



**Duckworth v Duckworth & 2 others (Civil Case 485 of 2017)  
[2022] KEHC 14597 (KLR) (Commercial and Tax) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14597 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 485 OF 2017  
A MABEYA, J  
OCTOBER 28, 2022**

**BETWEEN**

**JULIET KIRSTEN PERNILE DUCKWORTH ..... PLAINTIFF**

**AND**

**MICHAEL JOHN STANHOPE DUCKWORTH ..... 1<sup>ST</sup> DEFENDANT**

**GEOHUT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**I & M BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Pursuant to sections 1A, 1B, 2, 3, 3A & 63 of the *Civil Procedure Act*, Order 1 Rules 3,5 & 10, Order 8, 40 & 50 *Civil Procedure Rules* and Articles 40, 50(2) & 159 of *the Constitution*, the plaintiff lodged a Motion on Notice dated 24/9/2021.
2. In it, the plaintiff sought to restrain the defendants from interfering with his quiet possession of the property known as land reference number Ngong/Ngong/37632 in Kajiado District (“the suit property”) or taking any action adverse to her interest thereon.
3. Further, he sought to enjoin Ms. Idah Gatwiri Marangu and Daniel Mue Peter as the 4th and 5th defendant in this suit and to amend the plaint accordingly. He swore an affidavit in support thereof.
4. The grounds for the application were that; vide a ruling dated 15/8/2018 the Court issued an injunction against the defendants restraining them from interfering in any way with the suit property. That a ruling delivered on November 19, 2019 stayed any further proceedings in this matter pending the determination of the 3rd defendant’s intended appeal which barred the plaintiff from prosecuting this suit. To-date, the plaintiff has remained in actual and physical possession of the property.



5. However, the 3rd defendant has unlawfully sought to exploit its own stay order by threatening to evict the plaintiff whereas the property is in fact and in law protected from any interference. The bank entered into a purported sale, transfer and charging of the suit property with the proposed 4th & 5th defendant in total disregard to the orders of November 19, 2019.
6. The plaintiff pleaded that unless the orders sought are granted the suit will be rendered nugatory.
7. The 3rd defendant opposed the application through a replying affidavit sworn on November 25, 2021 and preliminary objection dated December 14, 2022.
8. In the replying affidavit, the 3rd defendant's senior manager, legal department, averred that the present suit abated for failure to comply with the requirement to file summons with the plaint. That the injunction restraining the bank from disposing of the suit property was granted on 28/9/2018 which automatically lapsed by operation of the law, one year later. That as at the time of the stay order, there was no injunction in force.
9. That following the lapse of the injunctive order on 28/9/2019, the bank advertised and sold the suit property to Mrs. Idah Gatwiri Marangu. The title has been already been transferred to the said purchaser and the application therefore has been overtaken by events.
10. That the Land Act protects a bona-fide purchaser of property unless there is proof of fraud and evidence that the purchaser was aware of the fraud. That the plaintiff's remedy lies in damages and not injunctive relief. That the present suit abated due to operation of the law and therefore there is no suit to amend.
11. In its objection, the 3rd defendant sought that the application and suit be dismissed in limine on the grounds that the suit had abated pursuant to Order 5 Rule 1 (5) and (6) of the Civil Procedure Rules for failure by the plaintiff to file the summons together with the Plaint.
12. The plaintiff swore and filed a supplementary affidavit sworn on 15/1/2022 in rebuttal to the 3rd defendant's averments.
13. The Court has considered the entire record. The first issue for determination is whether the suit has abated.
14. The 3rd defendant submitted that pursuant to Order 5 Rule 1 of the Civil Procedure Rules, the suit stands abated as to-date, no summons have been extracted nor served upon it.
15. Order 5, Rule 1(2) of the Civil Procedure Rules provides that summons are to be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
16. Further, Order 5 Rule 1(5) states that every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2).
17. Order 5 Rule 2 provides: -

“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.”
18. In the present case, the plaintiff filed her plaint on 4/12/2017 without summons. Therefore, to-date no summons have ever been served upon the defendants.



19. The wording of Order 5 indicate that the purpose of service of summons is to enable defendant(s) to enter appearance. In the present case, not only were the defendants aware of the suit, but they have throughout participated in its prosecution.
20. In *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR, the court held: -  
“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.”
21. I fully concur with the foregoing and reiterate the same here. A summons to enter appearance might not have been prepared nor served, but the record shows that the 3rd defendant throughout participated in the proceedings and was fully aware of the suit. Indeed, it even obtained orders in its favour. To declare that this suit as abated in the circumstances, would be in breach of Article 159(2) (d) of *the Constitution*.
22. I therefore make a finding that this suit did not abate for want of summons.
23. The next issue for determination is whether the suit has been overtaken by events.
24. The 3rd defendant averred that the suit property was already sold in a public auction and the property transferred to a bona fide purchaser.
25. Annexure ‘AM1’, indicates that the suit property was advertised for a public auction and sold at Ksh.3,751,000/- to Ms. Idah Gatwiri on 25/8/2020. A certificate of title was issued to her on 21/5/2021. The certificate of title indicates that the 3<sup>rd</sup> defendant subsequently charged the property for Kshs. 2,790,000/-.
26. It is clear that the property has already passed to a third party. The substratum of the subject application has therefore been overtaken by events.
27. Section 99(3) of the *Land Act* provides: -  
“A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.”
28. Section 99(4) states: -  
“A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.”
29. From the foregoing, it is clear that a purchaser of a charged property from a chargee is protected from an irregular sale save for fraud, misrepresentation or other dishonest conduct on the part of the chargee which the purchaser is aware of.
30. In the present case, the plaintiff has not pleaded nor proved any fraud that the chargee was involved in during the sale of the property. Fraud is a serious allegation that has to be strictly proved.



31. The plaintiff argued that in selling the property, the chargee had acted against the ruling of November 19, 2019 which stayed any further proceedings in this matter pending the determination of the 3rd defendant's intended appeal.
32. As the Land Act spells out, the plaintiff's remedy in this case will be in pursuing damages against the chargee.
33. I therefore find that the prayer 3 of the application cannot issue as the suit property has already been transferred.
34. The third issue is whether Ms. Idah Gatwiri Marangu and Daniel Mue Peter should be enjoined as the 4th and 5th defendant and the suit be amended accordingly.
35. According to the certificate of title annexed in the respondent's replying affidavit, the suit property was purchased and transferred to Ms. Idah Gatwiri Marangu and Daniel Mue Peter.

36. Order 1, Rule 3 of the Civil Procedure Rules states:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

37. The said parties have an interest in the suit since they are now registered as proprietors of the suit property. It follows that the prayer for amendment is merited and no injustice or prejudice will be suffered by any of the parties.
38. Accordingly, the application is partially successful as follows: -
  - a. The preliminary objection dated December 14, 2022 lacks merit and is dismissed.
  - b. The prayer for injunction is declined.
  - c. Ms. Idah Gatwiri Marangu and Daniel Mue Peter are hereby enjoined as the 4<sup>th</sup> and 5<sup>th</sup> defendant.
  - d. The said 4<sup>th</sup> and 5<sup>th</sup> defendant to file and serve their defence within 14 days of service of summons upon them.
  - e. Leave is granted to the plaintiff to amend file and serve the plaint within 14 days of the date hereof. The defendants to file and serve their amended defences, if any within 14 days of service by the plaintiff.
  - f. Costs in the cause.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF OCTOBER, 2022.**

**A. MABEYA, FCIArb**

**JUDGE**

