



REPUBLIC OF KENYA



**Raikundalia & another v SOL Electronics Kenya & 2 others (Civil Suit 94 of 2017) [2022] KEHC 3281 (KLR) (Civ) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3281 (KLR)

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

**CIVIL**

**CIVIL SUIT 94 OF 2017**

**JN MULWA, J**

**JUNE 30, 2022**

**BETWEEN**

**NISHIT RAIKUNDALIA ..... 1<sup>ST</sup> PLAINTIFF**

**SAWAN RAIKUNDALIA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SOL ELECTRONICS KENYA ..... 1<sup>ST</sup> RESPONDENT**

**VINOD SATPUTE ..... 2<sup>ND</sup> RESPONDENT**

**RAJESH RAMESH ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before court is a Notice of Motion dated 29<sup>th</sup> October 2019 filed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants (hereafter “the Applicants”) seeking the following orders:
  1. That this Honourable Court be pleased to declare that the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants has abated for failure to serve Summons to Enter Appearance upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants after the same was issued.
  2. That this Honourable Court be pleased to declare that the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants has abated for failure to serve Summons to Enter Appearance upon the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants within 24 months from the date of filing suit.
  3. That the costs of the suit and this application be borne by the Plaintiff.
2. The application was brought under Order 5 Rule (1), (6) (21) & (22) and Order 51 Rule 1 of the *Civil Procedure Rules 2010* and Sections 1A, 1B & 3A of the *Civil Procedure Act*.



3. It is supported by the Affidavit of Harshil Shah an Advocate of the High Court of Kenya from the firm of Mohamed Madhani & Company Advocates who are on record for all the Defendants herein. He averred that although Summons to Enter Appearance were issued, the Plaintiffs did not serve the same upon the Applicants within 12 months from the date of issue. That the Plaintiffs have never obtained leave to effect service of the summons upon the Applicants outside the jurisdiction of this court yet the Applicants reside outside Kenya. As such, the Applicants have never submitted to the jurisdiction of this court and have always challenged the same. Further, that the summons have since expired and the Plaintiffs did not apply to extend their validity within 24 months from the date of filing suit.
4. The Plaintiffs opposed the application through Grounds of Opposition dated 16<sup>th</sup> January 2020. They contended that the application is vexatious, frivolous and an abuse of the court process. They averred that the Applicants are well aware of the suit as they instructed their advocates to enter appearance on their behalf and file their separate Statements of Defence. Further, it was their contention that the Applicants submitted themselves to the jurisdiction of this court by their active participation in the matter. In their view therefore, the application should be dismissed with costs.
5. The application was canvassed by way of written submissions filed by the parties' respective counsel. The Applicants submitted that contrary to the Plaintiffs' contention, they have not submitted to the jurisdiction of this Honourable Court as they have never entered appearance in this suit. Rather, they filed a Notice of Appointment of Advocates followed by Statements of Defence in which they expressly denied the jurisdiction of this Court. They submitted that they reside in India and the United Arab Emirates respectively and since the Plaintiffs have never extracted summons and/or obtained leave to serve them with the summons wherever they are, the jurisdiction of the court over them is yet to be properly invoked. According to the Applicants therefore, the Plaintiffs' suit as against them has automatically abated by virtue of the provisions of Order 5 Rule 2(7) of the Civil Procedure Rules.
6. The Applicants cited several decisions where the High Court and the Court of Appeal underscored the importance of service of summons to enter appearance inter alia: Raytheon Aircraft Credit Corporation & Another v Air Alfaraj Limited [2005] eKLR; Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 Others [2019] eKLR; Grace Wairimu Mungai v Catherine Niambi Muya [2014] eKLR; Karandeep Singh Dhillon & Another v Nteppes Enterprises Ltd & another [2010] eKLR; and Tana Trading Limited v National Cereals And Produce Board [2014] eKLR.
7. Further, the Applicants contended that the provisions of Order 5 of the Civil Procedure Rules are mandatory and cannot be regarded as mere technicalities as the Plaintiffs purport them to be. In support of this submission, they relied on Tana Trading Limited v National Cereals And Produce Board (Supra); Antony Wechuli Odwisa v Alfred Khisa Munyanganyi [2006] eKLR; Techno Services Limited v Nokia International Oy-Kenya & 3 Others [2020] eKLR; John Walter & 92 Others v National Housing Corporation [2016] eKLR and Udaykumar Chandulal Rajani & 4 Others v Charles Thaiti [1997] eKLR where courts held similar views but under distinguishable circumstances.
8. On the other hand, the Plaintiffs submitted that the contention by the Applicants that the suit against them has abated for failure to serve summons to enter appearance is unsupported in law and fact. They found it absurd that only the Applicants are challenging the suit on grounds of want of service of summons to enter appearance yet service on the 1<sup>st</sup> Defendant Company is not disputed. Further, it was their submission that the objective of summons to enter appearance was substantially met when the Applicants filed a joint Notice of Appointment of Advocates as well as their respective Statements of Defence on 25<sup>th</sup> May 2017.



