



KENYA

REPUBLIC OF

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 584 OF 2011

**GRACE WAIRIMU MUNGAI..... PLAINTIFF**

**VERSUS**

**CATHERINE NJAMBI MUYA..... DEFENDANT**

**RULING**

The Defendant by a Notice of Motion application dated 22<sup>nd</sup> August 2013 seeks orders that:-

1. The entire suit be struck off with costs to the Defendant/Applicant.
2. The costs of this application be provided for.

The application is premised on the grounds appearing on the face of the application that:-

- a. **No summons to Enter Appearance were filed together with the plaint or at all as required in law.**
- b. **No summons to Enter Appearance has been issued to the Defendant as required in law almost two (2) years since the suit was filed and the suit is therefore bad in law and/or a non-starter.**
- c. **It is in the interest of justice that the suit be struck off as the Defendant/Applicant otherwise stands greatly prejudiced.**

The application is further supported on the annexed supporting affidavit of **Catherine Njambi Muya** the Defendant herein sworn on 22<sup>nd</sup> August 2013.

The plaintiff filed a replying affidavit sworn on 16<sup>th</sup> October 2013 in opposition to the Defendants application. The plaintiff depones that the Defendant upon being served with the plaint and initial application for injunction, the Defendant entered an appearance and instructed an advocate to act for her and answer to the suit. The plaintiff avers that the import of service of summons to enter appearance is to notify and bring to the attention of a Defendant that a suit has been brought against him or her and that he/she is required to take necessary actions within the time lines set out in the summons to answer to or respond to the suit.

The Plaintiff contends that the Defendant having appeared and instructed counsel she has notice of the suit and any oversight in serving of the summons to enter appearance would in the circumstances be inconsequential as the Defendant has notice of the suit. The plaintiff argues that the non service of the summons in the present matter was merely a procedural and/or technical oversight and does not go to the

root of the matter and contends that substantive justice should not be sacrificed at the alter of procedural technicalities and that the suit ought to be sustained to be determined on merits. The plaintiff further avers that no prejudice will be suffered by the Defendant in case the suit is allowed to proceed to be heard and determined on its merits.

At the direction of the court the parties filed written submissions where each of them articulated their positions and cited authorities to support their respective positions. The Defendant/Applicant filed her written submissions dated 10<sup>th</sup> December 2013 on 17<sup>th</sup> December 2013 and the Plaintiff/Respondent filed her submissions dated 4<sup>th</sup> February 2014 on 5<sup>th</sup> February 2014.

On the part of the Defendant/Applicant it was submitted that the suit by the plaintiff is incompetent and fatally defective as no summons to enter appearance were filed with the plaint and none has ever been served on the Defendant more than two years since the suit was filed on 27/10/2011. The Defendant applicant submits that failure to take out summons and serve is not a mere technicality and neither can it be grossed over as a mere oversight. The Applicant contends it goes to the root of the case as it is what puts the Defendant on notice that a suit has been filed against him and invites and requires the Defendant to enter appearance and file a defence.

The Defendant/Applicant referred the court to the decision by **Hon. Justice D.A Onyancha** in the case of **Karandeep Singh Dhillon & another vs- Nteppes Enterprises Ltd & another (2010) eKLR** where the learned judge ordered a plaint struck out where no summons had been taken out and/or served on the Defendant. **Onyancha Judge** in the said suit observed thus:-

**“It in my view 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 in the same case observed:-

**“It is my further view, from the reading and consideration of order IV rule 3 and order V rule 1, that a court has no jurisdiction to deal with a filed plaint until a 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 for striking out at any stage before the summons is so issued out”.**

The plaintiff in response submissions submitted that upon the Defendant being served with the suit papers, the Defendant appointed an advocate who filed a notice of appointment and even filed a response to the application by the plaintiff for injunctive relief. The plaintiff thus submitted the Defendant had notice of the suit and this according to the plaintiff satisfied the purpose for which summons to enter appearance are 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 plaintiff’s claim.

