



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC CIVIL SUIT NO. 312 OF 2012

MARGARET WAIRIMU NJUGUNA MWAURA.....1ST PLAINTIFF

JEREMIAH NJUGUNA MWAURA.....2ND PLAINTIFF

VERSES

KAHAWA SUKARI LIMITED.....1ST DEFENDANT

JAMES GITHIGA GACHOKA.....2ND DEFENDANT

RULING

1. The Second Defendant/ Applicant filed a Notice of Motion dated 10th October 2013 in which he seeks striking out of the Plaintiff's suit against him with costs. The Application is expressed to be brought under the Provisions of Order 2 Rule 15(1) (b) (c) and (d), Order 5 Rule 2 of the Civil Procedure Rules 2010 and Sections 3 and 3 A of the Civil Procedure Act.

2. The Applicant contends that summons to enter appearance were issued on 5th June 2012 but were not served upon him until 24th June 2013 when the same were forwarded to his advocates offices. The Applicant therefore contends that the summons had expired and that the Respondents altered the summons to read 25th June 2012 with the sole purpose of misleading the Applicant and the court. The Applicant further contends that as there was no application for extension of summons, the Plaintiffs' suit is therefore fatally defective and ought to be struck out.

3. The Applicant's application is opposed by the Respondent based on grounds of opposition dated 31st October 2013 and filed in court on the same day.

The Respondents contend that there was no alteration of summons as alleged. That the summons were served upon the Advocates of the Applicant upon collapse of negotiations which were going on. That the Applicant has brought this application as an afterthought after the Respondents opposed the Applicant's suit in the ELC 834 of 2013 which had been filed in contravention of Section 6 of the Civil Procedure Act. That the Respondents' claim raises triable issues and further that the suit should not be tied down to procedural/ technicalities.

4. I have carefully considered the Applicant's Application the Grounds of Opposition by the Respondents as well as submissions by the Applicant. I have looked at the court record which shows that summons to enter appearance were issued on 5th June 2012. The applicant did not annex a copy of the alleged altered summons. What is clear is that summons to enter appearance were forwarded to the Applicant's Advocates offices vide covering letter of 24th June 2013. The reason why the summons were being sent to

the Applicant's Advocates is clearly indicated in the utter.

5. There had been negotiations between the Applicant's Advocates and the Advocates of the respondents. The Applicant's Advocates were aware of the case which had been filed in court that is why summons could not be served pending negotiations.

The Applicant cannot therefore turn round and claim that the summons had expired. The Applicant had not denied that he filed his own case being ELC no. 834 of 2013 against the Respondents. The Applicant has also not denied the fact that the Respondents raised the issue of subjudice in as far as ELC 834 of 2013 relates to the present case

6. The Applicant entered appearance and filed defence on 5th July 2013. It amounts to an abuse of the process of the court for the Applicant to raise the issue of expiry of summons when he is fully aware why the summons which had been picked up for service in time were not served upon him. It is clear that applicant is raising the issue of summons in the hope that this case can be struck out so that he proceeds with ELC 834 of 2013 without the issue of subjudice being raised.

7. I have gone through the cases filed by the Applicant's Advocates. The cases are clearly distinguishable. In some instances, summons were not served at all as in Nairobi ELC 250 of 2010. There was no need for the Respondents to apply for extension of the summons because the Applicant was aware of their existence and that is why after negotiations failed, the summons were sent to his Advocates who entered appearance and filed defence. This Application is therefore an afterthought. The Applicant has also tried to imagine that there were alterations to the summons. No evidence of such alteration was shown. Nothing would have been easier that the Applicant annexing the alleged altered copy to his Affidavit. I find no merit in the Applicant's Application which is hereby dismissed with costs the Respondents.

It so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 31st day of May 2017

E. O OBAGA

JUDGE

In the presence of parties who were aware of the date and time of delivery of ruling.

Court assistant - Hilda