



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT NAIROBI

ELC SUIT NO. 92 OF 2010

JOHN NJUGUNA KIMUNYA.....PLAINTIFF

VERSUS

TERESIAH WACHUKA KIMUNYA..... DEFENDANT

RULING

The Application

The application before the Court for determination is a Notice of Motion filed by the Plaintiff dated 16th July 2014 seeking the following orders:

1. That the memorandum of appearance and the 1st and 2nd Defendant's statement of defence dated and filed on 6th May, 2014 be struck out.
2. That the suit against the 1st Defendant do proceed as undefended.
3. The costs of this application be borne by the Defendants/Respondents.

The grounds for the application are that this suit was commenced by the Plaintiff against the Defendants on 4th March 2010 by a plaint dated 2nd March 2010. Further, that the 2nd Defendant entered appearance on 25th May, 2010 by a memorandum of appearance of even date and filed a statement of defence dated 17th June, 2010. However, that despite being served with the plaint and the application, the 1st Defendant failed to enter appearance and/or file a statement of defence, and has now filed a memorandum of appearance and statement of defence for the 1st and 2nd Defendant dated and filed on 6th May, 2014. Further, that the said memorandum and statement of defence have been filed out of time, without leave of court and in blatant disregard of the rules of procedure.

The Plaintiff in her supporting affidavit sworn on 16th July 2014 reiterated the above grounds and explained that the suit herein was commenced by her deceased father against the Defendants by a Plaint dated 2nd March 2010. She gave an account of the proceedings herein since the institution of the suit culminating in a mention for purposes of taking directions at a pre-trial conference held on 13th May, 2014. Further, that the Defendants were duly served with the mention notice dated 27th February, 2014.

The Plaintiff further stated that at the mention on 13th May, 2014, the 1st and 2nd Defendants' Advocates informed the court that they had just been instructed and required time to file their documents, and that the matter was fixed for further mention on 16th July 2014. The said Advocates subsequently served the Plaintiff's Advocate with the memorandum of appearance and the statement of defence filed in court on 6th May 2014.

The Plaintiff averred that the period limited by the rules of this court for filing of the memorandum of appearance and the statement of defence lapsed over four year ago, and that filing and service of pleadings out of time and without leave of court is a gross abuse of the process of the court and the same ought to be struck out with costs.

The Response

The Defendants opposed the said application in a replying affidavit sworn on 10th September 2014 by the 1st and 2nd

Defendants. In summary, the Defendants averred that this suit was not served on them causing them not to enter appearance. Further, that on 25th March 2014, the Defendants were served with copies of the Plaintiff's list of documents and a hearing Notice and thereupon filed their memorandum of appearance and defence dated 6th May, 2014.

The Defendants deponed that the 2nd Defendant was not aware of the alleged memorandum of appearance dated 25th May 2010 and statement of defence dated 17th June 2010, and averred that this Court on 13th May, 2014 granted leave for the Defendants to file and serve the Plaintiffs with a statement of defence and memorandum of appearance which was not objected to by the Counsel for the Plaintiff. Therefore, that the Plaintiff's application has no merit, and that the Plaintiff Counsel should have raised the issue before the leave was granted by this Court.

The Issues and Determination.

The Plaintiff's Notice of Motion was canvassed by way of written submissions. I have carefully considered the pleadings filed herein, and submissions made by the Plaintiff and Defendants. The issue for determination is whether the 1st and 2nd Defendant's statement of defence dated and filed on 6th May, 2014 should be struck out for reasons that it is an abuse of the process of court. The Notice of Motion by the Plaintiff is brought pursuant to the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The Plaintiff in this regard in his submissions relied on Order 7 Rule 1 of the Civil Procedure Rules and the decision in Daniel Wambua Ndabi vs Peter Luka Nduku, H.C.C.C No. 56 of 2004 to argue that the Memorandum of Appearance and Defence filed by the 1st and 2nd Defendants were filed out of time and without leave of the Court, and ought to be struck out with costs. Further, that the court record shows, and that the ruling by Muchelule J. delivered on 25th October 2010 found that the Defendants were properly served with the Plaintiff and summons to enter appearance upon filing of the suit.

