



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KISUMU

ELC CASE NO. 360 OF 2013

MARGARET AUMA OMBAI.....PLAINTIFF

VERSUS

NOORALLAH TAJDIN HABIB.....1ST DEFENDANT

NAIMA ADEGA.....2ND DEFENDANT

THE LAND REGISTRAR KISUMU.....3RD DEFENDANT

RULING

1. **Noorallah Tajdin Habib**, the 1st Defendant, filed the notice of motion dated 17th July 2015 for the suit filed by the plaintiff to be dismissed with costs for want of prosecution. The application is based on the three grounds on its face and the affidavit sworn by **Norallah Jajdin Habib** on 17th July 2015.
2. The application is opposed by **Margaret Auma Ombai**, the Plaintiff, through her replying affidavit sworn on 15th February 2016.
3. The application came up for hearing on 8th March 2016 when M/S Kyamazima and Mr Ogejo advocates for the 1st Defendant and Plaintiff respectively made their rival submissions;
4. The 1st Defendant's case is that the suit should be dismissed as since the filing of this suit the 2nd and 3rd Defendants have not been served and their summons to enter appearance have expired and thus suit being a fast track one ought to have been finalized in six months. That after being served, he entered appearance on 13th October 2014 and filed defence on 21st October 2014 and the Plaintiff has not taken any steps to prosecute the suit since then, and hence this application.
5. The Plaintiff's case is that she instructed counsel to file the suit and serve the summons to enter appearance on 23rd December 2013. That the summons were served at the Defendants but the process server has not filed the return of service. That the failure by her counsel to have the return of service filed and set down the suit for hearing should not be visited upon her. That if the application is allowed, she will be greatly prejudiced.
6. The following are the main issues for the determination of the court;
 - a) Whether the 1st Defendant has established grounds for the dismissal of the Plaintiff's suit.
 - b) Who should pay the costs.

7. The court has after considering the three grounds on the notice of motion, affidavit evidence by both parties, submissions by court and the record come to the following finding;

a. That the Plaintiff commenced this suit against the 1st Defendant, Naima Adeg a and Land Registrar, Kisumu as 2nd and 3rd Defendants respectively, through the plaint dated 23rd December 2013 and filed in court on 24th December, 2013. That the plaint is branded " **fast track**" at the heading. The court issued the summons to enter appearance on 6th January 2014. There is no filed affidavit of service of the summons to enter appearance in respect of any of the three Defendants, but the record shows that the 1st Defendant entered appearance through M/S Ogejo, Olando & Co. Advocates on 13th October 2014 through the memo dated 10th October 2014. The said firm of advocates also filed list of witnesses, list of documents dated 15th October 2015, 1st Defendant's statement of defence dated 15th October 2015 and witnesses statements dated 21st October 2014 on the 21st October 2014. That the pleadings between the Plaintiff and 1st Defendant closed 14 days after the service of the documents filed by the 1st Defendant on the Plaintiff in accordance with **Order 3 Rule 13 of Civil Procedure**. The copies of the defence and memorandum of appearance marked "NTH – 1 AND 2" attached to the 1st Defendant's affidavit sworn on 17th July 2015 contains a "received" stamp of Amondi & Co Advocates carrying a date of 22nd October 2014 which the court takes to be the date of service. The pleadings between the Plaintiff and the 1st Defendant therefore closed 14 days after the service of the defence which was on 22nd October 2014. That by the time the 1st Defendant filed the notice of motion dated 17th July 2015, about eight and a half months had lapsed from the date of closure of pleadings. That period fall short of the 12 months required under **Order 17 rule 2 of Civil Procedure Rules** for dismissal of suits for failure to take action to prosecute in 12 months.

b. That the plaintiff has responded to 1st Defendant contention that summons to enter appearance for 2nd and 3rd Defendants had expired without being served by deponing that all the Defendants had been served but her advocate had failed to file the affidavit of service. In legal proceeding, evidence of service of legal documents, including summons to enter appearance is done by the filing of the affidavit of service in accordance with **Order 5 Rule 15 of Civil Procedure Rules**. The court cannot therefore take the Plaintiff deposition about service on 2nd and 3rd Defendants to be a substitute for the affidavit of service. The court therefore finds that the summons to enter appearance for 2nd and 3rd Defendants issued on 6th January 2014 expired at the expiry of 12 months under **Order 5 Rule 2 of the Civil Procedure Rules** without being served. That was on or about 5th January 2015. The Plaintiff has not taken any steps to have the summons reissued and the suit against the 2nd and 3rd Defendant should be struck out.

c) That it is only fair and just that the suit between the Plaintiff and 1st Defendant be set down for hearing without any undue delay as the application to dismiss the Plaintiff's case was filed prematurely.

8. That in view of the foregoing the 1st Defendant has partially succeeded in the application dated 17th July 2015 and the following orders are issued;

a) That the Plaintiff's case against the 2nd and 3rd Defendant is hereby struck out for failure to serve the summons which have since expired without extension.

b) That the Plaintiff do take steps within 90 days to set down the case between her and the 1st Defendant for hearing failure to which the 1st Defendant is at liberty to apply.

c) The costs of the application be in the cause.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016

In presence of;

Applicant Absent

Respondent Absent

Counsel Absent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016

18/5/2016

S.M. Kibunja J

Oyugi court Assistant

Parties absent

counsel absent

Court: Ruling delivered in open court in absence of the parties/Counsel and the Deputy Registrar to notify them.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

18/5/2016