



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 333 OF 2017

GRACE OBUYA OKUMU (suing as the legal administratrix of the

Estate of OBADIA AMBAR OKUMU (Deceased).....PLAINTIFF

-VERSUS-

DIRIRI MOHAMED DIRIRI.....1ST DEFENDANT

LAND REGISTRAR HOMA-BAY COUNTY.....2ND DEFENDANT

RULING

1. By a Notice of Preliminary objection dated 23rd May, 2017, and filed in court on 25th May 2017, the 2nd defendant through the Honorable Attorney General, has sought to have the suit filed by way of a plaint (fast track) dated 12th April 2017 struck out. The basis of the preliminary objection is that :-

a) The plaintiff's plaint filed on 12th April 2017 before the Honourable court is defective as it violates the provisions of Order 5, Rule 1 of the Civil Procedure Rules, 2010.

2. The plaintiff through learned counsel Mr. Sam Onyango opposed the preliminary objection. The grounds of opposition are that:-

- i. The preliminary objection flies in the face of Order 5 Rule 2 of the Civil Procedure Rules, 2010.
- ii. The preliminary objection is curable by Section 1A of the Civil Procedure Act, 2010
- iii. The preliminary objection is curable by order 50 Rule 6 of the Civil Procedure Rules, 2010
- iv. The preliminary objection is curable by order 17 Rule 2 of the Civil Procedure Rules, 2010
- v. The preliminary objection is curable by order 16 Rules 5 of the Civil Procedure Rules 2010
- vi. The preliminary objection is curable by Article 159 (d) of the Constitution of Kenya 2010
- vii. The preliminary objection is curable by Article 165 of the Constitution of Kenya 2010
- viii. The preliminary objection lacks merit and ought to be dismissed with costs.

3. The 1st defendant is represented by learned counsel, Mr. Samwel Nyauke who filed notice of appointment of advocates dated 22nd June 2017.

4. In the plaint, the reliefs sought include, a declaration that the transfer and registration of the suit property **L.R. NO. Kanyada/Kotieno/"a"/1462** was void abinitio, fraudulent and unlawful as well as rectification of the register thereof and a permanent injunction against the 1st defendant in respect of the suit property. The plaintiff claimed in that the suit land was registered in the name of OBADIA AMBAR OKUMU (deceased) who charged it in favour of Kenya Commercial Bank Ltd (the bank) as security for a facility he obtained on 16th January, 1995. The deceased was in arrears of the facility and he had engaged the bank in negotiations with a view to settling the debt owed to the bank prior to his demise. The bank had not discharged the charge registered in his favour. The plaintiff alerted the bank about the demise of the deceased and sought to know the status of the charge. Surprisingly the 1st and 2nd defendants without the authority of the plaintiff colluded and fraudulently transferred the suit property to the 1st defendant thus provoking the instant suit.

5. The defendants denied the plaintiff's claim. In a statement of defence dated 23rd May, 2017 and filed in court on 25th May 2017, the 2nd defendant averred that he carried out his duties in good faith after the presentation of documents to his office. The 2nd defendant sought dismissal of the suit with costs.

6. The preliminary objection was urged by way of written submissions further to directions given by the court on 28th June 2017. Learned counsel for 2nd defendant filed submissions dated 27th June 2017 and further submissions dated 17th August, 2017. Learned counsel for the plaintiff filed submissions on 21st September 2017 while learned counsel for the 1st defendant filed submissions dated 21st February 2018.

7. Learned counsel for the 2nd defendant submitted that the plaintiff only served the 2nd defendant with the plaint without summons accompanying it against the mandatory provisions of **Order 5 Rule 1 of the Civil Procedure Rules, 2010**. Counsel submitted that it matters not whether a statement of defence has been filed and termed the suit incompetent. Counsel also submitted that failure to serve summons on the defendants goes to the root of the case and it is not merely a procedural technicality.

