REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 888 OF 2017 (formerly Machakos ELC 31/2009)

FRANK MWANGI MATHEWS ..... PLAINTIFF

VERSUS

ELIZABETH HANNAH WAITHERA ..... 1ST DEFENDANT

SOIL MERCHANT (K) ..... 2ND DEFENDANT

STEPHEN MWANGI NDERITU ..... 3RD DEFENDANT

NICHOLAS MENENE KIMATU ..... 4TH DEFENDANT

REUBEN KARIUKI NGURUKU ..... 5TH DEFENDANT

MARY NGIMA KARANJA ..... 6TH DEFENDANT

JULIUS WAGACHA NDUNG'U ..... 7TH DEFENDANT

MARGARET NYAMBURA TIPIS ..... 8TH DEFENDANT

JANE WAMBETI RIUNGU ..... 9TH DEFENDANT

PETER WILFRED KAYE ..... 10TH DEFENDANT

OKWOYO KEGARA PETER ..... 11TH DEFENDANT

GEORGE GICHIRU NDERITU ..... 12TH DEFENDANT

JAMES OURU OSUMO ..... 13TH DEFENDANT

GODWIN OMONDI OJWANG ..... 14TH DEFENDANT

MORRIS KAMAU NDUATI ..... 15TH DEFENDANT

AILEEN MARITHA OMBATI ..... 16TH DEFENDANT

WILFRED MBOYA OSUMO ..... 17TH DEFENDANT

PAULINE GATHIGIA NDIRAGU ..... 18TH DEFENDANT

ESTHER MUTINGO WANGOMBE ..... 19TH DEFENDANT

JOHN KINIU MUSAU ..... 20TH DEFENDANT

IRENE MURUGI KABUYA ..... 21ST DEFENDANT

GEORGE GATURU NDIRITU ..... 22ND DEFENDANT

EVANS LUSIGI MUGERA ..... 23RD DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant's Notice of Motion application dated the 13th March, 2018 brought pursuant to Order 5 rule 1(2) & (6) of the Civil Procedure Rules as well as section 1A, 1B & 3A of the Civil Procedure Act and all the other enabling provisions of the law. In the said application, the 2nd Defendant seeks the following orders:

1. That the Plaintiff/ Respondent's main suit herein be declared fatally abated and be struck out forthwith.

2. That the costs of the cause and this application be awarded to the 2nd Defendant Applicant.

The application is premised on the following grounds, which in summary is that the Plaintiff never extracted and served the Summons to Enter Appearance on the 2nd Defendant in particular or on the 1st Defendant in this matter who were the original defendants. That despite the Court's directions to the Plaintiff requiring him to comply with the prescribed Civil Procedure Rules, the Plaintiff has been unwilling, reluctant and unenthusiastic to prosecute this case. Despite the 2nd Defendant's advocates urging the Plaintiff's Advocates to comply with the Court's directions and the prescribed Civil Procedure Rules, the Plaintiff and her Advocates on record have been unwilling, reluctant and unenthusiastic to comply and prosecute the case. The 2nd Defendant is suffering irreparable damage and prejudice due to the pendency of the main suit herein yet the Plaintiff seems unenthusiastic and disinterested in having the case heard, determined and concluded. The Plaintiff's main suit herein has abated and ought to be struck out forthwith for want of Summons to Enter Appearance, which have never been served upon the 1st and 2nd Defendants'.

The application is supported by the affidavit of one JAMES KANYORO, a director to the 2nd Defendant who deposes that they were sued together with the 1st Defendant in 2009, with the other Defendants being enjoined in the suit in 2017. He explains that prior to the enjoining of the other twenty (21) Defendants, this matter had come for dismissal for want of prosecution at Machakos High Court. He claims the Plaintiff never served the original Defendants with Summons to Enter Appearance in this matter and hence they have never been able to formally enter appearance and file their defences.

Both the 2nd Defendant and the Plaintiff filed their respective submissions that I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 13th March, 2018 including the supporting affidavit as well as the related submissions, the following are the issues for determination:

· Whether the Plaintiff has failed to adhere to the provisions of Order 5 of the Civil Procedure Rules.

· Whether the Plaintiff's suit has abated for lack of extraction and service of summons to enter appearance to enable the 1st and 2nd Defendants enter appearance.

