



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 77 OF 2010

GEORGE MUIRURI NJENGA.....1ST PLAINTIFF

JAMES KARANJA NJENGA.....2ND PLAINTIFF

VERSUS

PAUL KAGUNDA NJENGA.....1ST DEFENDANT

RAHAB NYAMBURA KARANJA.....2ND DEFENDANT

DANIEL MURIURI NJENGA.....3RD DEFENDANT

KANUNGA FARMERS CO-OPERATIVE SOCIETY.....4TH DEFENDANT

RULING

Introduction

There are two applications before the Court for determination. The first application is in a Notice of Motion dated 26th February 2013 filed by the 1st, 2nd and 3rd Defendants herein. The said Defendants are seeking orders that the Plaint filed in this suit on 23rd February 2010 be struck out for failure by the Plaintiffs to serve the Defendants with summons to enter appearance in the case. Further, that the said Plaint if frivolous and discloses no reasonable cause of action.

The second application is by the Plaintiffs, in a Notice of Motion dated 15th March 2013. The Plaintiff has sought orders for extension of time to serve the summons to enter appearance.

The 1st, 2nd and 3rd Defendants' Notice of Motion

The grounds for the 1st, 2nd and 3rd Defendants' Notice of Motion are that the Plaintiffs filed this suit on 23rd day of February 2010 and served the Defendants with the Plaint and a chamber summons application of the same date, which application was heard and dismissed by Muchelule J. on 28th September 2010. However, that during all this time, the Plaintiffs have never served the Defendants with summons to enter appearance which is a mandatory requirement of law, and that this case is therefore not properly before the court. Further, that under the circumstances, the Defendants were under no legal obligations to file a memorandum of appearance and statement of Defence.

The said Defendants in their supporting affidavit sworn by the 1st Defendant on 26th February 2013

further stated that the Plaintiff is frivolous and it discloses no reasonable cause of action against the Defendants, for reasons that no fraudulent acts by the Defendants are stated, and that the said fraudulent acts were undertaken by other persons.

The Plaintiffs opposed the 1st, 2nd and 3rd Defendants' Notice of Motion in a replying affidavit sworn by the 1st Plaintiff on 31st May 2013, and wherein he stated that the 6th November 2012 he employed the services of a Court Process Server one George Okwemba, who went with him to the Defendants' residence to serve them with the summons to enter appearance of the Plaintiff. However, that upon arriving at the Defendants' home they failed to get them, and thereupon decided to effect service at the Defendants' Advocates which was done by the said process server. The Plaintiffs also gave a detailed account of how the Defendants in collusion with their deceased mother allegedly fraudulently altered the record of the suit properties herein and obtained title thereto.

The Plaintiffs' Notice of Motion

The grounds for the Plaintiffs' Notice of Motion are stated in the supporting and further affidavit sworn by the 1st Plaintiff on 15th March 2013 and 3rd April 2013 respectively. He states that they have exercised all reasonable diligence to serve the Defendants. Further, that the Defendants have relocated from Kiambu Area, and that it is in the interests of Justice to extend the summons as the Plaintiffs stand to lose their inheritance.

The 1st, 2nd and 3rd Defendants opposed the said Notice of Motion in a replying affidavit sworn on 24th May 2013 by the 1st Defendant. They aver that there is nothing in the 1st Plaintiff's Affidavit to show that the Summons to Enter Appearance were ever taken out, or that they were ever served. Further, that their Advocates had written a letter to the Plaintiff's Advocates dated 22nd May 2012 seeking clarification on the issue of Summons but they never replied to the said letter, which letter was annexed. The 1st, 2nd and 3rd Defendants also state the Plaintiffs have not attached any document to show that they have exercised all reasonable diligence to serve the summons, neither have they set out the attempts made at service and their result as required under Order 5 Rule 2(5) of the Civil Procedure Rules.