8. Counsel further submitted that neither Section 1A of the Civil Procedure Rules 2010 nor Article 159 of the Constitution of Kenya, 2010 (the constitution) can be invoked to assist a party who has not complied with mandatory provisions of the law. That Order 16 Rule 5 and Order 17 Rule 2 of the Civil Procedure Rules, 2010 are irrelevant to the preliminary objection. Counsel cited authorities, among them, **Grace Wairimu Mungai –v- Catherine Njambi Muya (2014) eKLR**, **Lee Mwathu Kimani –v- National Social Security Fund & Another (2014) eKLR** and **Karandeep Singh Dhilion & Another –v- Nteppes Enterprises Ltd & Anor (2010) eKLR** in support of the submissions.

9. In his submission, learned counsel for the 1st defendant basically referred to a Notice of motion application dated 12th April 2017 and not the present preliminary objection. He sought dismissal of the application with costs for lack of merit.

10. Learned counsel for the plaintiff referred to the orders sought in the plaint, the background of the case and the purpose of service of summons to enter appearance as an issue for determination. He relied on authorities which include; **Paola Tarlazzi (suing through his attorney and or agent) Carla Tarlazzi –v- Robert Ciarolella (2016) eKLR** and **Richard Ncharpi –v- IEBC & 2 others (2013) eKLR**.

11. I have carefully considered the 2nd defendant's preliminary objection, the plaintiff's grounds of opposition and submission by counsel herein. The issue for determination is whether the plaint dated 12th April 2017 and filed on the even date violates Order 5 Rule 1 of the Civil Procedures Rules, 2010 (the Rules) which provides that :-

“Where a suit has been filed a summon shall issue to the defendant ordering him to appear within the time specified therein.
(Emphasis added)

12. It was the contention of the 2nd defendant's counsel that the plaintiff's failure to serve summons on the defendant was not merely a procedural technicality but a fundamental omission. That order 5 Rule 1 of the Rules is mandatory and any omission thereof is incurable under Article 159 of the Constitution.

13. There is no dispute that the plaintiff failed to serve summons on the defendants. The plaintiff's counsel termed the omission an oversight.

14. In **Karandeep case** (supra), D.A. Onyancha J noted that a plaint filed in court on its own without issuance and service of summons was impotent. The plaintiff had no power to summon the defendant to court and I approve that position taken by the honourable judge accordingly.

15. In **Grace Wairimu Mungai case (supra)**, J.M. Mutungi, J observed that no summons had been served on the defendant in the suit within the prescribed period of time. The defendant had no basis to answer the suit until he is served with summons to enter appearance in the suit.

16. Similarly, in **Lee Mwathi Kimani case (supra)**, J.M Mutungi J, held , inter alia:-

“Where no summons have been issued in accordance with order 5 of the Civil Procedure Rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborated and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended.”

17. I consider **ICDC & Richard Ncharpi and Paola cases** (supra), and **Sections 1A and 1B of the Civil Procedure Act (Cap 21) as read with Article 159 of the Constitution**. However, the cases especially, **Paola case** (supra) where the defendant was served with summons to enter appearance is distinguishable, in the present circumstances. Therefore the plaint cannot stand alone, without summons issued to the defendants ordering them to appear within the period specified therein.

18. Based on the authorities cited above by the 2nd defendant counsel and **Order 5 Rule 1 of the Rules** which is couched in mandatory terms, I find the 2nd defendant's preliminary objection dated 23rd May, 2017 merited. I uphold it accordingly.

19. Consequently and for those reasons I strike out the plaintiff's suit with costs to the defendants.

DELIVERED, DATED and SIGNED at MIGORI this 18th day of JULY 2018.

G.M.A. ONGONDO

JUDGE

In presence of :-

E.M. Opiyo learned counsel for the 2nd defendant

Mr. Sam Onyango for plaintiff

Tom Maurice - Court Assistant