



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C. NO. 182 OF 2010

TITUS KIRAGUPLAINTIFF

VERSUS

COMMISSIONER OF LANDS1ST DEFENDANT

LAWRENCE MAINA MWANGI2ND DEFENDANT

KINARO KIMAIGA NDUGI3RD DEFENDANT

RULING

1. Before the Court is the 2nd Defendant's Notice of Motion dated 23rd July, 2013. It is taken out under **Section 3A** of the **Civil Procedure Act, 2010** as well as **Order 5 Rule 2** of the **Civil Procedure Rules, 2010**. The application seeks the following two orders:

- a) That this honorable court be pleased to dismiss this suit as against the 2nd Defendant;**
- b) That costs of this application be borne by the Plaintiff/ Respondent**

2. The application is supported by the affidavit of **Lawrence Maina Mwangi** , the 2nd Defendant and is based on the grounds stated on the face thereof.

3. It is deposed that the Plaintiff instituted the suit by way of plaint against the 1st defendant herein on 20th July, 2010. The plaint was accompanied by summons to enter appearance dated 22nd July, 2011 and served upon the 1st Defendant. Thereafter the plaintiff filed an amended plaint dated 27th July, 2011 with a view to add the 2nd and 3rd defendants.

4. It is the deponent's contention that at the time the amended plaint was filed the summons to the case had expired; That the Plaintiff did not apply to court for an extension of time and as such the suit abated as against the deponent. He avers that he has never been served with the summons and the suit should be dismissed as the same is bad in law and an abuse of the court process.

5. The application is opposed vide the Plaintiffs Replying Affidavit dated 13th January, 2014.

6. The Plaintiff contends that the 2nd Defendant's application is brought in bad faith and an abuse of the court process. He avers that when he instituted the suit against the 1st Defendant, the defendant was served with summons to enter appearance. That he subsequently amended the plaint to include the 2nd

and 3rd Defendants who according to him had illegally acquired the suit property. It is his contention that there is no provision in law which requires an amended plaint to be accompanied by summons. Further the deponent avers that the 2nd Defendant is evasive and it was difficult to effect service of an application for injunction. Furthermore he avers that upon service of the application the 2nd Defendant entered appearance and therefore no prejudice is occasioned against him.

7. The matter was argued before me on 14th January, 2014. The learned counsel **Mr. Karanja** for the 2nd Defendant/ Applicant, **Mr. Simuyu** for the Plaintiff/ respondent, **Mr. Kirui** and **Mr. Kisila** for the 1st and 3rd Defendant's respectively were present in court. Counsel for the 1st and 3rd Defendants intimated to court that they would not be opposing the application.

8. **Mr. Karanja** submitted that the suit should be dismissed as against the 2nd Defendant because he was not served with summons to enter appearance. According to counsel, Order 5 Rule (2) of the Civil Procedure Rules provides that summons are valid for a period of 12 months; that no application was made under rule 7 following the expiry of the initial summons on 22nd July 2011. He urged the court that failure to serve the summons is an abuse of the court process. The court should therefore allow the application with costs.

9. **Mr. Simiyu** vehemently opposed the application. He urged the court to consider section 1A, 1B and 3A of the Civil Procedure Act and allow for the expeditious disposal of the suit without undue regard to technicalities. According to counsel, the applicant was served with court papers and engaged legal representation to defend the case. Therefore no prejudice was occasioned against him. He further argued that there is no provision in law that requires an amended plaint to be accompanied by summons. Further, it was the submission of the counsel that the applicant had knowledge of the suit and had taken the trouble to photocopy the pleadings. Therefore the issue of service of summons is a technicality to which court ought not pay much regard.

10. I have considered the pleadings herein, the affidavits and the submissions. The main issue for determination is whether the suit herein should abate as against the 2nd Defendant for want of service of summons to enter appearance.

11. It is not in dispute that the Plaintiff herein instituted this suit by way of plaint dated 19th July, 2010. The Commissioner of land was the only defendant in that suit. It is further not in dispute that the Plaintiff filed an amended plaint on the 27th July, 2011 which sought to add the 2nd and 3rd Defendants herein to the suit. The issue in contention is whether the Plaintiff ought to have served the new parties with summons to enter appearance and whether the initial summons were still valid.

12. It is the 2nd defendant's prayer that - the plaintiff's suit be dismissed for having abated on account of failure to serve him with summons to enter appearance.

13. The plaintiff has opposed the applicant's prayer on the ground inter alia, that there is no provision in law which requires to have an amended plaint accompanied with summons to enter appearance.

