



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC NO. 18 OF 2010**

**RAPHAEL NJUGUNA CHEGE.....1<sup>ST</sup> PLAINTIFF**

**BERNARD GOKO KARWENJI.....2<sup>ND</sup> PLAINTIFF**

**JAMES MBURU MWANGI .....3<sup>RD</sup> PLAINTIFF**

**(suing as Trustees of Christian Community Church Services)**

**VERSUS**

**MANDERA TOWN COUNCIL.....1<sup>ST</sup> DEFENDANT**

**KULLOW MOHAMED SHEIKH.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed suit against the Defendants on the 15/2/2010 and summons to enter appearance dated 25/2/2010 were issued, a counterpart original is on record.
2. This ruling is in respect to the Preliminary Objection filed on 2/7/2012 by the 1<sup>st</sup> Defendant opposing the Plaintiffs suit on the grounds that there is no suit as the same had abated and that summons to enter appearance have never been served upon the Defendants and the validity of the said summons have lapsed hence there is no suit pending.
3. The Preliminary Objection was served upon the Plaintiffs and 2<sup>nd</sup> Defendants counsels on the 25/9/2012 and 26/9/2012 respectively as shown by the affidavit of service filed on the 2/10/2012.
4. On the 12 /4 /2013 the Plaintiffs through their Counsel on record Messrs C K Nzili & Co Advocates wrote to the Deputy Registrar Meru to issue them with the summons to enter appearance. It would appear this letter did not elicit any response, at least none is on the file prompting the said advocates to file a Notice of Motion on 17/4 /2013 seeking *inter alia* an order for issuance of summons to the Defendants and secondly that the validity of the summons be extended. There is no evidence that this application was heard. I have perused the record of proceedings and I have not sighted any determination on this application. It would also appear that the said application was not served on the parties.
5. That notwithstanding the said law firm again wrote to the Deputy Registrar requesting for reissuance of the summons to enter appearance. There are summons to enter appearance on record signed by the Deputy Registrar and dated the 6/5/2013.
6. Whilst the above Preliminary Objection is still pending the Plaintiffs' counsel filed an application under Notice of Motion dated 14/10/2013 seeking orders that the suit be transferred to Garissa High Court for hearing and determination. This application is still pending hearing and determination. In response to this application the 2<sup>nd</sup> Defendant filed a Preliminary Objection dated and filed on the 20/5/2014 on similar grounds as the 1<sup>st</sup> Defendant that no summons to enter appearance had been filed together with the plaint or at all as is required in law and that the suit offends the express provisions of Order 5 rule 1(3) and Order 5 rule 1(5).
7. The matter was listed for hearing on the 1/11/2017 during service week when the learned Counsel for the 1<sup>st</sup> Defendant brought to the Court's attention that there were Preliminary Objection subsisting which needed to be disposed of before the matter could be ready for hearing. That the Defendants have never been served with summons to enter appearance and the plaint to enable them to file their defences. The parties stated that submissions had been filed and urged the Court to determine the application.
8. The Court has read and considered the submissions filed by the parties on various dates together with the legal authorities cited therein.

9. The Court in the case of Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696, defined what a preliminary Preliminary Objection is. Equally in the case of Oraro vs. Mbaja(2005) I KLR 141 Ojwang, J the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point .....Anything that purports to be a Preliminary Objection must not deal with disputed facts and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence .....

10. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

11. Given the definition of a Preliminary Objection stated above, there is no pleading by the Defendant that summons have not been served on them. Neither has that fact been admitted in the pleadings of the Plaintiff. In the view of this Court the Preliminary Objection does not fall within the meaning ascribed above. The Preliminary Objection therefore fails in that respect.

12. That said, the matter falls within procedural law. Issuance of summons to enter appearance is governed by Order 5 Rule 1 which states as follows;

(1) When a suit has been filed a summons shall issue to the Defendant ordering him to appear 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 in accordance with subrule (2) of this rule.

(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.

13. After the Plaintiff has filed his suit the Court must then summon the Defendant to come and respond to the suit within the time specified in the summons. The summons must be collected by the Plaintiff within 30 days of filing from the issuance of the same for service to the Defendants. From the record there is no evidence that the summons to enter appearance were ever served on the Defendants. The suit was filed together with the Notice of Motion which appears to have engaged the parties from the start. The Plaintiff has owned up in the supporting affidavit sworn by the 1<sup>st</sup> Plaintiff that the summons to enter appearance together with the plaint were not served upon the Defendants.

14. Order 5 rule 6 states that the summons must be collected within 30 days of issue or notification whichever is later, failing which the suit shall abate. The summons to enter appearance were issued on the 25/2/2010 and therefore lapsed on the 25/3/2010. The Plaintiff did not take steps to extend the summons except the belated attempt made on the 17/4/2013. Indeed, it would appear that the issue of summons was forgotten until the Preliminary Objection filed on 2/7/2012 aroused the matter. The application by the Plaintiff to extend the summons were futile as by then the suit had abated.

15. Further under Order 5 rule 2, the Court may on application, extend the validity of summons for 12 months if satisfied of the reasons why they were not served in the first place. Where no application has not been made under this rule the Court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons. This Court has made reference to some summons dated the 6/5/2013 which as I have stated were issued without any basis in my view. I say this because there are no orders of the Court ordering the issuance of the same nor the prosecution of the application that sought the orders. The Court will ignore those summons as they are doubtful.

16. The Plaintiff has urged this Court to be guided by Art 159 2 (d) of the Constitution and disregard procedural technicalities. With respect this Court is of the view that the provisions of Order 5 rules 1 and 2 are not mere technicalities. It provides for the procedure in which a Defendant is called upon to answer to a suit and is thus core to the initiation of a suit as far as the Defendant is concerned. The Plaintiff has stated that since the Defendants had participated in the prosecution of the application for temporary injunction, there was no need to effect summons to enter appearance on them. In my respectful view the Defendants must be served with the plaint so that they can know the suit that confronts them and prepare their defence accordingly. Ours is an adversarial system and the Defendant is not expected to guess the claims of the Plaintiff. Summons are therefore a vital step in initiating a suit against the Defendant and until the summons are properly served on the Defendant there is no valid invitation to the Defendant to defend the suit.

17. In the circumstances, it is my finding that no summons were served on the Defendant in the suit within the prescribed period and the suit

having abated and no steps having been taken to revive the same, the inaction and inordinate time taken by the Plaintiff to move the Court, the Plaintiff is undeserving of this Court's discretion.

18. The Preliminary Objection dated the 2/7/2012 is upheld. The suit has abated.

**DELIVERED, DATED AND SIGNED AT MERU THIS 15<sup>TH</sup> DAY OF OCTOBER 2018.**

**J G KEMEI**

**JUDGE**