The plaintiff equated the failure to take out the summons and to effect service to a procedural oversight and sought refuge under **Article 159 (2) (d) of the constitution** that enjoins courts to administer justice without undue regard to procedural technicalities and further submitted the overriding objective of the courts as embodied under **sections 1A and 1B** of the Civil Procedure Act is to facilitate the just, expeditious proportionate, and affordable resolution of civil disputes efficiently in order to achieve substantive justice to all litigants without undue regard to technicalities. The plaintiff referred the court to the decision by **Hon. Justice Mutava** in the case of **Uncle Sam’s Githurai Ltd & Another –vs- Samuel Mureithi Muriuki & 3 others** to support the proposition that where a Defendant had taken part in a suit he is deemed to have notice of the suit notwithstanding that summons to enter appearance may not have been served. **Mutava Judge** in the case stated thus:-

**15. “In my view, the purpose of summons to enter appearance is to bring to the notice of the Defendant of the fact of the institution and to require them to respond to the plaintiff’s claim. Where therefore the Defendants on their own motion file appearances and defence to the claim, it**

**becomes superfluous to still insist that summons should be served upon them.....”.**

The plaintiff further referred the court to the Court of Appeal ruling in the case of **Kihonge Nganga & 2 others – vs- Kenya Commercial Finance Company Ltd C.A N. NAI 309 OF 1997** where the court of Appeal in exercise of its discretion granted the Applicant an extension of time to serve a record of Appeal on the Respondent where owing to an oversight, service of the record of appeal was out of time by a period of 7 days. The plaintiff thus urges this court to exercise its discretion in favour of sustaining the plaintiff’s suit arguing that no prejudice will be suffered by the Defendant.

I have set out the rival submissions by the parties and now turn to determine the application on merits. Order 5 rule 1 provides thus:-

**Where a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.**

Order 5 rule 1(3) provides Rule 1 (3) provides

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

Order 5 Rule 1 (5) provides:-

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

Order 5 Rule 1(6) provides:-

**Every summons except where the court is to effect service shall be collected for service, within thirty days of issue or within thirty days of issue or notification, whichever is later failing which the suit shall abate.**

Order 5 Rule 1 of the Civil Procedure rules deals with the issuance and service and service of summons while in the event the summons are not served within the prescribed period order 5 rule 2 deals with the extension of the validity of summons for service upon the Defendant.

Pursuant to the provisions of order 5 rule 1 subrules 3,5 and 6 which I have reproduced herein above it is clear and evident that an obligation is placed on the plaintiff to ensure the summons are prepared and signed by the court and thereafter to effect service of the summons on the Defendant. The record of the court in the present case shows that the summons to enter appearance addressed to the Defendant are still held (**unsigned**) in the court file which means the plaintiff did not follow up and/or collect the summons for service as envisaged under order 5 rule 1 (6). The summons on the court file carry a date of 2011 and there is no indication that the plaintiff has applied for a re-issue and/or extension of the original summons.

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 (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 (1) provides:-

**Where a defendant has been served with a 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 “.**

My understanding of orders 5 Rules 1 and 2 and order 6 Rule 1 and order 7 Rule 1 is that until the Defendant is served with the summons to enter appearance there is no basis for him to answer to the suit. In the present suit the plaintiff served the suit documents excluding the summons to enter appearance and the Defendant's Advocates filed a notice of appointment ostensibly to defend the application for injunction that had been served and required to be responded to. The Defendant did not file an appearance and never filed a defence since no summons had been served on her. It is instructive that the ruling on the injunction application was delivered by **Hon. Lady Justice Ougo** on 17<sup>th</sup> December 2012 when she directed the parties to prepare the suit for trial as provided under order 11 and required that they do so within 40 days from the date of the ruling and take a date for pretrial conference for pretrial directions on the hearing date.

No party took any action until the instant application was filed on 27<sup>th</sup> August 2013 over 20 months later from the date of the ruling which puts to question the plaintiff's commitment to the prosecution of the suit.

Having regard to the applicable provisions which I have highlighted above it is my view that order 5 Rules 1 and 2 set out a very 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 outlined. I am unable to accept that order 5 Rule 1 would, fall to be considered as providing a mere procedural 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 and 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 a competent suit against a defendant. The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit.

In the premises it is my finding and holding that no summons have been served on the Defendant in this suit within the prescribed period and the suit having been filed in October 2011 the plaintiff has been extremely lax-in prosecuting it and is undeserving of any discretion from the court. I accordingly allow the Defendant's Notice of motion dated 22<sup>nd</sup> August 2013 and order the plaintiff's suit struck out with costs to the Defendant.

The costs of the application are awarded to the Defendant.

Orders accordingly.

Ruling dated signed and delivered at Nairobi this 3<sup>rd</sup> day of April 2014.

**J.M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... for the Defendant

