



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.623 OF 2013**

**CHARLES GITHINJI MURAGE .....PLAINTIFF**

**VERSUS**

**MUNJURU MURAGE.....1<sup>ST</sup> DEFENDANT**

**CHARLES OYOO KANYANGI .....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application to dismiss suit for want of prosecution or for want of service of summons; no merit in application; application dismissed).***

1. The application before me is that dated 17 March 2015 filed by the 2nd defendant. It is an application said to have been brought vide the provisions of Order 17 Rule 2 and Order 40 Rule 2, 3(3) and 4 (1) and (4) of the Civil Procedure Rules, 2010. As drawn, it sought various orders, including orders of injunction, but at the hearing of it, the application was narrowed down to two prayers that is :-

(i) *That the court does order that the plaintiff/respondent's application dated 9 December 2013 be dismissed.*

(ii) *That the Court do order that the plaintiff/respondent's Originating Summons dated 9 December 2013 be dismissed.*

2. The main reason for seeking dismissal of the suit and the said application is that the same have never been served upon the defendants since filing.

3. The suit itself was commenced by way of an Originating Summons, filed on 11 December 2013, taken out pursuant to the provisions of Order 37 Rule 7. It is a suit seeking a declaration that the plaintiff has acquired by way of adverse possession, the land parcel Kinamba Mithiga Block 2/127 (the suit land). The land is registered in the name of the 2nd defendant. The plaintiff (if I am to call him so for ease of reference), in his supporting affidavit, has averred that he holds letters of administration ad litem for the estate of his late father, one Joseph Githinji Murage. He has further deposed that his father had an agreement to exchange land with the 1st defendant, vide which his father and family, settled on the suit land. He has deposed that the 2nd defendant fraudulently transferred the land to the 2nd defendant who became registered as proprietor on 15 November 1999. It is said that the family of the plaintiff's father has however been in quiet possession to date.

4. Together with the suit, the plaintiff filed an application dated 9 December 2013, seeking orders of injunction to restrain the defendants from interfering with the land pending hearing of the suit. Interim orders of injunction were given on 11 December 2013. The interim orders were extended on subsequent mentions of the matter but on 2 July 2014, the court declined to extend the same.

5. The main reason given by the 2nd defendant for the dismissal of this suit is that the summons have never been served to date. The 2nd defendant submitted that if the suit had been filed by way of plaint, the same would have been captured by Order 5 Rule 1 (6) and Order 5 Rule 2. The plaintiff filed a lengthy replying affidavit, much of which tries to justify his ownership of the land. The only bit that I can see which seeks to respond directly to the prayers in the application is that the plaintiff was unable to trace the defendants for service. Ms. Mureithi for the plaintiff, at the hearing of the application, submitted that the application as drawn is defective for it seeks the dismissal of the suit for want of prosecution under Order 17, and not dismissal of the suit for want of service of the summons.

6. I have considered the application. I agree with Ms. Mureithi that the application as drawn, seeks the dismissal of the suit for want of prosecution under Order 17. Order 17 empowers the court to dismiss a suit where no step has been taken for a year. It is drawn as follows :-

***Notice to show cause why suit should not be dismissed [Order 17, rule 2.]***

(1) *In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.*

(2) *If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.*

(3) *Any party to the suit may apply for its dismissal as provided in sub-rule 1.*

(4) *The court may dismiss the suit for non-compliance with any direction given under this Order.*

7. The application herein cannot succeed under Order 17 Rule 2, for prior to this application being filed on 18 March 2015, the matter was in court on 2 July 2014, when the plaintiff sought extension of interim orders and was denied. One year had therefore not lapsed between the matter being last in court and the application being filed. I would find it hard to dismiss the suit, on the basis that summons had not been served, for the application before me shows that it has been brought under Order 17 Rule 2, and dismissal being a drastic remedy, I would have to give the plaintiff the benefit, that he responded to an application under Order 17 Rule 2.

8. But even assuming that the application was one for dismissal of suit for want of service, I would still not dismiss the suit. The case was filed by Originating Summons and Order 37 Rule 4, provides that service of the Originating Summons is to be effected in accordance with the provisions of Order 5. In so far as dismissal of a suit for want of service is concerned, the provisions of Order 5 Rule 2 apply. The said law is drawn as follows :-

***Duration and renewal of summons [Order 5, rule 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.*

9. It will be noted from the above, that a court will only dismiss a suit on expiry of 24 months from the issue of the original summons. This case was filed on 11 December 2013, and two years have not lapsed. The suit cannot therefore be dismissed for want of service of summons.

10. Whichever way you look at the application, whether as one falling under Order 17 Rule 2 or one falling under Order 5 Rule 2, the same has no merit and is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> day of October 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr Kanyangi 2nd defendant/applicant

Ms. Kipruto holding brief for Ms. Mureithi for plaintiff/respondent

N/A for 1<sup>st</sup> defendant

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**