



**Nyamunga v Ndeda & 3 others (Environment & Land Case
E030 of 2022) [2023] KEELC 518 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 518 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E030 OF 2022**

E ASATI, J

JANUARY 26, 2023

BETWEEN

ENGINEER ERIC NYAMUNGA PLAINTIFF

AND

JOEL MIDIGO NDEDA 1ST DEFENDANT

SHEM OCHIENG T/A PLINTH HECTARES 2ND DEFENDANT

COUNTY LAND REGISTRAR-KISUMU 3RD DEFENDANT

ARTTORNEY GENERAL 4TH DEFENDANT

RULING

Introduction

1. The application in respect of which this ruling is made is the notice of motion dated November 16, 2022 seeking for an order of interlocutory injunction restraining the defendants from interfering with the suit land known as Kisumu/dago/490 pending hearing and determination of the suit. The application is based on the grounds that the defendants had trespassed onto the suit land, fenced it off and were in the process of sub-dividing the same for purposes of sale or offering for sale to third parties. That the defendants have placed heavily armed thugs and hoodlums to guard the property which thugs have attacked the applicant's employees. That although the applicant has reported the defendants criminal acts to the police, the defendants are undeterred in their illegal activities. That he is the absolute legal owner of the suit property since 1990 and that the defendants have no right over the suit land. The application is supported by the averments in the supporting affidavit sworn by the applicant on November 14, 2022 and the annexures thereto.
2. The 1st respondent opposed the application vide the grounds raised in the replying affidavit sworn on November 21, 2022 and the notice of preliminary objection of even date challenging the entire suit.



The 1st respondent's case is that the application is defective, a misnomer, an afterthought and an abuse of the court process. That he is the *bona fide* registered proprietor of the suit land after buying it from one Martin Otieno Ogindo and having the same registered in his name. That he has been in constant occupation and use of the suit land for the last 20 years without interference. That he has not stationed criminals to guard the suit property. That the applicant has not demonstrated a *prima facie* case or shown that he will suffer irreparable harm should the orders sought not be granted.

3. The 2nd respondent though served, had as at the date of this ruling not responded to the application in any way. Affidavit of service was sworn by dr Miyawa Maxwell and filed in court on November 21, 2022 show that he was served.
4. The 3rd and 4th respondents filed memorandum of appearance and defence but no reply to the application.
5. The preliminary objection and the application were urged orally on November 22, 2022.

The Preliminary Objection

6. The preliminary objection is based on 3 grounds namely that:-
 - a. The plaintiff has deliberately failed to take out and serve summons to enter appearance upon the defendants as a mandatory requirement of the provision of order 5 rule 1 *Civil Procedure Rules*.
 - b. The plaint is not accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained therein as a prerequisite of the mandatory provisions of order 4 rule 1(2) of the *Civil Procedure Rules*.
 - c. The suit offends the provisions of section 7 of the *Limitation of Actions Act* cap 22 Laws of Kenya as the same is filed after expiry of more than 12 years from the date the right of action occurred hence the court lacks jurisdiction.
7. Under the *Civil Procedure Rules* any party may by his pleading raise any point of law and in determining what can be presented and argued by way of a preliminary objection the court is guided by the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited* (1969)EA 696 where it was held that:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”
8. The objection raised herein concerns competence of the suit for failure to comply with certain provisions of law. firstly, that summons to enter appearance were not taken out and/or served as by law required. On whether failure to do so was fatal to the suit, counsel for the applicant submitted that this was a matter filed under certificate of urgency and the deputy registrar could not be able to sign or issue summon to enter appearance since the file was in the hands of the Judge. That the purpose of summons to enter appearance is to bring the suit to the attention of the parties sued so that they can respond. In this case the 1st respondent ha responded by filing defence and notice of appointment of Advocates.



That by so responding to the suit the 1st defendant had submitted himself to the jurisdiction of the court. That the blame for failure to extract the summons is with the court.

9. Counsel for the 1st respondent, on the other hand, submitted that there is no competent suit before the Court. That according to order 5 rule 1 [Civil Procedure Rules](#), it is the duty of the plaintiff to take out summons to enter appearance and serve the defendants with the same. That no summons to enter appearance had so far been taken out hence the suit was defective.
10. I have read the provisions of order 5 rule 1 [Civil Procedure Rules](#) and the authorities cited by the parties herein. Extraction and service of summons to enter appearance is a question of law. Courts have discussed the effect of failure to extract or serve summons to enter appearance on the suit. In [Industrial and Commercial Development Corporation vs Sum Model Industries Limited](#) Civil Appeal No 229 of 2001, the Court of Appeal held:

“Service of the summons to enter appearance, though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case. On the facts and circumstances of this case, nothing turns on the issue.”

Also in [Central Bank of Kenya vs Uhuru Highway Development Ltd & 3 Others](#) Civil Appeal No 75 of 1998, that:

“Service of summons to enter appearance sets on the clock for counting the time, within which to enter appearance, and no more. If, however the defendant becomes aware of the suit against him, otherwise than through formal service, there is nothing in law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the plaintiff and the proceedings are supposed to continue in the normal manner.”

Similarly in [Paulina Wanza Maingi v Diamond Trust Bank Limited & another](#) [2015] eKLR, it was held that: -

“In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and six years having elapsed since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit.”

