



**Ombongi v Simiyu & another (Environment & Land Case
88 of 2017) [2023] KEELC 340 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 88 OF 2017
LN MBUGUA, J
JANUARY 26, 2023**

BETWEEN

JOEL MOTAROKI OMBONGI PLAINTIFF

AND

CHAMI SIMIYU 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. This ruling relates to an oral application made by counsel for the plaintiff on October 3, 2022 after the closure of their case where the court was urged to consider the matter as an undefended claim and proceed to give a date for judgment.
2. Counsel for 1st defendant opposed the said application averring that 1st defendant was never served with summons to enter appearance. In rejoinder, counsel for the plaintiff averred that summons were served way back in February 2017 and that the 1st defendant had failed to file any defence but instead just focused on interlocutory applications.
3. I have considered the application, the rejoinder thereof as well as the litigation history.
4. Firstly, I find that the 1st defendant has been represented in court right from the infancy stage of the trial on June 12, 2017. To this end, the 1st defendant has actively been involved in the litigation journey of the suit for the last five years, so much so that on 11.5.2021, the matter was fixed for hearing on February 14, 2022 in the presence of counsel for 1st defendant. The question begging for an answer is; why was the 1st defendant not raising any query when the matter was being fixed for hearing of the main suit that time?.



5. It is also noted that the 1st defendant has never raised the issue of service of summons until October 3, 2022, nor did they seek leave to defend the suit, and there are no witness statements or documents filed in support of his case.
6. The 1st defendant is raising the issue of service of summons rather late in the day. I find that whereas service of summons is a vital step in initiating litigation (see *Lee Mwachhi Kimani v National Social Security Fund & Another*) 2014 eKLR, the issue of summons was not a subject of contest during the lifespan of this suit.
7. In the case of *Industrial and Commercial Development Corporation V Sum Model Industries Limited* [2007] eKLR, the court of Appeal stated that:

“The appellant without any hesitation or protestation filed a written statement of defence and participated in the proceedings of the case without any complaint. And whether or not the summons to enter appearance violated order IV rules (3) and (4) of the *Civil Procedure Rules* is neither here or there as the summons was not made part of the record of appeal.”
8. It is noted that when the matter was called out in the virtual platform on the date of the hearing on October 3, 2022, counsel for the 1st defendant informed the court that “we are ready”, thus the matter was allocated time at 10.30 am in open court. However, at the scheduled time, the 1st defendant was absent and his counsel knew not of his whereabouts. In a short ruling delivered just before the trial, the court observed that no good reasons had been advanced as to why the 1st defendant was absent in court. This is another tell tale sign that the 1st defendant has not been vigilant in the prosecution of his case.
9. The right to be heard has always been a well protected right in our Constitution and is also the cornerstone of the rule of law – see *Wachira Karani vs Bildad Wachira* [2016] eKLR. However, this is a case whereby the 1st defendant has squandered that right. In that regard, I do allow the application made to the effect that this is an undefended claim. The court will therefore proceed to give a date for judgment but parties shall be given an opportunity to file their submissions.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Ndete holding brief for Nyaudi for Plaintiff

Nyoike for 1st Defendant

Court Assistant: Eddel

