



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 724 OF 2012**

**JOHN arap KOECH..... PLAINTIFF**

**VERSUS**

**AINU SHAMSI AUTOMOBILE**

**& HARDWARE LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE CHIEF REGISTRAR OF LANDS.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 13<sup>th</sup> June 2014 in which the 1<sup>st</sup> Defendant/Applicant seeks for orders that the Plaint dated 24<sup>th</sup> June 2013 and filed on 26<sup>th</sup> June 2013 together with the accompanying documents be struck out and this suit be dismissed with costs.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Abdifatah Muhumed Abdi, a director of the 1<sup>st</sup> Defendant, sworn on 13<sup>th</sup> June 2014 in which he averred that the 1<sup>st</sup> Defendant/Applicant has never been served with summons to enter appearance in this matter although a Plaint was served on 27<sup>th</sup> June 2013. He further averred that his Advocates wrote to the Plaintiff's Advocates seeking to be served with the summons to enter appearance but that the Plaintiff's Advocates failed to do so. He further averred that in the Plaintiff's Affidavit of Service sworn by one Mathias Mboya, the process server does not make mention of the summons to enter appearance having been served upon the 1<sup>st</sup> Defendant/Applicant. He further averred that he does not know a Mr. AINU Shamshi who the process server claimed to have served as a director of the 1<sup>st</sup> Defendant/Applicant opposite City Cabanas. He averred that there is no Mr. AINU Shamshi who is a director of the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant/Applicant is not situated opposite City Cabanas. He further stated that in May 2013, the Plaintiff/Respondent made an application for judgment to be entered against the 1<sup>st</sup> Defendant/Applicant and that on 11<sup>th</sup> February 2014, the Deputy Registrar gave directions that the suit should proceed to hearing on the basis that the 1<sup>st</sup> Defendant had been served with summons to enter

appearance and failed to file a defence within the stipulated period. He averred that in the absence of service of summons to enter appearance, directions that the suit be set down for hearing under **Order 10 Rule 9 of the Civil Procedure Rules, 2010** ought not to be maintained against the 1<sup>st</sup> Defendant/Applicant. He further averred that if this Application is not allowed, the matter will proceed to judgment and the 1<sup>st</sup> Defendant will be condemned unheard. He sought for the court to set aside all proceedings entered in default of defence on 11<sup>th</sup> February 2014 and strike out the amended Plaintiff.

The Application is contested. The Plaintiff/Respondent, Lt. Gen. (Rtd.) John arap Koech, filed his Replying Affidavit sworn on 20<sup>th</sup> June 2014 in which he averred that the prayers sought in this Application cannot be granted as they were overtaken by events in that this suit has already been fully heard and submissions tendered and further that judgment in default of entering appearance and defence was requested and entered against the 1<sup>st</sup> Defendant/Applicant. He averred that the 1<sup>st</sup> Defendant/Applicant's directors were duly served with summons to enter appearance and they have always been aware of this suit. He added that the 1<sup>st</sup> Defendant/Applicant has always sought to create one excuse after another with a view to disobey this court's orders. He averred that the 1<sup>st</sup> Defendant/Applicant's director, namely Abdifatah Muhumed Abdi, received summons and court documents but declined to enter appearance and his continued disobedience of court orders prompted the Plaintiff/Respondent to file an application for him to be committed to civil jail. He further averred that he instructed his Advocates to seek leave to serve court documents by way of advertisement and that the same was advertised on 21<sup>st</sup> November 2012 which notice ordered the Defendant/Applicant to enter appearance. He added that the 1<sup>st</sup> Defendant/Applicant only entered appearance when it was served with the Notice for hearing of formal proof. He further averred that the 1<sup>st</sup> Defendant/Applicant's advocates wrote a letter dated 18<sup>th</sup> June 2013 indicating that summons to enter appearance had been furnished on their clients in respect of this matter. A copy of that letter was annexed. He averred further that having failed to enter appearance and failing to file a defence within time, the 1<sup>st</sup> Defendant/Applicant only has itself to blame as the situation left the Honourable Court with the option of entering judgment and setting the matter down for hearing.

The issue that I am called upon to determine is whether or not to strike out this suit on the ground that a summons to enter appearance was never issued and served upon the Defendant/Applicant. **Order 5 rule 1 of the Civil Procedure Rules, 2010** provides thus:- *Where a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.* **Order 5 rule 1(3)** provides that:- *Every summons shall be accompanied by a copy of the plaint.* **Order 5 Rule 1 (5)** provides:- *Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.* **Order 5 Rule 1(6)** provides:- *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.*

Pursuant to the above legal provisions, it is clear and evident that an obligation is placed on the Plaintiff/Respondent to ensure the summons are prepared and signed by the court and thereafter to effect service of the summons on the Defendant/Applicant. The record of the court in the present case shows that the summons to enter appearance was prepared and issued to the Plaintiff. The claim by the 1<sup>st</sup> Defendant/Applicant that it was not served with the summons to enter appearance appears to go contrary to the admission In the letter dated 18<sup>th</sup> June 2013 by their Advocates, M/s S. Musalia Mwenesi, that indeed summons to enter appearance was served upon them. In fact, it is also factual that the 1<sup>st</sup> Defendant/Applicant proceeded to enter appearance after being served with the Notice of the Hearing of formal proof. Clearly, this goes to show that they were indeed served with the summons to enter appearance. In the circumstances, I find that the 1<sup>st</sup> Defendant/Applicant was served with summons to enter appearance and failed to enter appearance and file their statement of defence within the timelines allowed.

Accordingly, this Application is hereby dismissed with costs to the Plaintiff.

It is so ordered.

**DELIVERED AND DATED IN NAIROBI THIS 18<sup>TH</sup>**

**DAY OF MARCH 2016.**

**MARY M. GITUMBI**

**JUDGE**