The 4th Defendant also opposed the Plaintiffs' Notice of Motion in a replying affidavit sworn on 29th July 2013 by its Chairman, Njoroge Gatua Kiarie. The deponent stated that no summons had been extracted in this suit and that the 4th Defendant has never been served with any summons to enter appearance.

The Submissions

The 1st, 2nd and 3rd Defendants' counsel filed two sets of submissions both dated 24th May 2013 on the two Notices of Motion, in which he reiterated the arguments made in the foregoing. He relied on the provisions of Order 5 Rule (1), (3) and (6) as to the issue and service of summons within thirty days of issue, and submitted that the said provisions are mandatory. He also relied on the decision in **Kenya Bridge Association & 2 Others vs Samina Esmail & 4 Others, (2007) e KLR** that it is the summons that order the Defendant to enter appearance and file defence.

The counsel also relied on the decisions in **Udaykumar Chandulal Rajani vs Charles Thaiti, Nairobi Civil Appeal No. 85 of 1996** and **National Bank of Kenya Ltd vs Syntax Printers Limited and 2 Others, (2006) e KLR** that the court has no powers to issue fresh summons after the expiry of the original summons. The counsel also submitted that there must be clear and distinct allegations of fraud in pleadings, and relied on the decision in **Associated Leisure Ltd vs Associated Newspaper Ltd, (1970) 2 QB 450** in this regard.

The Plaintiffs' counsel in submissions dated 31st May 2013 and 22nd October 2013 relied on the provisions of the Constitution, including Articles 159 (2) (d) and 50 (1) as well as section 1A and 1B of the Civil Procedure Act to argue that the Plaintiffs have a right to a fair trial, and that the court should

administer justice without undue regard to technicalities and with the overriding objective of providing substantive justice. The counsel also submitted that Order 5 Rule 2(2) of the Civil Procedure Rules gives the court discretion to enlarge time to serve summons, and that Order 2 Rule 14 of the said Rules disallow an objection to pleadings on grounds of want of form. He submitted that summons were served on the Chairman of the 4th Defendant on 2nd November 2012.

The 4th Defendant's counsel filed submissions dated 29th July 2013 in which he reiterated that the Plaintiffs did not take out summons to enter appearance, and/or did not move the court to have them validly extended within twelve months. Further, that no summons were ever served on the 4th Defendant. He submitted that under Order 5 Rule 7 (1) of the Civil Procedure Rules, once summons expire without extension, the court may without notification dismiss the suit at the expiry of 24 months, and that the Plaintiffs' application is caught up by this provision. He also relied on the decision in **Udaykumar Chandulal Rajani vs Charles Thaiti, Nairobi Civil Appeal No. 85 of 1996** in this respect.

The Issues and Determination.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiffs and Defendants. There are two issues for determination: the first issue is whether the court can extend the time for service of summons to enter appearance on the Defendants. The second issue for determination is whether the Plaintiffs' application should be struck out for reasons of failure to serve summons to enter appearance and that it is frivolous and discloses no cause of action.

On the first issue on the extension of time for service of summons to enter appearance, the applicable law is Order 5 Rules 1 and 2 of the Civil Procedure Rules. Order 5 Rule 1 of the said Rules provides for the issue and service of summons as follows:

1. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.

(6) 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.

Order 5 Rule 2 of the Civil Procedure Rules on the other hand provides for the period of validity and extension of summons once issued in the following terms:

2. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant the court may extend the

validity of the summons from time to time if satisfied it is just to do so.

(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

I have perused the court file and note that summons were issued on 22nd October 2012, more than two years after filing of the suit. The Plaintiff attached to their submissions a copy of the summons purported to have been served upon and service acknowledged by the 4th Defendant on 2nd November 2012, but there is no affidavit of service on the court record or produced in evidence to this effect. There is an affidavit of service sworn on 15th March 2013 by a court process server known as George Okwemba on the attempted service of the summons on the 1st, 2nd and 3rd Defendants, and wherein he states that he served the summons on the said Defendants' Advocates.

