



**Royal Media Services Ltd v Ominde & another (Civil Appeal
E1195 of 2023) [2024] KEHC 9124 (KLR) (Civ) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9124 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1195 OF 2023

JM OMIDO, J

JULY 30, 2024

BETWEEN

ROYAL MEDIA SERVICES LTD APPELLANT

AND

BISHOP OSHAM OMINDE 1ST RESPONDENT

NATION MEDIA GROUP 2ND RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. Selina N. Muchungi, Principal Magistrate delivered on 27th October, 2023 in Milimani CMCC No. 25 of 2023)

JUDGMENT

1. This is an appeal from the ruling of the Magistrate's Court (Hon. Selina N. Muchungi, PM) delivered on 27th October, 2023 dismissing the Appellant's application dated 21st June, 2022 that sought for an order of striking out the suit against the Appellant (before the lower court) with costs.
2. A brief history of the dispute is that the 1st Respondent herein filed the suit in the lower court vide the plaint dated 18th June, 2020, against the Appellant and the 2nd Respondent (as 1st and 2nd Defendants respectively) seeking reliefs in the nature of a permanent and mandatory injunctions, general and aggravated damages for defamation, costs and interest.
3. Contemporaneous with the plaint was filed an application by Motion on notice dated 18th June, 2020 seeking temporary injunctive reliefs pending the hearing and determination of the suit.
4. Admittedly, the 1st Respondent did not take out or serve summons to enter appearance upon the Appellant and the 2nd Respondent. Nevertheless, having been served with the Notice of Motion dated 18th June, 2020, the Appellant filed a notice of appointment of Advocates dated 13th July, 2020, while



the 2nd Respondent filed a memorandum of appearance dated 14th July, 2020. The two parties then went ahead to respond to and resist the 1st Respondent's application.

5. Following the failure by the 1st Respondent to take out and serve summons to enter appearance, the Appellant moved the lower court vide the Motion dated 21st June, 2022 that sought that the suit be struck out as having abated. It is that application that gave rise to the ruling from which the present appeal emanates.
6. The grounds upon which the application before the lower court was premised were that the summons to enter appearance in the matter were never taken out or collected for service and were therefore never served upon the Appellant and that effectively, the suit had by operation of the law abated. The 2nd Respondent supported the Motion.
7. In dismissing the application, the learned trial Magistrate rendered herself as follows:

“Summons to enter appearance serve the purpose of inviting the defendant to appear in a suit within the stipulated time and also serve the purpose of notifying the defendant of the existence of a suit against them.

In the instant case the plaintiff has conceded that he did not prepare summons for them to be signed and sealed by the court and thus never served the defendants with summons as stipulated under Order 5 rule 1 of the CPR.

On whether this omission is fatal to his case. Having gone through the parties' submissions, the authorities cited and the relevant law and guided especially by Article 159(2)(d) and the material placed before me, I find in the negative. The defendants acquiesced to the jurisdiction of this court by their conduct and are thus estopped from alleging that they are improperly before this court.

It would appear that upon being served with the plaint and the accompanying application dated 18/6/20 the defendants entered appearance and filed their defence to the claim suit. They went as far as filing their witness statements documents. They were present during the pre-trial conference conducted on 13/3/22 by Hon. Sergon J. The Honourable Judge proceeded to certify the matter as ready for hearing.

By their conduct they demonstrated that they had notice of the suit and though not finally invited to enter appearance they voluntarily entered appearance. They have not shown any prejudice they are likely to suffer on account of the omission on the plaintiff's part to serve them with summons.

Indeed, as stated by the Hon. J.G. Kemei Judge in the case of *Waithira Kimondo & another v Vigilant Auctioneers & 2 others* [2019] eKLR, this ship is already sailing into the high seas and cannot be allowed to be steered back to the shore.

In the upshot, the 1st defendant's application is dismissed. Costs shall be in the cause”.

8. One will notice that from what I have stated above, the position that the learned Magistrate took was not quite accurate. I have perused the record of the lower court and note that the Appellant did not enter appearance but his Advocates filed a notice of appointment of Advocates. A notice of appointment of Advocates is not synonymous with a memorandum of appearance.
9. Aggrieved by the ruling and order of the lower court, the Appellant preferred the instant appeal vide the Memorandum of Appeal dated 8th November, 2023 proffering the following grounds of appeal:



1. That the learned Magistrate wholly misunderstood the case before the court.
2. That the learned Magistrate erred in not holding that the suit before her abated automatically, after 24 months of its filing, by virtue of Order 5 of the Civil Procedure Rules in view of the fact that no summons to enter appearance were extracted and/or served on the Appellant by the 1st Respondent.
3. That the Magistrate erred in not following the stare decisis principle/the doctrine of precedent which mandates that lower courts are bound by the decisions of higher courts.
4. That the learned Magistrate wholly ignored the binding decisions of both this court and the Court of Appeal on the validity of suits where no summons to enter appearance have been extracted and/or served on a party to a suit.
5. The learned Magistrate erred in ignoring the Appellant's submissions on the issue of abatement of the suit, under Order 5 of the Civil Procedure Rules, in view of the fact that no summons to enter appearance were extracted and/or served on the Appellant by the 1st Respondent.
6. The learned Magistrate erred in misinterpreting and misapplying the provisions of Article 159 of *the Constitution* to the case before the court.
7. The learned Magistrate overlooked the principal in law that there can be no estoppel to a statute as held by this court in Tarmal Industries Ltd v Commissioner of Customs [1968] EA 471.
8. The learned Magistrate, in her said ruling, contravened the Appellant's right to a fair trial as mandated by Article 50 of *the Constitution*.
9. Directions were issued by the court in this appeal that the same proceeds by way of written submissions and the court issued timelines for the filing of the same. In compliance with the court's directions, the Appellant filed its submissions. The Respondents did not file their respective submissions.
10. I have perused the submissions filed by the Appellant and the record of the lower court. The single issue for determination is whether by operation of Order 5 of the Civil Procedure Rules, the suit before the lower court abated when summons to enter appearance were not taken out and/or collected for service upon the Appellant and the 2nd Respondent within 30 days of filing suit and whether therefore, the learned Magistrate erred in her findings in the ruling rendered on 27th October, 2023.