11. In the present case, it is not denied that summons to enter appearance had not been taken out and served in accordance with the provisions of order 5 [Civil Procedure Rules](#) as at the time of arguing the application. However, counsel for the applicant explained the circumstances leading to non-compliance. guided by the above-cited authorities, the provisions of article 159 of the [Constitution](#) and in order to serve substantive justice, this court finds that failure to extract and serve summons to enter appearance in the special circumstances of this case; namely, that the case was filed together with an application brought under certificate of urgency which had to be processed first, the court finds that the failure does not render the suit incompetent. In any event, the 1st defendant had already responded to the plaint. The anomaly can be rectified. Striking out of pleadings is a draconian measure and where the anomaly can be redeemed by way of amendment or other lawful mode of correction, the court should give a chance for the correction.



12. The second point of the preliminary objection is that the plaint is defective as it is not accompanied with a verifying affidavit in compliance with the provisions of order 4 rule 1(2) Civil Procedure Rules. In their submissions both counsel for the applicant and for the 1st respondent urged the court to peruse the court file and ascertain whether there was a verifying affidavit filed with the plaint. Perusal of the court file shows that the plaint was accompanied with a verifying affidavit sworn by the plaintiff / applicant on November 14, 2022 and filed in court on the same date.
13. The last ground of the preliminary objection is that the suit is filed out of time pursuant to the provisions of section 7 of the Limitations Actions Act. Section 7 of the Limitations Actions Act provides that

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the cause of action accrued to him or, it first accrued to some person through whom he claims, to that person.”

Counsel for the applicant submitted that it is a question of fact as to whether the suit was filed out of time which will be determined on the basis of the evidence. Counsel for the 1st respondent submitted that from the pleadings it is clear that the 1st respondent's title was issued in the year 2002 and therefore the suit filed in 2022 was filed after expiry of the 12 years limitation. That nothing stopped the plaintiff from filing the suit earlier after he learnt of the 1st defendant's title.

The question is when did the cause of action accrue to the plaintiff? Was it in the year 2002 when the 1st defendant claims to have obtained title to the suit land or when the plaintiff learnt of the actions complained of? The plaintiff states that he learnt of the unlawful actions of the defendants on November 7, 2022 (see paragraph 6 of the supporting affidavit). I agree with the applicant that it will be a matter to be ascertained by production of evidence as to when the right of action accrued.

I find that the preliminary objection has not been proved. The same is dismissed.

The Application

14. The substantive prayer in the application is the prayer for temporary injunction restraining the defendants/respondents and/or their servants, agents, employees and any other person acting in their stead or behalf from selling, offering for sale, transferring, trespassing, entering, remaining in, making any construction or in any other way interfering or dealing with the applicant's- ownership, possession and enjoyment of the property known as Kisumu/Dago/490 pending hearing of the suit.
15. The grounds for and principles guiding grant of temporary injunction are found in order 40 Civil Procedure Rules and the case of *Giella vs Cassman Brown Co Ltd* (1973) 358. These are firstly, the applicant must establish a *prima facie* case with a probability of success, secondly, an interlocutory injunction will not normally be granted unless the applicant would suffer irreparable injury which would not adequately be compensated in damages and when the court is in doubt, it will decide the application on a balance of probabilities.
16. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd vs First American Bank Kenya Ltd & 2 Others* [2003] eKLR as follows:

“a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



17. In the present case both the applicant and the 1st respondent displayed to the court title documents in respect of the suit property and both claim to have possession of the suit land. The applicant attached a copy of title deed dated April 4, 1990 to his supporting affidavit. The same was marked annexure EN1. It shows that the suit land measuring 3.4 hectares was registered in his name on March 28, 1990 and title issued to him on April 4, 1990. He claims to have been paying property rates to the government and annexed some receipts to the supporting affidavit.
18. The 1st respondent claims to be the registered owner of the suit land. To his replying affidavit, he annexed a copy of land sale agreement to explain how he acquired the land. He also annexed a copy of title deed dated June 6, 2002 showing that the suit land measuring 3.4 hectares was registered in his name on 6.6 2002 and that title deed was re issued on October 5, 2018. He also attached a photocopy of the title deed dated October 5, 2018.
19. Copy of register (green card) in respect of the suit land were filed by the 1st, the 3rd and 4th defendants. It shows the history of the suit land; that the register in respect of the suit land was opened on October 23, 1973 and the land first registered on the same date in the name of Hongo Ogola who on December 7, 1978 transferred it to John G Mburu and Hellen Naututu. These two held the title till May 19, 1982 when they also transferred it to one George Johnson Odid Kwanyah who in turn transferred the land to the applicant on March 28, 1990. The copy of register shows further that the land was transferred from the applicant to one Martin Otieno Ogindo from whom the 1st respondent claims to have bought the land. It shows further that the land is currently registered in the 1st respondent's name since the year 2002.
20. On occupation, the applicant deposed in paragraph 5 of the supporting affidavit that he has enjoyed quiet possession and free access and ownership of the property for over 30 years now. Photographs annexed to the applicant's supporting affidavit reveal that the land is generally undeveloped save for the fencing in progress and a small temporary structure seen in the photograph marked EN3. These are some of the activities complained of by the applicant as acts of trespass committed by the respondents. There are no houses or other developments to show that any party has been in occupation or use of the land.
21. Without going into the merits of or pre-empting the case, I note that the applicant has not challenged the 1st respondent's title, has not sued the person who allegedly sold the land to the 1st respondent and according to the register, the applicant's title does not exist. I find no *prima facie* case or irreparable injury demonstrated. Payment of property rates does not confer title to the person paying.
22. I find that the grounds for grant of the orders sought have not been demonstrated. The application therefore lacks merit and is hereby dismissed. Each party to bear own costs.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED VIRTUALLY THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

E. ASATI

JUDGE

In the presence of:

Maureen: Court Assistant.

Dr. Miyawa for the Plaintiff/the applicant.

Odeny for the 1st respondent.



Kimberly for 3rd and 4th respondents

N/A for the 2nd Respondent.