14. The issuance and service of summons is governed by **Order 5** of the **Civil Procedure Rules**. **Order 5 Rule 2** of the said rules provides that summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue. The summons in our instant case were issued on the 22nd July, 2010 against the 1st defendant and duly served.

15. The amended plaint which seeks to commence a claim against the 2nd and 3rd Defendant was filed on 27th July, 2011. There are no summons on record issued against the 2nd defendant. Counsel for the plaintiff has also admitted that none were issued.

16. **Order 5 Rule 7** of the **Civil Procedure Rules** stipulates that where there are more defendants than one, service of the summons shall be made on each defendant. It therefore follows that the plaintiff should have taken out summons against the 2nd defendant and served him with the same to enter appearance

within the time specified therein. The summons should have been accompanied by a copy of the amended plaint.

17. The significance of service of summons to enter appearance on a defendant is clear on review of Order 6 Rule (1) and Order 7 Rule 1.

Order 6 Rule 1 provides:-

"Where a defendant has been served with summons to appear he shall unless some order be made by the court file his appearance within the time prescribed in the summons,"

Order 7 Rule 1 provides:-

"Where a defendant has been served with summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

18 . The purpose of service of summons is to give clear guidelines to the defendant on the timelines within which to enter appearance. This is enunciated in the case **of Lucy Wanjiru Kabutha vs Jane Muthoni**, Civil Appeal No. 82 of 2002, Musinga J. (as he then was) cited The Court of Appeal decision in **John Akasirwa V Alfred Inat Kimusu**, Civil Appeal No. 16 of 1999:

"Proper Service of Summons to enter appearance in litigation is crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore chooses to enter appearance or not".

The facts before **Musinga J.** can be distinguished from our instant case. In that case there was a default judgment in place which he held the court had no option but to set aside. However how critical summons are is not lost.

19. In the case of **Karandeep Singh Dhillon & Another V Nteppes Enterprise Limited & Another**, (2010) Eklr, Justice D.A. Onyancha ordered a plaint struck out where no summons had been taken out and/ or served on the Defendant. He observed as follows:

"...failure to have summons issued and served is as bad, if not worse, as failure to extend the same. A plaint filed in court on its own, carries no power to summon a Defendant to Court. The plaint will lie there impotently. It will alone have no power to bring the parties before the court for its adjudication."

The learned Judge further observed that:

"It is my further view from the reading and consideration of Order 1V Rule 3 and Order . V Rule 1, that a court has no jurisdiction to deal with a filed plaint until summons which alone will activate it has been issued and served. If this Proposition is correct, as I think it is, it would follow that a plaint and suit would be liable to striking out at any stage before the summons is so issued out."

20. The plaintiff in his submissions stated that the 2nd Defendant was aware of the suit and he filed a Notice of Appointment and took it upon himself to photocopy the filed proceedings. According to the plaintiff, the 2nd Defendant had notice of the suit and this satisfied the purpose for which service to enter appearance is intended which is to bring to the notice of the Defendant of the existence of a suit and to require the Defendant to respond to the Plaintiffs claim. I disagree with Counsel for the plaintiff.

21. I am guided by the observation of Hon. Justice J.M. Mutungi in **Grace Wairimu Munggai V Catherine Njambi Muya**, Civil Suit No. 584 of 2011 where the learned judge faced with similar facts

made the following observation:

"Having regard to the applicable provisions which I have highlighted above it is my view that Orders 5 Rule 1 and 2 set out an elaborate procedure of how summons are to be processed, issued and served . and where there are difficulties of serving within the prescribed time frames an equally elaborate procedure for extending the validity of the summons is out lined. I am unable to accept that Order 5 Rule 1 would fall to be considered as providing mere 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 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 competent suit against a defendant. The provisions of Order 5 Rule 1 are couched in mandatory terms and cannot be taken causally and/or lightly. In my view service of summons on a defendant is a vital step in initiation of litigation against a Defendant and until a summons is properly served on a Defendant there is no valid invitation to the Defendant to defend the suit.

22. I agree with the observation of the learned judge and wish not to add to it. It is my finding that in the present case, no summons were issued and served upon the 2nd Defendant. Consequently I allow the 2nd Defendant's Notice of Motion dated 23rd July, 2013 and order the plaintiff's suit be dismissed as against the 2nd Defendant. The costs of the application be awarded to the 2nd Defendant.

Dated and Signed at Nakuru this 4th day of April 2014.

L N WAITHAKA

JUDGE