



**Timothy v Mutunga (Environment & Land Case 6 of 2021)
[2023] KEELC 15903 (KLR) (27 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 6 OF 2021
MN GICHERU, J
FEBRUARY 27, 2023
FORMERLY MAKUENI ELC NO. 12 OF 2017**

BETWEEN

JAMES KATUA TIMOTHY PLAINTIFF

AND

JOHN MWINZI MUTUNGA DEFENDANT

RULING

1. This ruling is on the Notice of Motion dated 27/2/2021. The motion which is brought under Sections 1A, 1B and 3A of the *Civil Procedure* Code, Orders 5, Rule 1, 6, Rule 1, 7, Rule 1 and 51, Rule 1 *Civil Procedure Rules* and all other enabling provisions of the law seeks one main prayer namely,

(i) Striking out of the amended plaint dated 22/8/2019 for failure to serve summons to enter appearance. The other prayer is for costs.

2. The motion is based on nine grounds and a supporting affidavit dated 27/9/2021 sworn by the Defendant.

The gist of the above material is as follows. The court ordered that the Defendant be joined as a party in this case and that the judgment of 7/11/2017 be set aside. Thereafter the Plaintiff amended the plaint as ordered by the court. The Plaintiff served the amended plaint without summons to enter appearance. The Defendant filed a memorandum of appearance and a defence but under protest. To date summons to enter appearance has never been served hence this application.

3. The motion is opposed by the Respondent/Plaintiff who has filed a replying affidavit dated 4/1/2022 in which he deposes that if the Defendant was not served as alleged, then that is an inadvertent mistake on the part of his advocate which should not be visited upon him.



Secondly, the Plaintiff says that since the purpose of the summons to enter appearance is to inform a Defendant of the steps to take after service with the plaint, it is immaterial that the summons to enter appearance was not served because the Defendant has already taken all the procedural steps required by such summons.

Finally, the Defendant has actively participated in the suit by filing an application for transfer of the suit and also attending court.

4. I have carefully considered the application in its entirety including the affidavits, the grounds, the submissions dated 5/10/2022 and 14th October, 2022 respectively together with issues raised therein. I find that there is only one issue to be decided in this case namely, whether failure to serve the summons to enter appearance on the Defendant occasioned a failure of justice?

I find that failure to serve the Defendant with the summons to enter appearance did not occasion a failure of justice for the following reasons.

Firstly, the Defendant has not shown what prejudice he suffered due failure of service of summons to enter appearance. The court has general power to extend time within which a party is required to perform a certain act. The Defendant is not saying that he prays for time to be extended.

Secondly, it is a draconian move to strike out pleadings. Striking out pleadings means that a suit will not be decided on merit but on a technicality. A court should rather sustain a suit than strike it out except on serious grounds such as res judicata, lack of jurisdiction or limitation.

Thirdly, the Defendant having participated in the suit even after failure of service of summons to enter appearance is estopped from raising this failure of service of summons as an issue after such participation.

For the above reasons, I find that the application has no merit and I dismiss it. Costs to be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 27TH DAY OF FEBRUARY, 2023.

M.N. GICHERU

JUDGE

