



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO 8 OF 2016

TABELGA KOEI ALIAS TABELGA KOEI BUSIENEI

(suing as the administrator of the estate of

Kiprop Arap Busienei -deceased.....PLAINTIFF

VERSUS

WESLEY AYEGO AGINA.....1ST DEFENDANT

JOSEPH ALUOCH AGENGA.....2ND DEFENDANT

LAWRENCE KIPKORIR.....3RD DEFENDANT

GEORGINA MUTHONI.....4TH DEFENDANT

THE DISTRICT LAND

REGISTRAR NYANDO.....5TH DEFENDANT

THE HON ATTORNEY GENERAL.....6TH DEFENDANT

RULING

Introduction

1.This Ruling is in respect of the 2nd defendant's Notice of Motion dated 8th October 2018 brought pursuant to Order 5 Rule 27 of the Civil Procedure Rules, Order 5 Rule 2(1),(2), (3), (4) and (5), Order 5 Rule 4 (1) and Order 5 Rule (15) of the Civil Procedure Rules, 2012, Sections 1A and 3A of the Civil Procedure Act. The application seeks the following orders:

a) Spent

b) That this honorable court be pleased to dismiss the suit against JOSEPH ALUOCH AGENGA the 2nd defendant herein for being a nullity and an abuse of the court process

c) That the purported summons issued on 28/02/2018 as against the 2nd defendant be expunged from the record (court file) for being an abuse of the court process.

d) That costs of this application be provided for.

2. The application is based on the grounds that the suit herein was filed in 2016 and the 2nd Defendant has never been served with Summons to enter Appearance. The said summons's validity not having been extended renders them invalid and the suit herein a nullity, bad in law and an abuse of the process of the court.

3. The application is supported by the affidavit of Joseph Aluoch Agenga, the 2nd Defendant herein sworn on the 8th October 2018 together with the supplementary affidavit sworn on the 30th October 2018. In the supporting affidavit he depones that he only learnt about this suit when his advocate was served with a Notice of Change of Advocates by the firm of W.K Ngeno Lessan & Co Advocates who were taking

over the conduct of this case from the firm of G. M Maengwe & Co Advocates who had been acting for the plaintiff. His advocates then perused the file and discovered that the suit had been filed on 10.2.2016 and summons had been taken out on 26.2.2016. According to the court record, the summons had purportedly been served upon the applicant by registered post on 9.5.2016. Thereafter the Plaintiff requested for judgment. When the matter came up for mention on 24.10.2016 before Justice Sila Munyao, he observed that the service of summons was irregular as it offended Order 5 of the Civil Procedure Rules. He then directed that the 2nd Defendant be properly served. To date the 2nd Defendant has not been served even though fresh summons were taken out on 28th February, 2018.

4. The application is opposed by the Respondent through her Replying Affidavit sworn on the 26th October 2018 together with her Reply to Supplementary Affidavit sworn on 2nd November 2018. In the Replying Affidavit, the Respondent depones that the applicant was served on 26th February 2016 and therefore maintains that the summons were served within the period required by law and there was no need to have them extended. She further depones that the application is incompetent and bad in law and is merely intended to stifle the respondent's claim for injunction and prevent the case from being heard on the merits.

Issue for determination

5. The main issue for determination is whether the Plaintiff's suit against the 2nd Defendant is a nullity for failure to serve the 2nd Defendant with summons.

Analysis and determination

6. Order 5 of the Civil Procedure Rules sets out an elaborate procedure for service of summons. In particular rule 5(1) provides as follows:

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

Rule 2 provides that

“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”.

7. Order 5 Rule 2(1) of the Civil Procedure Rules provides for the duration and renewal of the summons as follows:

“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.”

8. Under Order 5 rules 2 and 5 of the Civil Procedure Rules, one may apply for the summons to be extended. Order 5 Rule 2 ((2) and (5) provides for a situation where the summons has expired as follows:

Sub-rule 2

“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 that it is just to do so”

Sub-rule 5

“An application for an order under sub-rule 2(2) shall be made by filing an affidavit setting out the attempts made and their result, and the order may be made without the advocate or plaintiff being heard.”

Sub-rule 7

“Where an application has not been made under sub-rule 2 the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.”

9. In the instant suit, it is clear that whatever service is alleged to have been effected by the Respondent was found to be improper and the court directed that fresh service be effected upon the applicant. The Respondent's counsel did not collect the summons until 28th February, 2018, which is a period of one year and four months since the order was made and more than twenty four months since the original summons were issued. By the time the said summons were collected, the initial summons which had been issued on 26th February, 2016 had expired on 26th February, 2017 and no application was made under Order 5 Rule 2(5) for their extension. Even after collecting the said summons, the same were not served upon the applicant and the suit was therefore liable to be dismissed under Order 5 Rule 2 (7). I however note that the Plaintiff has changed advocates a number of times and this may have occasioned the lapse resulting in failure to serve the summons as required.

10. Counsel for the applicant has relied on the case of **Nagendra Saxena V Miwani Sugar Mills (1989) Ltd (Under Receivership) Civil Appeal No. 261 of 2008** where the Court of Appeal held that:

“the Deputy Registrar had no jurisdiction to re-issue summons after the expiry of twenty four months. The appellant needed leave to do so and under Order 49 Rule 5, the Deputy Registrar had no jurisdiction to hear the application... The purported extension of the validity of the summons by the Deputy Registrar was done without jurisdiction and was therefore void ab initio.”

The court further observed that

“For our part we must consider the issue of service on the basis that every court is entitled to ensure that its processes are not abused in the sense that those who seek the assistance of the court must do so in conformity with existing law.”

11. The above case is distinguishable from the instant case. In the case at hand no application has been made for extension of summons before the Deputy Registrar and instead the court is faced with the dilemma of whether or not to validate the summons that were issued after the lapse of twenty four months. The answer is found in the provisions of section 59 of the Interpretation and General Provisions Act. These provisions on the construction of the power of the court to enlarge time are as follows:

“Where in a written law a time is prescribed for doing an act or taking a proceeding and power is given to a court or other authority to extend that time then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed”.

12. This provision was applied in the case of **Tropical Foods and Another V Eastern and Southern African Trade & Development Bank & Another (2017) eKLR** where the court faced with a similar situation where summons had not been served after a period of three years declined to dismiss the suit and extended the summons for a period of thirty days.

13. I have carefully and anxiously considered the plaint, notice of motion, rival affidavits and counsel’s submissions and given the peculiar circumstances of this case I am of the view that it would not serve the interests of justice if the Plaint was dismissed for failure to serve the summons within the prescribed time. As observed by Madan JA in the case of **D.T Dobie Kenya Ltd V Muchina (1982) KLR1** *A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal.*

14. Consequently, I disallow the application and direct that the summons be served on the defendant’s advocates within 21 days.

15. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 13th day of December, 2018.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. W. K. Ngeno for the Plaintiff
2. Mr. K. Omolo for the 2nd Defendant
3. Court assistant - Rotich