



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**THIKA LAW COURTS**

**ELC.NO.59 OF 2017**

JAMES KINYUA KAIRU.....PLAINTIFF/RESPONDENT

**-VERSUS-**

STANLEY MWANGI KIMAMO.....DEFENDANT/APPLICANT

**RULING**

The matter for determination is a *Notice of Motion* application dated *7<sup>th</sup> September 2015*. The Defendant/Applicant has sought for the following orders:-

- 1) That the Plaintiff's suit as against the Defendant be dismissed for being in violation to the mandatory provisions of the law.*
- 2) That the costs of this application and the suit be awarded to the Defendant in any event.*

The application is supported by the grounds stated on the face of the application and on the annexed *Affidavit* of *Stanley Mwangi Kimamo*. These grounds are:-

- a) That Plaintiff filed the instant suit on the 23<sup>rd</sup> June 2005.*
- b) That since the date of filing suit, the Plaintiff failed to obtain the summons to enter appearance for service against the Defendant till the end of May 2005 when he served summons to enter appearance dated 13<sup>th</sup> May 2015 upon the Defendant a period of over 10 years since inception of the suit.*
- c) The Plaintiff has no valid reason as to why he failed to obtain the summons prior to the said date when they were issued unprocedurally, as there was no application made for their renew at all..*
- d) The Defendant has always been available to receive summons, more so since he appointed his Advocates on record and it is unjust for him to have to be kept waiting for such an inordinate length of time.*
- e) The Plaintiff as appears from the summons served upon the Defendant did not file any summons to enter appearance together with the Plaintiff herein and as such his entire suit has been before this Honourable court by dint of an obvious mistake that cannot be atoned for.*

**f) The entire suit of the aforesaid reasons is an abuse of the court process.**

In his **Supporting Affidavit, Stanley Mwangi Kimamo** reiterated the averments on the grounds in support of the application and averred that he is registered as the absolute proprietor of the parcel of land known as **Ruiru West Block1/3351** since the year **2004**, when he was issued with a title deed as per annexure **“SMK-1”**. The Defendant further averred that the instant suit was filed against him on 25<sup>th</sup> May 2005 by the Plaintiff but took no steps to obtain the summons to enter appearance till **13<sup>th</sup> May 2015**, and delayed in having the same served on him or his Advocate on record.

The deponent deposed that he is advised by his Advocates on record which advise he verily believe to be true that the late service and obtaining of the summons to enter appearance at this stage in the day is a complete abuse of the court process and which is incapable of being rectified by a court order of this Court.

The Defendant also averred that the conduct of the Plaintiff in having this suit move forward has been wanting and impacting negatively since he is not in a position to utilize his property since this suit has been an impediment all along.

The application is **opposed** by the Plaintiffs who have filed their **Replying Affidavit** and averred that there have been several interlocutory applications and he is advised by his advocate on record that interlocutory applications have to be disposed of first before a court of law can go into the merits of the matter and that this matter has never been scheduled for pre-trial directions until **4<sup>th</sup> May 2015**, when **Hon. Justice Mutungi** directed that summons to enter appearance be issued by the Plaintiff as per annexure **“JKK1”**

The Plaintiff further averred that his advocate on record duly served the summons to enter appearance upon the Defendant who has never filed any Defence and/or complied with **Justice Mutungi’s Order**.

The Plaintiff claimed that the same Judge denied Defendant’s Advocate on his oral application to have the suit dismissed and directed that the same be heard on merit and granted the Defendant **45 days** within which to comply with his Order of **19<sup>th</sup> May 2015**. The Plaintiff also averred that the application by the Defendant is an afterthought and as a means of defeating the expeditious disposal of this matter and that he has viable claim that raises triable issues and should therefore be heard on merit.

The Court directed the parties to canvass the instant **Notice of Motion** by way of written submissions. Further the Defendant/Applicant had been granted leave to file a further affidavit on **18<sup>th</sup> November 2015**.