9. Additionally, the Plaintiffs contended that the authorization letter given to the 1<sup>st</sup> Applicant on 25<sup>th</sup> May 2017 to represent the 1<sup>st</sup> Defendant Company in this suit not only notified him of this suit but anticipated that he would actively participate for and on behalf of the 1<sup>st</sup> Defendant/Applicant in the matter. It was urged that the Applicants active participation in this matter operates as an estoppel which prevents them from objecting to the jurisdiction of this court over them. Moreover, the Plaintiffs submitted that the present application is an attempt at frustrating their pursuit for justice on account of a technicality which goes against the spirit of Article 159(2) (d) of *the Constitution* of Kenya 2010. They relied on the cases of *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR, *Eunice Nyambura Irungu v Libey Njoki Munene & 2 Others* [2012] eKLR, *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2016] eKLR where courts refused to dismiss suits for want of summons in view of the Defendants active participation in the suits prior to making applications in that regard.
10. Further, the Plaintiffs took issue with the fact that the application was supported by the affidavit of the Applicants' advocate on record. They contended that it is only the Applicants who can depose to whether or not they were served with summons to enter appearance because that is a matter within their personal knowledge. It was also the Plaintiffs submission that the present application is a delay tactic meant to unnecessarily drag the case given that the Applicants have heavily laden the suit with several applications in the past.
11. The court has carefully considered the application, the response thereto, the rival submissions and the authorities cited. The only issue that arises for determination is whether the suit against the Applicants has abated for want of service of summons to enter appearance.
12. I have carefully examined the court record. The Plaintiffs instituted the instant suit vide a Plaint dated 24<sup>th</sup> April 2017 and filed on 25<sup>th</sup> April 2017. Summons to enter appearance for all three Defendants were issued by this Court on 28<sup>th</sup> April 2017. Whereas there is no Affidavit of Service showing that each of the three Defendants were duly served with the summons, the record shows that on 25<sup>th</sup> May 2017 the firm of Messrs Mohamed Madhani & Company Advocates filed a Notice of Appointment of Advocates indicating that all the three Defendants herein had appointed the firm to act for them in the suit. Subsequently, on 12<sup>th</sup> June 2017, all the three Defendants filed their respective Statements of Defence through the said Firm of Advocates.
13. Further, the record reveals that on 15<sup>th</sup> June 2017, the 1<sup>st</sup> Defendant filed an Amended Statement of Defence and Counterclaim. The same was accompanied by a Verifying Affidavit sworn by the 1<sup>st</sup> Applicant herein on 12<sup>th</sup> June 2017 deposing that he is familiar with the facts of the instant case. It was also accompanied by an authorization letter dated 25<sup>th</sup> May 2017 signed by the 2<sup>nd</sup> Applicant herein authorizing the 1<sup>st</sup> Applicant to take all actions as may be necessary on behalf of the 1<sup>st</sup> Defendant Company in this case. In addition, on 27<sup>th</sup> September 2017, the 1<sup>st</sup> Defendant filed a chamber summons dated 25<sup>th</sup> September 2017 seeking an order for taking of accounts. The application was supported by the Affidavit of the 1<sup>st</sup> Applicant herein.
14. Summons to enter appearance are meant to inform a party who has been sued of the existence of the suit. The objective is to invite such a person to enter appearance and file his or her defence to the claim. See the Court of Appeal decisions in *Misnak International (UK) Limited v 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 others* [2019] eKLR, *Giro Commercial Bank Ltd v Ali Swaleh Mwangula* [2016] eKLR and *Babs Security Services Ltd v Mwarua Yawa Nzao & 19 Others* [2019] eKLR. In my considered view, the history of this matter as highlighted above reveals that the objective of summons to enter appearance was duly achieved. The Applicants,



