



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.787 OF 2015**  
**{FORMERLY CIVIL SUIT NO.202 OF 2011}**

**ERICK OPON NYAMUNGA.....PLAINTIFF**

**VERSUS**

**SUTTON HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**LUKE OCHIENG OGADA.....2<sup>ND</sup> DEFENDANT**

**NOOREZ SHAMJI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By notice of motion dated 11<sup>th</sup> April 2016 which is under **Order 10** Rules 6, 9, and 11 of Civil Procedure Rules, **Sections 1A, 1B** and **3A** of Civil Procedure Act, **Sutton Holdings Limited**, the 1<sup>ST</sup> Defendant, prays for the following;

- a) That the interlocutory judgment entered against the 1<sup>st</sup> Defendant on 24<sup>th</sup> July 2012 be set aside.
- b) The suit be struck out and dismissed with costs to the 1<sup>st</sup> Defendant.

The notice of motion is based on the four grounds on its face and supported by the affidavit of Aman Kurji, a Director of the 1<sup>st</sup> Defendant sworn on the 11<sup>th</sup> April 2016.

2. The application is opposed by Erick Opon Nyamunga, the Plaintiff through the three grounds of opposition dated 25<sup>th</sup> May 2016.

3. The application came up for hearing on the 26<sup>th</sup> of July 2016 when counsel for the Plaintiff and 1<sup>st</sup> defendant agreed to file written submissions. The 1<sup>st</sup> Defendant's submissions dated 10<sup>th</sup> October 2016 were filed on the 17<sup>th</sup> October 2016 while that of the Plaintiff dated 13<sup>th</sup> October 2016 were filed on the 18<sup>th</sup> October 2016.

4. The issues for determination are as follows;

- a) Whether the Plaintiff has served the 1<sup>st</sup> Defendant with summons to enter appearance in this suit,

and if not whether the suit as against the 1<sup>st</sup> Defendant has abated.

b) Whether there is interlocutory judgment entered against the 1<sup>st</sup> Defendant on 24<sup>th</sup> July 2012 and if so, whether it should be set aside.

c) What orders to issue

d) Who pays the costs of the application

5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by 1<sup>st</sup> Defendant, grounds of opposition by the Plaintiff, the court record, submissions by counsel and come to the following findings;

a) That the suit was commenced by the Plaintiff against the 1<sup>st</sup> Defendant through the plaint dated 11<sup>th</sup> November 2011 and amended on 11<sup>th</sup> July 2012 adding two other Defendants.

b) The court has noted from the record that summons to enter appearance were issued on the 19<sup>th</sup> July 2012.

c) That the affidavit of service sworn by Julius Otieno Ramunya on 18<sup>th</sup> January 2011, which both the 1<sup>st</sup> Defendant and Plaintiff counsel have referred to confirms service of the following only;

i) The demand notice served on 7<sup>th</sup> November 2011 upon George Janganya, the site manager (see paragraph 2, 3 and 4) of the said affidavit.

ii) The court order dated 14<sup>th</sup> November 2011 by **“pinning it on the electricity pole at the side” and “posting other copies on the building blocks”** on the 22<sup>nd</sup> November 2011.(see paragraph 10 of the said affidavit).

d) That though paragraphs 5 of the process server’s affidavit indicates that he had received other documents, including summons to enter appearance, there is no paragraph in the rest of the body of the affidavit showing how they were served and upon whom.

e) That the 1<sup>st</sup> Defendant deposition in the affidavit in support of the notice of motion dated 11<sup>th</sup> April 2016 that the summons to enter appearance has never been served has not been disputed and remains unchallenged.

f) That **Order 5** of the Civil Procedure Rules provides for the issue and service of summons to enter appearance and the following rules are relevant in the determination of the issues herein;

“1(1).....

(2) .....

(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.

(5).....

(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.

2 (1) 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 time of issue of the concurrent summons.

(2) Where a summons has not been served on defendant the court may extend the validity of the summons from time to time if satisfied it is just to do.

(3) .....

(4) .....

(5) .....

(6).....

(7) Where no application has been made under Subrule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.

3 .....

4.....

5.....

6.....

7. Save as otherwise prescribed, where there are more Defendants than one, service of the summons shall be made on each defendant.

8 .....

9 .....

10 .....

11.....

12 .....

13 .....

14 .....

15 (1) The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time, when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.....”.

g) That the documents served to the 1<sup>st</sup> Defendant counsel through the Plaintiff’s counsel letter dated 5<sup>th</sup> December 2011, that is annexed to supporting affidavit, did not include the summons to enter appearance.

h) That it follows therefore that the request for judgment against the Defendant made vide letter

dated 23<sup>rd</sup> July 2012 was premature as summons to enter appearance has never been served on the 1<sup>st</sup> Defendant. That though the 1<sup>st</sup> Defendant seen to believe interlocutory judgment was entered on 24<sup>th</sup> July 2012, the court has perused the record and there is no order or proceedings of that date. The available notes of that period are those of 23<sup>rd</sup> May 2012, which is followed by that of 26<sup>th</sup> July 2012 and the two do not deal with entry of interlocutory judgment requested vide Plaintiff counsel's letter dated 23<sup>rd</sup> July 2012.

i) That in view of the finding in (h) above the court declines to enter interlocutory judgment sought against 1<sup>st</sup> Defendant for reasons that there is no evidence of service of summons to enter appearance upon the 1<sup>st</sup> Defendant in the court record.

That in case the interlocutory judgment may have been entered on a record that the court has missed to trace or see the same is hereby vacated for the same reasons.

4. That flowing from the foregoing the court finds that the 1<sup>st</sup> Defendant has established that the Plaintiff has never served them with the summons issued on the 19<sup>th</sup> July 2012. That in terms of **Order 5 Rule 1(6) and 2 (7)** of Civil Procedure Rules, the suit against the 1<sup>st</sup> Defendant has since abated and is dismissed with costs.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF FEBRUARY 2017**

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Mrs Onyango for Shamji for 1<sup>st</sup> Defendant

Mr Nyanga for Yogo for Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/2/2017**

8/2/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mrs. Onyango for Shamji for 1<sup>st</sup> Defendant

Mr. Nyanga for Yogo for the Plaintiff.

Court: Ruling dated and delivered in open court in presence of Mrs. Onyango for Shamji for 1<sup>st</sup> Defendant and Mr. Nyanga for Yogo for the Plaintiff.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/2/2017**