The 2nd Defendant contends that the main suit is fatally defective as the Plaintiff failed to extract summons to enter appearance and serve the same upon the 1st and 2nd Defendants. The 2nd Defendant relied on the following judicial authorities: **Lee Mwathi Kimani Vs NSSF & Anor (2014) eKLR and Kranti Enterprises Limited Vs Ravs Fashions Limited (2015) eKLR** to support its arguments. The 2nd Defendant further submitted that any order arising from an injunction or an application lapses after twelve (12) months if not extended or provided otherwise by the Court. Further that the orders to enjoin the twenty one (21) other Defendants were granted on the 15th January, 2015 and the same was purportedly complied with in November, 2017, two and a half years after they were issued. The Plaintiff opposed the application and submitted that the 2nd Defendant has actively participated in the instant suit by responding to applications including attending Court to defend the claim. Further, that its advocates exchanged and accepted correspondence on its behalf confirming that they had adequate instructions to do so. He submitted that the 2nd Defendant actively participated in the application to enjoin the rest of the Defendants by filing a replying affidavit dated the 23rd July, 2010 to oppose the said application and a ruling was delivered on 15th January, 2015 in favour of the Plaintiff. The Plaintiff insisted that the 2nd Defendant has not demonstrated what prejudice it stands to suffer should the suit be allowed to proceed to conclusion. Further, that the 2nd Defendant has not advanced any sufficient grounds nor annexed any evidence to have the suit struck out and it would be unjust and against the oxygen principle to have the suit struck out based on an ambiguous, unmerited and misinformed application. He reiterates that the instant application is in bad faith as they have been acting in good faith in the proceedings and should have filed a holding defense. Further, that the time limit for filing such a Defence has since expired and the Application is an attempt by the 2nd Defendant herein to hoodwink the court as ten (10) years later it is yet to file a Defense. He relied on the following authorities of **Peter Kinyua Ngacha Vs James Wachira Munene Nairobi HCCA 72 of 2007** and **Terry Wanjiru Kariuki Vs Equity Bank Ltd & Another Nairobi HCCC 343 of 2009** to support his argument.

As per the Court records, I note the 1st and 2nd Defendants had instructed messrs Mutitu Thiongo & Company Advocates who filed a Notice of Appointment dated the 24th February, 2009 on 26th February, 2009 and have actually participated in the proceedings herein from then on.

I note one Samwel Njenga Kanyoro, a director to the 2nd Defendant, filed a replying affidavit to the Plaintiff's Chamber Summons application dated the 16th February, 2009 on 2nd March, 2009. Further, the 1st Defendant Elizabeth Hanna Waithera also filed a replying affidavit dated the 25th February, 2009 on 2nd March, 2009. I note on 21st May, 2009 the 2nd Defendant hired the services of messrs Ogessa & Co. Advocates who filed a Notice of Change of Advocates on the said date. The 2nd Defendant filed Grounds of Opposition dated the 21st May, 2009 as well as a replying affidavit sworn by one Samwel Njenga Kanyoro, a director therein, in response to the Plaintiff's Chamber Summons application dated the 8th May, 2009. From this narrative, it is evident that the 1st and 2nd Defendants have always participated in the proceedings herein but never raised the issue of not being served with the summons to enter appearance but only did so at the Pre Trial stage. I note the above cited authorities by both the Applicant and the Respondents are conflicting but also persuasive upon this court. The authorities for the Applicant intimate that a suit should be struck out where summons to enter appearance have not been served while the ones by the Respondents state that the suit should be heard on its merits.

Order 5 rule 1 and 6 of the Civil Procedure Rules provides as follows:'

> **(1) When a suit has been filed a summons shall issue to the defendant ordering him to within the time specified therein. (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit. (3) Every summons shall be accompanied by a copy of the plaint. (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days. (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed (6) Every summons, 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.'**

Insofar as there is no evidence that the 1st and 2nd Defendants were served with the Summons to enter appearance, I note that the procedure envisaged in Order 5 was to inform parties of the suit against them. In the current scenario, I note that the 1st and 2nd Defendants were well aware of the suit against them and continued to participate in the proceedings by filing various pleadings except for their Defences. I note the Plaint raises serious issues touching on fraud which is pertinent to be determined on its merits. I further note that the rest of the Defendants have filed their respective Defenses that also raise triable issues. I smell an element of mischief from the Applicants who have all along participated in the proceedings and even filed affidavits as well as submissions but never raised the point that they were not served with Summons to Enter Appearance. How did they know there was a suit against them where they have been participating for almost a decade, but only raised the issue that they were not served with summons to enter appearance at the pretrial stage. I concur with the Plaintiff that the 2nd Defendant has not demonstrated what prejudice it stands to suffer should the suit be allowed to proceed to conclusion.

In the Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005]** eKLR held as follows:

> **"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-**
>
> **"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."**
>
> **In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."**

In relying on the above cited Court of Appeal decision as well as the overriding objective of this Court as governed by Section 3 of the Environment and Land Court Act which directs courts to ***facilitate the just, expeditious, proportionate and accessible resolution of disputes,*** I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand. I find that there is an element of bad faith on the part of the 1st and 2nd Defendants' who were even served with an amended Plaint and waited for the rest of the 3rd to 23rd Defendants to be included in the current proceedings before seeking the Court's Intervention to strike out the suit. Further, section 19(1) of the Environment and Land Court Act mandates the Courts that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further **article 159 (2) (d) of the Constitution** stipulates that ***' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.***

This position is affirmed in the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that .. **to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing'**

It is against the foregoing that I will decline to allow the Applicants' application dated the 13th March, 2018 to declare the main suit fatally abated and struck it out with costs. I will exercise my discretion and direct the 1st and 2nd Defendants' to file their respective Defences within 14 days from the date hereof, to enable the suit be set down for hearing on its merits.

Costs will be in the cause.

Date signed and delivered in open court at Kajiado this 27th day of September, 2018.

CHRISTINE OCHIENG

JUDGE