



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C. CASE NO. 299 OF 2010

MARTHA WAMBUI KINYUA.....PLAINTIFF

VERSUS

BEATRICE WANJIRU KAMBO.....1ST DEFENDANT

BOARD OF TRUSTEES NATIONAL SOCIAL

SECURITY FUND.....2ND DEFENDANT

RULING

This ruling relates to two applications. The 1st Defendant filed the first application dated 9/2/2017 seeking to have the court make a finding that the suit against her has abated. The Plaintiff filed the second application dated 2/3/2017 in which she seeks to have the court issue fresh summons to the 1st Defendant and that the 1st Defendant be served by way of substituted service.

The court notes that the 1st Defendant previously sought to have the plaint struck out through the application dated 29/9/2014. One of the grounds for that application was that the 1st Defendant had never been served with summons to enter appearance. The court considered that application. Lady Justice Gacheru in her ruling delivered on 26/6/2016 dismissed that application. Instead of appealing against that decision, the 1st Defendant filed the application dated 9/2/2017. The court finds that the 1st Defendant application has already been determined and this court cannot sit on appeal of the decision made by Gacheru J. The application dated 9/2/2017 is dismissed with costs to the Plaintiff.

Turning to the second application, the court notes that the 2nd Defendant filed its defence on 10/9/2014. In her replying affidavit filed in court on 27/3/2017, the Plaintiff depones that attempts to serve the 1st Defendant Advocates with summons to enter appearance were made but the 1st Defendant's advocate declined to accept service. The court notes that the plaint has been amended severally. At one point the amendment was necessitated by the need to correct the 1st Defendant's names after the 1st Defendant filed her replying affidavit in opposition to the Plaintiffs application for injunction.

The 2nd Defendant in its defence filed on 10/9/2014 admits at paragraph 8 that it allocated the Suit Property to the Plaintiff and has never allocated it to any other person.

The issue for determination is whether the court ought to re-issue the summons to enter appearance to the 1st Defendant and grant leave for the 1st Defendant to be served by substituted means. The court has looked at the case of **Tropical Foods International and Another V Eastern and Southern African**

Trade and Development Bank & Another, HCC No. 119 of 2014, Commercial and Admiralty Division in which Justice Tuiyott dealt with the issue of summons. The Judge observed that an application to extend the validity of summons can be made even after the expiry of the original summons. The Judge observed that the purpose of issuing summons to enter appearance is for the Defendant to appear within the time specified since summons give notice to the Defendant of the existence of a suit against them. The court observed that if the Defendant gets notice of the suit by other means other than the summons to enter appearance and participates in subsequent proceedings, then the Defendant should not complain about the non-service of summons unless he can demonstrate that the non-service caused him prejudice.

The court notes that the 1st Defendant has actively participated in these proceedings. The 1st Defendant appointed her advocate on 29/6/2010. She states in her replying affidavit sworn on 13/7/2010 as follows:

“That I have seen the suit filed herein as well as the application under certificate of urgency.”

The court finds that the 1st Defendant has had notice of the existence of this suit against her from 2010 when it was filed. The 1st Defendant has not shown what prejudice she will suffer by the non-service of the summons on her.

The court allows the application dated 2/3/2017. Summons will be issued and will be served upon the 1st Defendant by substituted means within 30 days of the date of this ruling. The 1st Defendant will pay the costs of this application to the Plaintiff.

Dated and delivered at Nairobi this 19th day of September 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Mwangi for the Plaintiff

Ms. Wangui for the Defendant

Mr. V. Owuor- Court Assistany