



REPUBLIC OF KENYA



**Ndege v Alela (Environment & Land Case 478 of 2012)
[2016] KEELC 1310 (KLR) (11 March 2016) (Ruling)**

Francis Okello Ndege v Alexander Ochwo Alela [2016] eKLR

Neutral citation: [2016] KEELC 1310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 478 OF 2012**

MM GITUMBI, J

MARCH 11, 2016

BETWEEN

FRANCIS OKELLO NDEGE PLAINTIFF

AND

ALEXANDER OCHWO ALELA DEFENDANT

RULING

1. Coming up before me for determination is the Notice of Motion dated 2nd April 2014 in which the Defendant/Applicant seeks for an order that this suit be struck out and the costs of this Application be provided for.
2. The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Defendant/Applicant, Alexander Ochwo Alela, sworn on 2nd April 2014 in which he averred that this suit is an abuse of the due process of this court in view of the failure by the Plaintiff/Respondent to file witness statements and summons to enter appearance.
3. The Application is contested. The Plaintiff/Respondent filed his Replying Affidavit filed on 17th December 2014 in which he averred that the allegation that he has failed to file requisite documents with the Plaintiff is a mere technicality and an oversight on his part, that in any event this matter is in the application stage and that he intends to file and serve the missing documents before the pre-trial stage. He further added that pursuant to Article 159(d) of *the Constitution* of Kenya, 2010 dismissing this suit on such grounds would be defeating the wheels of justice. He further added that the subject matter of this suit being land is a very contentious and emotive issue and dismissing this suit would serve no justice. He further averred that he has suffered great hardship and injustice as the Defendant/Applicant has illegally obtained possession of the subject matter of this suit, impeding him from developing the same and continues to operate as if there is not law.



4. 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.
5. 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 were never filed, issued or served along with the Plaint. In his Replying Affidavit, the Plaintiff/Respondent has admitted that this is the position and that it was an oversight on his part. He has urged the court to overlook this omission, citing Article 159(d) of the Constitution of Kenya, 2010 which states that the court should not pay undue regard to technicalities. On this point, I can do no better by agree with the decision of Mutungi, J. in Grace Njambi Mungai versus Catherine Njambi Muya (2014) eKLR where he stated as follows:

“I am unable to accept that Order 5 Rule 1 would fall to be considered as providing a mere procedural technicality as suggested by the plaintiff. It does in my view substantively provide the procedure under which a defendant is called to answer to a suit and is thus core to the initiation of a suit as far as a defendant is concerned and it would be my holding that where no summons have been issued in accordance with order 5 and appropriately served on the defendant there cannot be a competent suit against the defendant. The provisions of Order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly.”
6. In my view, service of summons on a defendant is a vital step in initiating the litigation against a defendant and until a summons is properly served on the Defendant, there is no valid invitation to the Defendant to defend the suit. In light of the foregoing, I hereby allow this Application with costs to the Defendant.

It is so ordered.

DELIVERED AND DATED IN NAIROBI THIS 11TH DAY OF MARCH 2016.

MARY M. GITUMBI

JUDGE

