



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 57 OF 2017

SKEETER KWAMBOKA.....PLAINTIFF/RESPONDENT

VERSUS

WATER RESOURCES MANAGEMENT AUTHORITY

(now known as WATER RESOURCES

AUTHORITY).....DEFENDANT/APPLICANT

AND

OASIS PART SELF HELP GROUP

(SUING THROUGH JOHN MUTINDA).....1ST INTERESTED PARTY

SYOKIMAU RESIDENTS ASSOCIATION.....2ND INTERESTED PARTY

RULING

1. In the Notice of Motion dated 24th April, 2018, the Defendant is seeking for an order striking out with costs the Plaint dated 19th October, 2015.
2. The Application is supported by the Affidavit of the Defendant's advocate who has deponed that the Plaintiff filed the suit on 19th October, 2015; that the Plaintiff has neither collected for service nor served Summons on the Defendant contrary to the provisions of Order 5 Rule 1 of the Civil Procedure Rules and that the suit has abated.
3. In his response, the Plaintiff's advocate deponed that the Plaint herein was filed alongside an Application for injunction; that the Defendant replied to the said Application and that the Defendant has always been represented in the suit.
4. According to the Plaintiff's advocate, the failure to take up and serve Summons is a procedural infraction which should be remedied by both Article 159(2) (d) of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Act and that the suit should be heard on its merits.
5. The Defendant's advocate submitted that the Plaintiff has neither collected for service nor served Summons to Enter Appearance on the Defendant contrary to Order 5 Rule 1(6) of the Civil Procedure Rules; that the suit has abated and that the suit should be struck out. Counsel relied on several authorities which I have considered.
6. The Interested Parties' advocate submitted that where no Summons to Enter Appearance have not been issued and served, the Plaint should be struck out with costs.
7. This suit was commenced by way of a Plaint dated 19th October, 2015. In the said Plaint, the Plaintiff sought for a permanent injunction restraining the Defendant from interfering with his peaceful possession of land known as L.R. No. 12715/254/26 Syokimau. I have perused the Plaint and I have not come across any Summons to Enter Appearance duly signed by the Deputy Registrar. Indeed, the Plaintiff's advocate has admitted that he has neither extracted nor served the Summons to Enter Appearance to date.
8. This suit is governed by the Civil Procedure Act and the Civil Procedure Rules, 2010. Order 5 Rule 1 of the Civil Procedure Rules provides that when a suit has been filed, a Summons shall issue to the Defendant ordering him to appear within the time specified therein. The Summons is supposed to be signed by a Judge or an officer appointed by the Judge and should be sealed with the seal of the court.

9. Order 5 Rule 6 provides that every Summons, except where the court is to effect service, shall be collected for service within thirty (30) days of issue or notification, whichever is later, failing which the suit shall abate.

10. The provision of Order 5 Rule 6 of the Civil Procedure Rules is in mandatory terms. The said provision ensures the just and orderly administration of justice and is not a procedural technicality that can be cured by Article 159 (2) (d) of the Constitution. As was held by Kiage JA. (*dissent*) in the case of ***Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 others [2013] eKLR***, Article 159 of the Constitution was never meant to aid parties in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice.

11. The law clearly provides what would happen to a suit if Summons are not collected for service on the Defendant within thirty (30) days. This suit abated thirty (30) days after it was filed for want of extraction of Summons. The suit therefore ceased to exist, and this court can only reiterate that position. The court being an instrument of the law, can do nothing in a situation where the Defendant cannot respond to the allegations raised in the Plaintiff's Complaint for want of extraction and service of Summons to Enter Appearance.

12. In the circumstances, I allow the Defendant's Application dated 24th April, 2018. The Plaintiff's Complaint dated 19th October, 2015 is hereby struck out with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE