



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC NO. 84 OF 2015

DAVID CHERUIYOT RONO.....PLAINTIFF

VERSUS

KIPNYOLEI ARAP TUM.....1ST DEFENDANT

ELIPHAS NDUSU ABASI.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 20th March 2018 brought by way a notice of motion by the 2nd defendant applicant for orders that this suit be marked as abated.

Counsel for the plaintiff and the applicant responded to the application vide filing of authorities to support their positions as regards the application. The 1st defendant's Counsel was in support of the application as presented.

The 2nd defendant's application is based on the ground that this suit was filed on 23rd March 2015 but no summons to enter appearance was served hence the suit has abated.

The plaintiff opposed the application and relied on order 5 rule 1(6) that provides that every summon, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. It was the plaintiff's assertion that there is no evidence of such notification. The plaintiff further averred that failure to serve the summons was a technical omission and since both the plaint and the application were served and responded to by the 2nd defendant no prejudice has been suffered by the failure to serve the summons to enter appearance as he has fully participated in the proceedings.

Counsel also submitted that the 2nd defendant was well aware of the matter as he instructed Counsel to represent him by filing a notice of appointment and replying affidavit. It was further Counsel's submission that where a defendant has taken part in a suit he is deemed to have notice of the suit notwithstanding that summons to enter appearance may not have been served. He stated that the procedural function of service of summons to enter appearance is to notify the other party of the institution of the case which was done by service of the plaint and the application which the defendant filed a response to. He therefore urged the court to exercise its inherent jurisdiction and order that the matter do proceed on merit and dismiss the application.

Both Counsel filed authorities in support of their client's position. Counsel for the applicant urged the court to find that the plaintiff's suit had abated due to lack of service of summons.

Analysis and determination

Counsel for the plaintiff and the 2nd defendant filed their respective authorities and urged the court to consider the application on the basis on the affidavits and the authorities. I have perused the affidavits, the court record and the authorities cited in support of the positions taken by both parties.

The issues for determination is whether the plaintiff's suit has abated and who should pay the costs. This suit was filed by the plaintiff on 23rd March 2015 together with an application for injunction. The court certified the matter as urgent and granted a temporary injunction against the defendants with a direction that the same be served on the defendants within 7 days.

The defendants were served with the application, a copy of the plaint together with the order. The 1st defendant filed a memorandum of appearance through the firm of Nyaundi Tuyiot & Co Advocates. The said firm also filed a replying affidavit, a defense list of documents,

list of witnesses and witness statements.

The 2nd defendant also filed a replying affidavit and a notice of Appointment of Advocates through the firm of Kiarie & Co Advocates who are still on record. The replying affidavit was very comprehensive with annexures of a sale agreement, photographs, extract of green card and a caution lodged on the suit land. My question would be, what was the 2nd defendant responding to elaborately if he had not been served with a plaint? Did the plaintiff serve the order without the application and the plaint? The provisions of Order 5 on the service of summons is very clear that it is supposed to be for notifying a party that a suit has been instituted against him or her. Further it also stipulates timelines within which responses are to be filed and procedure for non-adherence.

In my view, the defendant was duly notified of the institution of the suit and has been participating in the proceedings. For the 2nd defendant to come to court after 4 years with an application that he has never been served with summons to enter appearance in my view is being dishonest. The defendant has not suffered any prejudice to the lack of service of summons to enter appearance and therefore it would not be just to declare that the suit has abated.

I am also guided by section 95 of the Civil Procedure Act which gives the court discretion to extend time fixed for doing any act which provides as follows:

95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired

This gives the court discretion to extend time but the same must be done judiciously without causing any prejudice to parties. Order 50 Rule 6 of the Civil Procedure Rules also fortifies the provision for extension of time.

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

I have considered the affidavits filed herein, the relevant law and authorities and come to the safe conclusion that I will exercise my discretion to allow the plaintiff's case to proceed as no prejudice will be caused to the 2nd defendant. This is in line with the requirement by the court to do substantive justice to both parties. The 2nd defendant's application dated 20th March 2018 is hereby denied as it has no merit. I order that the 2nd defendant files a defence within 15 days from the date of this ruling. Parties to comply with Order 11 within 30 days and fix this suit for hearing on priority basis as had earlier been ordered by the court. The costs of this application shall be in the cause.

Dated and delivered at Eldoret this 12th day of July, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Cheruiyot holding brief for Mr. Akenga for 1st defendant/Respondent and in the absence of Mr. Kahiga for the Plaintiff/Applicant.

Mr. Koech: Court Assistant.