



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
ELC NO. 350 OF 2010

ALICE WANJA MUNJI.....PLAINTIFF

VERSES

SAMUEL MUNJI KIHANYA.....1ST DEFENDANT

NELSON GATHOGO KIBAGU.....2ND DEFENDANT

JOSEPH MUNJI.....3RD DEFENDANT

RULING

What is before me is the defendant's application by way of Notice of Motion dated 19th June 2015 brought under Order 51 Rule 1 and Order 5 rules 1 of the Civil Procedure Rules seeking an order that this suit be struck out with costs on the grounds that the Plaintiff did not file in court summons to enter appearance together with the plaint and as such no summons to enter appearance has been served upon the defendants since the suit herein was filed in the year 2010. When the application came up for hearing on 17th December, 2015 the Plaintiff's advocates sought adjournment of the same to enable the Plaintiff file a replying affidavit. The court dismissed the Plaintiff's application for adjournment on the ground that the plaintiff was served in good time and had had sufficient time to respond to the application. The application was therefore not opposed.

In her submissions, Ms. Wambua Advocate who appeared for the defendants reiterated the contents of the 1st defendant's affidavit that was filed in support of the application. She submitted that since the plaint filed herein was not accompanied by summons to enter appearance, the same is fatally defective and as such should be struck out. Ms. Wambua submitted that the defendants have not been able to enter appearance and file their statement of defence due to the plaintiff's failure to take out summons to enter appearance. Ms. Wambua submitted further that the plaintiff lost interest in the suit after her two applications were dismissed by the court with costs. Counsel urged the court to dismiss the suit as a non starter.

Although the Plaintiff filed neither a replying affidavit nor grounds of opposition to the application, the Plaintiff's advocate was allowed to address the court. Ms. Nyamolo submitted that the Plaintiff has been sick for sometime and it is as a result of her failure to give instructions due to illness that contributed to procedural lapses in the institution of the suit. She urged the court to exercise its discretion in favour of sustaining the suit.

I have considered the defendants' application together with the affidavit filed in support thereof. I have also considered the respective submissions by the advocates for the parties. Order IV Rule 3(1) of the repealed Civil Procedure Rules which was in force when this suit was filed provides that: **"When a suit**

has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”

Order IV Rule 3 (5) of the Civil Procedure Rules Provides that:

“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 V rule 1(2) and (7) of the repealed Civil Procedure Rules provides that where summons has been taken out but not served, the court may extend its validity from time to time it satisfied that it is just to do so and that when no application is made for the extension of the validity of the summons the court may without notice dismiss the suit at the expiry of twenty four (24) months from the date of issue of the original summons.

Order V Rule 1(7) above of the repealed Civil Procedure Rules provided for the consequences of failure to extend the validity of unserved summons to enter appearance. However, repealed Civil Procedure Rules was silent on the consequences of failure to prepare summons and file the same in court together with the plaint like in the present case. I am of the view that the court has power under section 1A, 1B and 3A of the Civil Procedure Rules to strike out or dismiss a suit in which summons has not been taken out and where that failure has impeded the expeditious disposal of the case. Like any other discretion exercised by the court, the discretion to strike out a suit for failure by the Plaintiff to take out summons must be exercised judiciously having regard to the fact that the duty of the court is to determine disputes brought before it and that courts should endeavour to sustain suits rather than to strike them out summarily.

It is not disputed that the Plaintiff has not taken out summons to enter appearance since this suit was filed on 21st July 2010. The Plaintiff did not file an affidavit to explain the reason for her failure to take out the summons. The Plaintiff’s advocate stated from the bar that summons were not taken out due to the Plaintiff’s illness. I find the Plaintiff’s excuse for not taking out the summons not convincing. I am in agreement with the submissions by the defendants’ advocate that the

Plaintiff’s advocates having been instructed to file this suit did not require separate instructions from the Plaintiff to prepare and file summons in court. I have noted from the record that the defendants have neither entered appearance nor filed a defence to the Plaintiff’s claim. This has been attributed to the Plaintiff’s failure to take out and serve upon them summons to enter appearance. I have noted further that even after the Plaintiff’s advocates were served with the present application, no attempt was made by them to take out summons. This suit which was filed more than 5 years ago cannot proceed to hearing due to the Plaintiff’s failure to take out and serve summons upon the defendants. There is no doubt from the foregoing that the Plaintiff’s conduct has impeded the progress of this case and is inconsistent with the overriding objectives of the Civil Procedure Rules.

In the absence of any reasonable explanation for the Plaintiff’s conduct and an attempt by the Plaintiff to remedy the situation, this court has no basis on which it can exercise its discretion in favour of the Plaintiff. Article 159(2) (b) enjoins this court to dispense justice without delay. I am in agreement with the defendants’ advocate that the Plaintiff lost interest in this case after losing the application for temporary injunction. I am of the view in the circumstances that justice would be better served in this case by striking out the same.

For the foregoing reasons, I will allow the defendants’ application dated 19th June 2015 which I hereby do. In view of the relationship between the Plaintiff and the 1st defendant and the fact that the defendants neither entered appearance nor filed a defence, each party shall bear its own costs of the application and the suit. Orders shall issue accordingly.

Dated and Delivered at Nairobi this 20th day of May, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Chenge holding brief for Owaga for the Plaintiff

Ms. Nyarindo holding brief for Ms. Wambua for the Defendants

Kajuju Court Assistant