

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. SUIT NO. 514 OF 2012

VICTOR MOSE BIRUNDU.....PLAINTIFF

VERSUS

PETER MANYURU.....1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND.....2ND DEFENDANT

RULING

In the application dated 31/7/2014, the 1st Defendant seeks to have the suit struck out with costs on the grounds that it has never been served with summons to enter appearance yet the suit was filed on 16/8/2012. The application is supported by the affidavit of Austin Ouko, the 2nd Defendant's Legal Manager who depones that the 2nd Defendant has not filed a defence since it was not been served with summons to enter appearance by the Plaintiff.

The application came up for hearing on 13/6/2018. The Plaintiff's advocate confirmed that he had not filed a response to the application since his client was to appoint a new advocate. He stated that he had no instructions to continue acting in the matter and sought two days to file an application to cease acting for the Plaintiff. That application was opposed by the Defendant who pointed out that the Plaintiff's counsel has had ample time to apply to cease acting. The court agreed with the Defendant's advocate and directed the parties to proceed with the hearing of the application.

The 2nd Defendant relied on Order 5 Rule 1 of the Civil Procedure Rules which requires plaints to be accompanied with summons to enter appearance. The Plaintiff is required to collect the summons within 30 days of filing suit. Under Rule 2 summons are valid for 12 months and may be renewed. The Defendants relied on the decision on **Multiscope Consulting Engineers v University of Nairobi & Another** [2014] eKLR on the issue of summons being issued to inform the Defendant to appear within the specified time. The court looked at the affidavit of service which did not show that the process server tendered summons to enter appearance and required the party served to endorse the summons. The court found that there was no evidence of service of summons to enter appearance. Since the summons had expired, the court validated the summons and directed that they would be reissued and served on the 2nd Defendants. The court was dealing with an application that sought stay of proceedings and the setting aside of interlocutory judgement.

There is no interlocutory judgement in this case. The suit was filed on 16/8/2012. The Plaintiff's application for injunction was dismissed on 20/6/2014. The Plaintiff did not file any response to explain the reasons for failing to serve summons to enter appearance despite being served in 2014. The court has looked at the file and found no evidence of service of summons to enter appearance on both Defendants.

The court agrees with the Defendant that the suit should be struck out. It is struck out with costs to the Defendants.

Dated and delivered at Nairobi this 26th day of July 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Mutanda holding brief for Mr. Otieno for the 1st Defendant

Mr. Adala holding brief for Mrs. Mbaabu for the 2nd Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff