



**Abdalla (Suing as the Administrator of the Estate of Mohammed Hussein Absura (Deceased)) v United Care Limited & 2 others (Environment & Land Case 151 of 2018) [2024] KEELC 7495 (KLR) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7495 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 151 OF 2018  
CA OCHIENG, J  
NOVEMBER 11, 2024**

**BETWEEN**

**HAWA MOHAMMED ABDALLA ..... PLAINTIFF  
SUING AS THE ADMINISTRATOR OF THE ESTATE OF MOHAMMED  
HUSSEIN ABSURA (DECEASED)**

**AND**

**UNITED CARE LIMITED ..... 1<sup>ST</sup> DEFENDANT  
AMIR FAUD MOHAMMED ..... 2<sup>ND</sup> DEFENDANT  
ASHA ABDULKADIR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the 1<sup>st</sup> Defendant's Notice of Motion Application dated the 21<sup>st</sup> February, 2024 where it seeks the following Orders:-
  1. Spent
  2. That this Honourable Court be pleased to strike out the Amended Plaint dated 26<sup>th</sup> January, 2024 and the Plaintiff's suit in its entirety.
  3. That the costs of this Application and the suit be awarded to the 1<sup>st</sup> Defendant.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Rishad Hamid Ahmed. The 1<sup>st</sup> Defendant contends that it is the lawful owner of LR No. 12715/690 Grant IR 47950, hereinafter referred to as the 'suit property'. It confirms that this suit was filed on 30<sup>th</sup> July, 2018 and the Plaintiff obtained orders of interim injunction on 5<sup>th</sup> April, 2019. It claims that for over four (4) years, the Plaintiff has failed to extract and serve it with Summons to Enter Appearance. Further,



that failure to extract summons contravenes the provisions of Order 5 of the Civil Procedure Rules. It states that the Plaintiff filed a Notice of Motion Application dated the 11<sup>th</sup> October, 2022 seeking leave to substitute Hawa Mohammed Abdala (deceased) and the Court granted them leave on 24<sup>th</sup> November, 2022 to do so. It avers that the Plaintiff delayed in filing the Amended Plaintiff, for more than one year. Further, they filed two amended Plaintiffs and on 31<sup>st</sup> January, 2024, they withdrew one amended Plaintiff dated the 30<sup>th</sup> January, 2024 and retained the one dated 26<sup>th</sup> January, 2024. It argues that the amended Plaintiff dated the 26<sup>th</sup> January, 2024 is illegal and void ab initio, as leave granted to substitute the deceased Plaintiff lapsed after two weeks. Further, the amended Plaintiff dated the 26<sup>th</sup> January, 2024 incorporated additional amendments and no leave was sought to do so. It reiterates that owing to failure to effect substitution of the deceased Plaintiff within timelines set in law, the instant suit has abated and is untenable.

3. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by Fatuma Mohamed Hussein, Twaha Mohamed Absura and Zakaria Mohammed Hussein where they confirm being administrators to the Estate of Mohamed Hussein Absura as they were duly appointed legal representatives vide Kadhi's Court at Nairobi in Succession Cause No. 56 of 2017 dated the 4<sup>th</sup> August, 2022. They contend that the instant Application is fatally defective, frivolous, vexatious, devoid of any legal merit; and the same should be struck out in limine. They confirm that the instant suit was filed by Hawa Mohamed Abdalla as a representative of the Estate of the late Mohamed Hussein Absura where she sought proprietary rights over LR No. 12715/690. They highlight the proceedings in this matter, regret not serving summons upon the 1<sup>st</sup> Defendant but argue that the 1<sup>st</sup> Defendant has always participated in these proceedings, filed a Defence on 2<sup>nd</sup> October, 2018 and this means it was aware of this suit. They claim that it is their erstwhile advocate who was uncooperative and took long to release the file to their current advocate and this culminated in the delay in filing the Amended Plaintiff as had been ordered by the Court. They insist that they only filed one amended Plaintiff dated the 26<sup>th</sup> January, 2024 and not two amended Plaintiffs as claimed by the 1<sup>st</sup> Defendant. They state that the amendment made is absolutely necessary for the determination of the real matter in dispute between the parties in respect of the subject property being LR No. 12715/690. They reiterate that Article 159(2) (d) of the Constitution, Order 5 Rule 2 of the Civil Procedure Rules as well as Section 59 of the Interpretation and General Provisions Act, grants this Court inherent jurisdiction to extend validity of summons from time to time, if satisfied that it is just to do so. They reaffirm that the 1<sup>st</sup> Defendant has not demonstrated any prejudice it would suffer in admitting the Amended Plaintiff on record as it reserves the right to file its Amended Defence to the Amended Plaintiff.
4. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivaling submissions, the only issue for determination is whether the Amended Plaintiff dated the 26<sup>th</sup> January, 2024 and this suit, should be struck out with costs.
6. Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 highlights circumstances, under which a party can apply to strike out pleadings and provides inter alia:-

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

- (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 an abuse of the process of the court.”

7. The Court of Appeal in *Ramji Megji Gudka Ltd –Vs- Alfred Morfat Omundi Michira & 2 Others* [2005] eKLR provided parameters on striking out of pleadings and stated thus:-

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT Dobie & Company (kenya) Ltd. V. Muchina* [1982] KLR 1 in which Madan J.A. at p. 9 said:-

““The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

8. In this instance, the 1<sup>st</sup> Defendant has sought for striking out of the Amended Plaintiff and this suit, contending that it was not served with summons to enter appearance. Further, that the amended Plaintiff was filed late and without leave. The Plaintiffs have explained that after the initial Plaintiff passed on, they had to undertake succession proceedings, which was concluded but their erstwhile advocate declined to release the file to them culminating in their filing the amended Plaintiff late.

9. Upon perusal of the court file, I note there was a series of court attendance revolving around a dispute on costs of the Plaintiff’s erstwhile advocate as well as dealing with some interlocutory Applications.

10. On service of summons to enter appearance Order 5 Rule 8 of the Civil Procedure Rules provides as follows:-

“(1) Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient. (2) A summons may be served upon an advocate who has instructions to accept service and to enter an appearance to the summons and judgment in default of appearance may be entered after such service.”

11. In the current scenario, the 1<sup>st</sup> Defendant claims that for over four (4) years, the Plaintiff had failed to extract and serve it with Summons to Enter Appearance (STEA). Further, that failure to extract summons contravenes the provisions of Order 5 of the Civil Procedure Rules. It is trite that the rationale behind service of Summons to Enter Appearance (STEA) is to alert the Defendant of the existence of a suit against it. I note in the instant suit, in 2018, the 1<sup>st</sup> Defendant through its advocates filed a Notice of Appointment of Advocate, Replying Affidavit to application for injunction, Statement of Defence and fully participated in the proceedings herein. All along, it never raised any issue that it was not served with summons to enter appearance. Further, in the current Application, it has not demonstrated what prejudice it is suffering since the summons to enter appearance, was not served upon it.



12. In the case of Nanjibhai Prabhudas & Company Ltd v Standard Bank Ltd [1968] EA (K) 670 the Court of Appeal held, inter alia that:-

“ a. Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity. b. Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;” Sir Charles Newbold at page 681 and 682 stated: “The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High court; and it was not until at a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

13. In the foregoing, while relying on the legal provisions cited and decision quoted, I find that the objective of the summons to enter appearance was achieved since there was an unconditional appearance by the 1<sup>st</sup> Defendant, that participated in the proceedings, which constituted voluntary and complete waiver of any defect that could have affected the said service of summons to enter appearance.

14. On the issue of the late filing of the Amended Plaintiff. I note the Plaintiff has provided reasons on why it delayed in the filing of the Amended Plaintiff. Further, I note the Amended Plaintiff which forms part of the court record has raised triable issues revolving around ownership of the suit land, which I believe should be determined on merit and not struck off at this interlocutory stage. In my view, I find that since this Court allowed substitution of the Plaintiff on 24<sup>th</sup> November, 2022, the suit has not abated as claimed. Further, the 1<sup>st</sup> Defendant has not demonstrated what prejudice it has suffered since the Amended Plaintiff was served upon its' advocates, albeit late.

15. Section 95 of the [Civil Procedure Act](#) provides for enlargement of time and stipulates thus:-

“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.”

16. While Order 50 Rule 6 of the Civil Procedure Rules states that:-

“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.”

17. It is trite that Sections 3 and 3A of the [Civil Procedure Act](#) further grants this court inherent jurisdiction to achieve the ends of justice.



18. In the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR Justice Ochieng (as he then was) held that:-

“To my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) ..... in exercising Judicial Authority, the courts ‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities.”

19. Based on the facts as presented while relying on the legal provisions I have quoted, as well as associating myself with the cited decisions, I will decline to strike out the Amended Plaintiff as sought by the 1<sup>st</sup> Defendant on the ground of late filing as this is indeed a procedural technicality, it seeks to rely on. I opine that time can indeed be enlarged to admit the amended Plaintiff as it is already part of the court record. It is my considered view that no prejudice would be suffered by the 1<sup>st</sup> Defendant as it will have leave to file and serve amended Defence to the Amended Plaintiff.

20. In the foregoing, I will admit the Amended Plaintiff dated the 26<sup>th</sup> January, 2024 as part of the court record. I grant the Defendants leave of twenty one (21) days to file and serve amended Defences.

21. In the circumstances, I find the Notice of Motion application dated the 21<sup>st</sup> February, 2024 unmerited and will dismiss it.

22. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of:**

Wangui holding brief for Muchoki for 1<sup>st</sup> Defendant

Mwangi for Ingutya for 2<sup>nd</sup> Defendant

Gisemba for Plaintiff

No appearance for 3<sup>rd</sup> Defendant

Court Assistant – Simon/Ashley