11. Let us read what the relevant provisions of the Civil Procedure Rules state:

Order 5 - Issue And Service of Summons

1. Issue of summons [Order 5, rule 1.]
 - (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
 - (2) Every summons shall 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.
 - (3) Every summons shall be accompanied by a copy of the plaint.



- (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
 - (5) 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) of this rule.
 - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.
- (Underlined emphasis).

12. Once a suit is filed, it is by practice and by dint of Order 5 Rule 1(5) the duty of the Plaintiff to prepare the summons to enter appearance and present the same to the court for endorsement by the judge or an officer appointed by the judge who shall then seal the same with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit (see Order 5 Rule 1(2) of the Civil Procedure Rules; see also Francis Ndegwa Muhoro v Ahmednassir M. Abdullahi [2019] eKLR).
13. My understanding of the above provisions of the law is that where summons to enter appearance are not prepared by the Plaintiff for endorsement and sealing by the court within the period provided of 30 days and where no extension thereof is obtained by a Plaintiff, with the effect that no summons are served upon a Defendant, Order 5 Rule 1(6) of the Civil Procedure Rules automatically applies in that the suit abates.
14. In my view, it matters not that the Defendant may have by other means been notified of the suit and entered an appearance. Such appearance is of no effect. In fact, a Defendant who may be aware of the existence of such a suit can opt to ignore it if not properly notified through service of valid summons to enter appearance. I say so because it is the by the very act of service of the summons that the court's jurisdiction is properly invoked. On this, I will take cue from the case of Law Society of Kenya v Martin Day & 3 others [2015] eKLR in which my sister Aburili, J. observed as follows:

“It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked and therefore the 1st and 2nd defendants may choose never to appear or respond to the suit and nothing can happen to them. Consequently, the suit will never proceed against them and neither can the plaintiffs obtain interlocutory judgment against them nor set down the suit for hearing against the defendants since no interlocutory judgment can be entered in such a suit as this in default of appearance or defence.”

15. There is also the case of Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited [2016] eKLR in which the High Court held a similar view, that:

“From the civil dispute perspectives, it is clear that without being served with the summons, one need not enter appearance or file a defence. That is why Order 5 rule 3 provides that every summons shall be accompanied by a copy of the plaint. It is the summons which calls



upon the defendant or defendants to enter appearance and not the plaintiff. The plaintiff simply states a party's case. The summons calls upon the cited party to enter appearance within the period stated in the summons.....

The plaintiffs' suit has abated for lack of service of summons upon the defendant.”

16. In the authority of *Firenze Investment Limited v Kenya Way Limited* [2001] eKLR, the court while dealing with a similar issue stated thus:

“A summons to enter Appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the timetable of pleadings and the Rules governing Issuance and Service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of appeal in CA 85/96 *Uday Kumar Chandullal Rajani & others T/A Lit Petrol Station v Charles Thaithi* (UR) where a defective summons was issued and served (beyond the validity of one year) but objection was raised to its validity although the defendant had already accepted it and entered unconditional Appearance. The High Court was of the view that any irregularity in the issuance of summons was cured by the fact that the defendant had entered appearance without protest and the court could issue orders to meet the ends of Justice by validating it under S.3A of the Civil Procedure Rules. But the Court of Appeal held that:

“Order V r 1 provided a comprehensive Code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under S.3A of the *Civil Procedure Act* cannot cure”.”

17. In the above case, the court declared that there was no valid summons in existence and that there were no valid proceedings before the court and the suit was dismissed.
18. The above decisions provide the jurisprudence that where a party files a suit and there is no compliance with Order 5 Rules 1 (1) to (6) of the Civil Procedure Rules, the jurisdiction of the court is not properly invoked and the suit abates under sub-rule 6. Where the jurisdiction of the court is not properly invoked, Article 159(2)(d) cannot save the situation as such does not amount to a technicality.
19. Consequently, my persuasion is that the learned Magistrate erred and reached a wrong determination that the Appellant's application dated 21st June, 2022 was without merit.
20. In the result, I allow the instant appeal and set aside the order of the trial court of 27th October, 2022 dismissing the application dated 21st June, 2022 with costs and substitute the same with an order allowing the said application and thus striking out the suit with costs on the ground that the same stood abated under Order 5 Rule 1(6) of the Civil Procedure Rules.
21. The Appellant's costs of this Appeal to be borne by the 1st Respondent. I make no order as to costs regarding the 2nd Respondent on the appeal.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 30TH DAY OF JULY, 2024

JOE M. OMIDO

JUDGE

For The Appellant: Mr. Munyori.

For The 1st Respondent: Mr. Chege holding brief for Mr. Matende.



For The 2nd Respondent: Mr. Karuti.

Court Assistant: Ms. Njoroge.

