



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO.250 OF 2017

JAMES WAITHAKA WACHIRA.....PLAINTIFF

VERSUS

DIPT BHATT.....DEFENDANT

RULING

The Plaintiff herein **James Waitthaka Wachira** brought this claim against the Defendant herein **Dipti Bhatt** vide a **Plaint** dated **28th October 2014**. The Plaintiff prayed for Judgement against the Defendant in the following terms:-

- a) A declaration that the Plaintiff is legal and bona fide owner as purchase of all that property known as LR.No.14870 situated in the Ruiru South area of Kiambu County.***
- b) An order for specific performance compelling the Defendant to transfer all that property known as LR.No.14870/532 situated in the Ruiru South area of Kiambu County to the Plaintiff in exchange for the balance of the purchase price.***
- c) A permanent injunction restraining the Defendant whether by herself or her agents or otherwise howsoever from trespassing upon, alienating, selling, transferring, or otherwise howsoever interfering with the Plaintiff's ownership and quiet possession of all that property known as LR.No.14870532 situated in the Ruiru South area of Kiambu County.***
- d) Costs of the suit and interest.***
- e) Such other/further relief as this Honourable Court may deem fit and just to grant.***

It was the Plaintiff's claim that by an **Agreement for Sale** dated **30th July 2010**, between the Plaintiff and the Defendant, the Defendant agreed to sell and the Plaintiff agreed to purchase all that property known as **LR.No.14870/332** situated in the **Ruiru South area** of **Kiambu County** for a consideration of **Kshs.1,900,000/=** upon the terms and conditions set out therein. It was an express term of the agreement that upon the Plaintiff paying the agreed deposit of **Kshs.400,000/=** to the Defendant on execution of the agreement, the Defendant would hand over vacant possession of the suit property to the Plaintiff pending completion.

Further the Defendant was to pursue a **provisional Certificate of title** to replace the lost Certificate of title. He further averred that he promptly paid the agreed deposit and immediately took possession of the suit property wherein he has since proceeded to carry out substantial development thereon at considerable expense. He contended that in breach of the **Sale Agreement**, and despite receiving the further payment from the Plaintiff at her request which amount stands at **Kshs.755,000/=**, the Defendant has todate failed to deliver completion documents to the Plaintiff's advocates despite repeated requests to do so and thus the filing of this suit.

Though the **Summons to Enter Appearance** were signed on **30th October 2014**, there is no evidence that the same were extracted and served upon the Defendant.

The **Return of Service** filed on **19th March 2015** by **Caroline Wanjiku Boro** only indicated that the said **Process Server** received an **application** dated **28th October 2014**, an **Order** issued on **30th October 2014** and **Hearing Notice** dated **10th February 2015**. However, there was **no mention** of **Summons to Enter Appearance**.

The **Notice of Motion** application which was filed on **28th October 2014** was allowed on **19th March 2015** after the Defendant failed to file her **Replying Affidavit** to the said application. However on **4th August 2016**, the Defendant filed a **Notice of Motion** application dated **2nd August 2016**, seeking to set aside the proceedings of **19th March 2015** and the injunction that was issued by the court on allegation that the said application and suit was never served upon her.

However the said application was dismissed by the court on **12th June 2017**, which held that the said application was filed with undue delay and further the injunctive orders were meant to preserve the suit property before the hearing and determination of the main suit. The parties were directed to prepare the suit for hearing expeditiously and were given time frame of 60 days from the date of the said Ruling. Thereafter, the Defendant filed undated and unsigned Defence and denied having breached the Sale Agreement in issue.

From the court record, the Court noted that the Plaintiff's advocate sought for re-issue of Summons which had expired vide a letter dated **27th January 2017** to the **Deputy Registrar Environment and Land Court**,

Milimani.

However, the said **Summons to Enter Appearance** remained unsigned and were not extracted. Therefore, it meant that the Defendant herein **was never** served with **Summons to Enter Appearance**. If Summons to Enter Appearance were never extracted or served, what does this mean?

Order 5 Rule 1 of the **Civil Procedure Rules** provides:-

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein”.

Further **Order 5 Rule 2(1)** provides:-

“A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons”.

and **Order 5 Rule 2(2)** also provides:-

“Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so”

However, where the Summons have not been extended, the Court may without **Notice** dismiss the suit at the expiry of **twenty four (24) months** from the issue of the original Summons. The original Summons herein were signed on **30th October 2014** but not served. The Court had discretion to dismiss the suit by or on **30th October 2016**. However, that was not done and though the Plaintiff applied for re-issue of the expired **Summons**, the said **Summons** were not signed nor extracted. Therefore that there is no suit standing. See the case of **Udaykumar Chandulal Rajan & Others...Vs...Charles Thathi**, where the Court held that:-

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 months period. Neither did the entry of appearance by the Defendants revive the Summons which had expired”

See also **HCC No.62 of 2004, Zakaria Somi Nganga....Vs...Kenya Commercial Bank & 3 Others**, where the Court held that:-

“In the instant case, the original Summons were issued on 4th February 2004. That is four years ago. There is no dispute that the Summons were neither served on the 1st and 2nd Defendants nor was an application made to renew them within the requisite time. The Summons to enter appearance in this case expired 12 months from the date of issue and 24 months from the date of re-issue, it was not possible to revive them. That therefore means that the Plaintiff's suit has lapsed for reasons of non compliance with Order V Rule 1 of the Civil Procedure Rules...”

It is very clear that the Plaintiff did not serve **Summons** which lapsed after **12 months** from the date of issue and never applied for re-issue until **27th February 2017**. However the said **Summons** were never issued and therefore the Plaintiff's suit lapsed for reasons of non-compliance with the provisions of the law which goes to the root of this suit.

The Court finds that there is no competent suit as filed by the Plaintiff since the suit herein **abated 12 months after failing to serve Summons** upon the Defendant. Without having been served with Summons, then the Defence filed by the Defendant is irregular. The said Defence is also undated and unsigned.

Having found that the Plaintiff's suit had long abated, the Court finds no suit pending to warrant it decide the issues on merit.

Consequently, the Court proceeds to find and hold that the Plaintiff's suit had long abated and his claim is dismissed entirely with no orders as to costs as the Defendant did not file a competent Defence.

It is so ordered.

Dated, Signed and Delivered at Thika this 19th day of October 2018.

L. GACHERU

JUDGE

In the presence of

M/S Karwitha holding brief for Mr. Wachira for the Plaintiff

Mr. Maina holding brief for Ochoo for the Defendant

Lucy - Court clerk

Court – Judgement read in open court in the presence of the above advocates.

L. GACHERU

JUDGE

19/10/2018