The Defendant/Applicant failed to file either the further affidavit or his written submissions as directed by the Court. However, the Plaintiff/

Respondent herein through the **Law Firm of Kimani Richu & Associates Advocates** filed their submissions on **23<sup>rd</sup> February 2017** and urged the Court to dismiss the Defendant’s application.

The Plaintiff submitted that the summons to enter appearance have since been issued and served upon the Defendant. Further that the Defendant had gotten notice of the suit through other means other than the summons and participated in subsequent proceedings, and therefore, there would be no prejudice occasioned to him by delay in service of the summons that would warrant the dismissal of the suit. It was further submitted that the Defendant was aware of the suit filed against him and there were several interlocutory applications that had to be disposed off first before the hearing of the main suit. It was the Plaintiff’s submissions that whatever anomaly that was caused by failure to issue and serve summons can be cured.

It is evident that the Defendant/Applicant did not file his written submissions as instructed by the Court. In essence the instant application is unprosecuted and the normal procedure would be to have the said application dismissed.

However, the Plaintiff/Respondent filed his submissions and cited various authorities. The Court will determine the instant application on merit.

The application is anchored under Order 2 Rule 15(1) b, c, & d and Order 5 Rules 1 & 2 of the Civil Procedure Rules. Order 2 Rule 15 deals with the issue of striking out pleadings at any stage of the proceedings, if the same are scandalous, frivolous or vexatious, may prejudice, embarrass or delay the fair trial or is an otherwise an abuse of the process of the Court. The Court finds that the Defendant/Applicant had filed a similar application on **26<sup>th</sup> August 2008**, which was determined on **26<sup>th</sup> November 2009**. However, on **3<sup>rd</sup> December 2011**, the court reviewed the Order of **2008** and **reinstated the suit**. Therefore, the prayers under Order 2 Rule 15 were determined in the year **2009**, and later the suit was reinstated vide the Court Order of **3<sup>rd</sup> December 2011**.

It is also trite that striking out suits is a draconian act which the Court should employ sparingly. The Court's duty is to sustain suits and decide them on merit but not to dismiss them summarily. See the case of ***D.T.Dobie (K) Ltd...Vs...Muchina (1982) 1 KLR***, where the Court observed that; **"the duty of the court is to sustain suits and not to dismiss suits by way of summary procedure."**

Order 5 Rule 1(1) provides that:- **"when a suit has been filed, summons shall issue to the Defendant ordering him to appear within the time specified therein"**. It is therefore evident from the above provisions of law that once a suit is filed, the Plaintiff is supposed to extract summons and serve them upon the Defendant within the specified period/time. In this case, it was supposed to be not more than **thirty days** from the date of filing the suit.

It is evident that in this suit, summons were extracted on **13<sup>th</sup> May 2015**. Failure to extract summons is a good ground for declaring the suit abated. The Court did dismiss the Plaintiff's suit on **26<sup>th</sup> November 2009**, for among other reasons, failure to take out summons. However, the said suit was later **reinstated on 3<sup>rd</sup> December 2011**.

Being guided by the provisions of Sections 1A & 1B of the Civil Procedure Act, which behoves the court to further the overriding objective of the Act and also Article 159 (2)(d) of the Constitution which enjoins the court to administer justice without undue regard to procedural technicalities, the **Court finds the instant application is not merited**. Consequently, the **Court disallow the Notice of Motion dated 7<sup>th</sup> September 2015 entirely with costs being in the cause**.

The Plaintiff to set the matter for hearing expeditiously by fixing the matter for Pre-trial Conference before the Deputy Registrar within a period of 30 days from the date hereof.

It is so ordered.

Dated, Signed and Delivered at Thika this **27<sup>th</sup>** day of **October 2017**.

**L. GACHERU**

**JUDGE**

In the presence of

M/S Ndungu for Plaintiff/Respondent

No appearance for Defendant/Applicant

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**