The Defendants on their part submitted that the Court had already decided on the issue of service of the Plaintiff and summons to enter appearance, and reiterated that they were granted leave by this Court on 13th May 2014 to file their memorandum of appearance and Defence and were not therefore in breach of Order 7 Rule 1 of the Civil Procedure Rules.

This Court notes that the Defendants do not contest that they filed a Defence after over 3 years of filing of the Plaintiff. They claim that they were not served with the Plaintiff and that this Court gave them leave to file the Defence. I have perused the Court record and note that the affidavit of service sworn by the process server on 11th March 2010 and filed in Court on 16th March 2010 attests to the service of the Plaintiff's application dated 2nd March 2010 and court order issued on 5th March 2010. This is the affidavit of service which was relied on by Muchelule J. in his ruling delivered on 25th October 2010, whereupon the Honourable Judge found that the 2nd Defendant was served with the said orders.

There is however no affidavit of service or any other evidence of service of the Plaintiff filed herein and summons to enter appearance on the Defendants as required by Order 5 Rule 15 of the Civil Procedure Rules. In addition, upon perusal of the court record, the summons to enter appearance thereon are neither dated, signed or sealed. It is therefore apparent as claimed by the Defendants that there was no service of the Plaintiff or summons to enter appearance upon them. Indeed summons do not appear to have been issued in the first place. This Court therefore finds that the time lines as provided by Order 7 Rule 1 of the Civil Procedure Rules could not have applied to the Defendants as they only apply after service of summons.

As regards the directions given by this Court on 13th May 2014, the court record shows that this Court directed as follows:

“The 1st and 2nd Defendants to file and serve their list and bundle of documents and witness statements within 21 days. The pre-trial conference shall be held on 16th July 2014. “

Further, no leave was sought or given for filing of a memorandum of appearance of defence by the 1st and 2nd Defendants. However, given the finding that the Defendants were not served with the Plaint and summons, no such leave was in any event required.

We therefore have a situation where we have two Defences on file with regard to the 2nd Defendant, in circumstances where the Plaint was not served on the Defendants and also where summons have not been issued or served on the Defendants. The Plaintiffs therefore have no grounds for seeking the striking out of the Defendants' memorandum of appearance and Defences on account of being abuse of the court process, as they are the ones culpable in not having followed the required procedures as shown in the foregoing.

This Court notes that Order 5 Rule 1(2) of the Civil Procedure Rules requires summons to be signed and sealed without delay and not later than 30 days of filing of a suit. To facilitate the expeditious hearing of this suit this Court will exercise the discretion granted to it under Order 50 Rule 6 of the Civil Procedure Rules to extend time for any acts required to be done within a limited time under the Civil procedure Act and Rules, and *suo moto* extends the time for issuance of the summons in this suit.

As regards the Defences on file, the same are not properly on record. The Defendants will however be given the opportunity after service of the Plaint and service of summons by the Plaintiff to file the Defences that they wish to rely on during trial.

This Court accordingly orders as follows arising from the foregoing reasons:

1. That the time for issue of summons to enter appearance be and is hereby extended for 30 days from the date of this ruling.
2. That the Plaintiff shall serve summons to enter appearance and the Plaint filed herein upon the Defendants within 30 days of the date of this ruling.
3. The Defendant shall file and serve their Defences, list and bundle of documents and witness statements within 15 days of service by the Plaintiff.
4. The 2nd Defendant's Statement of Defence dated 17th June 2010 and filed on the same date, and the 1st and 2nd Defendants Statements of Defence, list and bundle of documents, and witness statements dated 6th May 2014 and filed on the said date, be and are hereby expunged from the Court record.
5. The Plaintiff shall meet the costs of the Notice of Motion dated 16th July 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____9th____ day of ____February____, 2015.