



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 279 OF 2017

(Formerly Machakos ELC No. 315 of 2012)

ARTHUR KAHURANI NGANGA.....PLAINTIFF

VERSUS

THE COUNTY COUNCIL OF OL KEJUADO.....1st DEFENDANT

LILIAN A. DICKSON.....2nd DEFENDANT

RULING

The application before Court is the 2nd Defendant's Notice of Motion dated 22nd April, 2015 brought pursuant to Order 5 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The Application is based on the following grounds which in summary is that the 2nd Defendant herein has never been served with summons to enter appearance and was only served with the plaint and an application.

The application is supported by the affidavit of LILIAN ATIENO DICKSON the 2nd Defendant herein where she deposes that she was served with a notice of motion dated 16th August, 2012, an original Plaint as well as verifying affidavit in 2012 whereupon she instructed her advocate to defend her. The said advocates filed a Notice of Appointment of Advocates on 4th September, 2012. She avers that to date she has never been served with summons to enter appearance contrary to the clear provisions of the Civil Procedure Rules and her advocates have also confirmed not being served. She states that the suit against her is fatally incompetent and ought to be struck out with costs.

The application is opposed by the Plaintiff who filed a replying affidavit sworn by MARTIN MURIU MAINA, an advocate of the High Court of Kenya who has conduct of this suit. He confirms that it is true the 2nd Defendant and /or its erstwhile advocates in this matter messrs Kabue Thumi & Co. Advocates had not been served with the summons to enter appearance as at 22nd April 2015 when the subject application by the 2nd Defendant was filed in court for the reason that there was a justifiable delay by the court in signing and sealing the said summons to enter appearance (STEAs) which delay was occasioned by the prolonged hearing and determination of the Plaintiff's Notice of Motion dated 16th August, 2012 filed contemporaneously with the Plaint. He states that summons to enter appearance in this suit against the Defendants was duly issued by the court on 20th May, 2015, and the Plaintiff occasioned a process server one Stephen Maina Macharia with instructions to effect service upon the 2nd Defendant but the efforts were fruitless. He states that as the Plaintiff's advocates, they duly effected service of summons to enter appearance upon the 2nd Defendant's advocates messrs Kabue Thumi & Co. Advocates on 8th June, 2015 who accepted service and subsequently acknowledged receipt on behalf of the 2nd Defendant. He

claims the instant notice of motion application dated 22nd April , 2015 is overtaken by events.

On 13th July, 2017 the Plaintiff and 1st Defendant submitted on the application which submissions I have duly considered.

Analysis and Determination

From the Notice of Motion dated 22nd April, 2015, supporting affidavit and replying affidavit, the only issue in contention is whether the suit herein should be struck out for non service of STEA. The 2nd Defendant stated that she was only served with the Plaint and an application but never with STEA and this renders the suit fatally incompetent.

The 2nd Defendant further relied on the case of Patrick Karige Munge v Francis Gatiba Nganga [2015] eKLR which referred to the case of. **Grace Wairimu Mungai v Catherine Njambi Muya Nairobi ELC Civil Suit No. 584 of 2011 [2014] eKLR** where Justice Mutungi held as follows:

“My understanding of orders 5 Rules 1 and 2 and order 6 Rule 1 and order 7 Rule 1 is that until the Defendant is served with the summons to enter appearance there is no basis for him to answer to the suit. In the present suit the plaintiff served the suit documents excluding the summons to enter appearance and the Defendant’s Advocates filed a notice of appointment ostensibly to defend the application for injunction that had been served and required to be responded to”.

From the records I note the 2nd Defendant's Advocates messrs Kabue Thumi & Company Advocates filed a Notice of Appointment of Advocates on 4th September, 2012, and also replying affidavit in opposition to the Plaintiff's Notice of Motion.

The Plaintiff contends that summons to enter appearance as against the Defendants was duly issued by the court on 20th May, 2015, and the Plaintiff occasioned a process server one Stephen Maina Macharia with instructions to effect service upon the 2nd Defendant but the efforts were fruitless. Further that the summons to enter appearance were duly served upon the 2nd Defendant's advocates messrs Kabue Thumi & Co. Advocates on 8th June, 2015 who accepted service and subsequently acknowledged receipt on behalf of the 2nd Defendant. This claim is not controverted by the 2nd Defendant.

Order 5 rule 8 of the Civil Procedure Rules provides as follows: '***(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient.(2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service***'.

In this instant case, from Annexure 'MMM 1", I note messrs Kabue Thumi & Co. Advocates who were the 2nd Defendant's Advocates was legally allowed to accept service of the STEA on behalf of the 2nd Defendant.

In case of **MOBILE KITALE SERVICE STATION v MOBIL OIL KENYA LIMITED & ANOTHER [2004] 1 KLR** where J. Warsame as he then was stated:

“Order 4 of the Civil Procedure Rules contemplates that summons will be issued and served at the same time as the plaint and the duty according to Rule 3(5) of the Civil Procedure Rules is placed upon the plaintiff. It is the responsibility of the Plaintiff or his advocate to prepare the summons so that the court may sign the document to give it validity. According to Order 5 rule 1(7), the life span of summons is 24 months and after the expiry of 24 months, if no application has been made to extend, then the court without notice would dismiss the suit. In the present matter, no summons was issued, leave alone seeking extension of time. If there is no summons which was issued, in the first instance, there is nothing capable of being extended. The failure of the Plaintiff to issue and give summons is in clear contravention of the order of injunction

granted to the plaintiff and it would be impossible for the defendant to respond to the suit. Parties ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties: summons is a judicial document calling a party to submit to the jurisdiction of the court and if the party is not given that opportunity how else would he submit to the jurisdiction of the Court. Order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. The word 'shall' which makes it mandatory to comply with the direction and if there is no explanation as to why the summons were not taken out, then the court has no discretion but a judicial duty to ensure the Rules of Procedure are followed and failure to observe would be fatal".

The rationale behind service of STEA is to alert the Defendant of the existence of a suit against it. In so far as failure to serve STEA upon Defendant is fatal, I note in the instant suit, the Plaintiff sought for extension of the summons to enter appearance, which was reissued. Further the 2nd Defendant's advocate not only filed a Notice of Appointment of Advocates in 2012 but also received summons to enter appearance on her behalf in 2015 in accordance with the Civil Procedure Rules. In essence this means the 2nd Defendant was dully served and well aware of the existence of this suit against her.

From the above, it is evident the Plaintiff has provided a clear explanation on why the STEA were served late upon the 2nd Defendant's advocate who never declined to accept service. The 2nd Defendant cannot turnaround and seek to rely on technicalities by claiming the STEA was not served upon her, yet she had an advocate on record who was legally allowed to receive it on her behalf.

I find that the 2nd Defendant reliance on technicalities offends the provisions of Section 19(1) of the Environment and Land Court Act which provides that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

In the circumstances, I find that this application has indeed been overtaken by events as alluded to by the Plaintiff, and 2nd Defendant has not demonstrated the prejudice she would suffer if the suit is allowed to proceed.

At this juncture we should focus on substance of the suit instead of relying on technicalities.

The upshot of the matter is that the 2nd Defendant's Notice of Motion dated 22nd April, 2015 is not merited and is dismissed. Costs will be in the cause.

Parties urged to comply with Order 11 and set the suit down for hearing and final determination

Dated signed and delivered in open court at Kajiado this 13th day of November, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION

Faith holding for Owino for applicant

No attendance for respondent

Court Assistant Mpoye