It therefore appears that summons to enter appearance were issued in this suit after two years of filing of suit, and signed and sealed after the thirty days' time limit provided in Order 5 Rules 1 (2) of the Civil Procedure Rules. I have perused the court file and there is no extension of time granted by the court to do so. It appears from the evidence provided by the Plaintiffs that the said summons were collected within 30 days of their issue as they were received by the process server on 6th November 2012 as indicated in the affidavit of service he swore on 15th March 2013. There is however no evidence of personal service of the said summons on the Defendants.

This court therefore has to determine the effect of the issue of summons after two years of filing of suit. I note that the only effect provided for in Order 5 Rules 1 (6) of the Civil Procedure Rules is that a suit will be abate if the summons are not collected within 30 days of their issue or notification thereof. The summons herein were collected after their issue on 22nd October and service attempted on the 1st -3rd Defendants, and apparently successfully on the 4th Defendant.

In addition after filing of this suit, the 1st 2nd and 3rd Defendants appointed Muthoga and Gaturu Advocates to act on their behalf in a Notice of Appointment dated 8th March 2010 and filed in court on the same date. The parties herein then proceeded to prosecute a Chamber Summons by the Plaintiffs dated 18th February 2010, and a ruling on the same was delivered on 28th September 2010. I cannot therefore locate any prejudice that has been suffered by the parties by the late issue of the summons.

More fundamentally, this Court is granted discretion to extend time fixed for doing any act under section 95 of the Civil Procedure Act as follows:

“ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period,

even though the period originally fixed or granted may have expired.”

Order 50 Rule 6 of the Civil Procedure Rules also has similar provisions as follows:

“ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise. “

It is my view that these provisions give the court discretion to extend time *suo moto* or upon application and upon such terms as the justice of the case may require. In this regard the Court notes that the summons issued on 22nd October 2012 expired on 21st October 2013, and the Plaintiffs’ application for extension of time for service was made on 15th March 2013 before their expiry.

Furthermore, the Constitution now enjoins this court to provide substantive justice under Article 159(2) (b), and as no prejudice has been shown to have been occasioned to the Defendants by the late issue and lack of service of summons to enter appearance, I accordingly allow the Plaintiff’s Notice of Motion dated 15th March 2013 and order as follows:

1. The time for the issue of summons in this suit be and is hereby extended and the summons issued on 22nd October 2012 are hereby deemed to have been validly issued.
2. The validity of the summons to enter appearance issued on 22nd October 2012 is hereby extended for twelve months with effect from 22nd October 2013.
3. The summons to enter appearance to be served upon all the Defendants and/or their Advocates within 30 days of the date of this ruling.
4. The Plaintiffs shall meet the costs of the said Notice of Motion.

As this court has determined the issue of service of summons to enter appearance, the outstanding issue left to be determined is whether the Plaintiffs’ Plaint should be struck out for being frivolous and disclosing no cause of action. The provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules state as follows in this regard:

“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 overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. It is also provided in Order 2 Rule 15(2) of the Civil Procedure Rules that the fact of a Plaintiff disclosing no cause of action must be clear on its face and no evidence shall be admissible in this regard. It is evident from the pleadings filed by the parties that triable issues have been raised by both the Plaintiffs and Defendants, and they have both sought to provide evidence in support of their respective arguments on the issue as to whether there was any fraudulent dealing with the properties that are the subject matter of the suit herein.

The arguments raised by the 1st, 2nd, and 3rd Defendants in this regard as to the details of the fraud that has been pleaded in the Plaintiff, and of their participation in the said fraud, are matters to be decided upon after the examination of evidence at full trial and not at this stage. In any event the said Defendants have a remedy in costs if indeed it is found that they were wrongly sued. It is therefore the finding of this Court that the Plaintiff filed herein merits adjudication by this Court.

The 1st, 2nd, and 3rd Defendants Notice of Motion dated 26th February 2013 is therefore hereby denied for the reasons given in the foregoing. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____6th____ day of

____March____, 2014.

P. NYAMWEYA

JUDGE