previous advocates for what he is now facing and pleads with the court to spare dismissal of the suit so that he can effect some amendments to bring up a proper claim given the circumstances.

ANALYSIS.

11. I have carefully gone through the submissions filed by the parties herein. The court had directed parties to file their written submissions. The first issue to be dealt with is the preliminary objection. There is no doubt that neither summons were applied for nor issued. In the case being relied on by the plaintiff, summons had been issued but had not been served. The summons had also abated. In the instant case, the plaintiff did not apply for summons.

12. Even when he was confronted with another suit where his eviction was sought, he never bothered to apply for extension of summons because there were no summons to be extended. Summons to enter appearance are very fundamental in a suit. It is summons to enter appearance which sets out in motion the other processes which follow. One cannot therefore fail to serve summons and simply seek to come under the overriding objective under section 1A and 1B of the Civil Procedure Act or under Article 159 of the constitution. I agree with the persuasive authorities in **Nairobi ELC 584 of 2011 Grace Wairimu Mungai Vs Catherine Njambi Muya (2014) eKLR, Tana Trading Limited Vs National Cereals and produce Board (2014) eKLR and Leonard Njogu Vs Barclays Bank of Kenya & another (2014) eKLR** which all emphasized the importance of summons to enter appearance and held that procedural requirements of taking out summons to enter appearance are not technical in nature which can be cured by Article 159 of the Constitution. I therefore find that this is a proper case where the preliminary objection should be upheld. I uphold the preliminary objection and proceed to strike out the plaintiff's suit with costs to the first and third defendants.

13. Even though the preliminary objection has disposed of the entire suit, I will nevertheless address the issue of the dismissal of the suit for want of prosecution. I have given the background of this suit so that it can give an insight on why I would have still proceeded to dismiss this suit for want of prosecution. This suit was filed over a year after the suit property had been transferred to the third defendant.

14. The plaintiff had wanted to bar the defendants from evicting him from the suit premises. When he failed to get an injunction, he went into slumber. He was only jolted from his slumber when the third defendant filed ELC 61 of 2017(OS) seeking for his eviction. In his response to ELC 61 of 2017, he brought to the attention of the court the presence of this suit. The plaintiff was given time to bring up this file so that it could be mentioned together with ELC 61 of 2017 (OS) for directions but he did not . He did not even bother to apply for summons to enter appearance.

15. When the present application was filed, he started blaming his previous lawyers. This is a clear case where the plaintiff had lost interest in his case. The plaintiff has already been evicted from the suit property through orders obtained in ELC 61 of 2017 (OS). There would be no useful purpose to be served if this suit were to be spared dismissal. If the plaintiff still wishes to bring a suit for a damages that is if he will succeed to show that the auction was not conducted in a lawful way, he can still do so in a separate suit but not through this one where he intends to amend before he can make a proper cause of action. This is a case which would have been dismissed for want of prosecution were it not for the fact that it has been struck out.

CONCLUSION

16. For the reasons given hereinabove I proceed to strike out the plaintiff's suit with costs to the first and third defendants.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 13th day of June, 2018.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Udoto for Plaintiff/Respondent

M/s Nyaga for 3rd Defendant/Applicant

Court Assistant: Hilda

E.O.OBAGA

JUDGE