who are described as the General Manager for legal and compliance and majority shareholder/ Chief Executive Officer of the 1<sup>st</sup> Defendant Company respectively, not only filed unconditional Statements of Defences but also actively participated in the matter thereafter. At paragraph 15 of their respective defences, the jurisdiction of this court is denied on the basis that the cause of action did not arise within its jurisdiction and not for failure of being served with summons to enter appearance outside the jurisdiction as their counsel purports.

15. Further, they went on to sign various documents in respect to this matter which are all on the court's record and even prosecuted and defended two other applications prior to lodging the instant application without raising the issue of non-service of summons to enter appearance. In the circumstances, it is safe to conclude that the instant application was an afterthought. Having established that the purpose of summons to enter appearance was clearly achieved in this matter, it would not serve the ends of the justice to dismiss the suit for non-service of summons.
16. I am guided by the case of *Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others* [2016] eKLR, where the court while considering a similar application where the Defendants had already entered appearance held:

“40. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. If a defendant files a Memorandum of Appearance, it is deemed to have had due notice of the institution of such suit. In this case, therefore, the defendant having filed Memorandum of Appearance on 5<sup>th</sup> October 2014 signifying their intention to defend the suit they are deemed to have had notice of institution of such suit and therefore their purported disowning of their Memorandum of Appearance and the explanation thereof falls flat on its face and must be rejected. Further, the filing of notice of appointment of advocates subsequently filed was of no consequence. It is irrelevant and a technical gimmick or theatrical maneuver intended to defeat the ends of justice which technicality is abhorred by Article 159(2) (d) of *the Constitution...*

41. In this case, that aim of summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons.

17. Further, in *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR which is on all fours with the instant case, the court held:

“While I am of the view that the plaintiff has an obligation to ensure the summons to enter appearance is prepared and signed by the court to facilitate service upon the defendant, and that it is apparent that in this case the plaintiff did not follow up and or ensure the summons were signed/issued and collected for service, and that there is no indication that the plaintiff has applied for issuance (not reissue since there were no summons issued in the first instance), I find that the circumstances of this case do not warrant a dismissal of this suit for want of summons to enter appearance being issued/collected and or served upon the 1<sup>st</sup> defendant. Albeit the provisions of Order 5 are comprehensive and are couched in mandatory terms, parties must understand the purpose of issuance of summons to enter appearance which in this case, has been overtaken by events. Those events include the acknowledgment by the 1<sup>st</sup> defendant of the existence of this suit, the filing of notice of



appointment, the filing of defence, list of witnesses and Notice of Claim against the 2<sup>nd</sup> defendant.

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 1<sup>st</sup> 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 traversity of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit.”

18. I have carefully studied the authorities cited by the Applicants. Whereas some of them emanate from the Court of Appeal as rightfully argued in their supplementary submissions, I note that all of them are distinguishable from the instant case. In some of the authorities, I noted that the defendants neither entered appearances nor filed defences despite having instructed counsel to defend applications filed alongside the Plaintiff while in others, the Defendants were served with summons which had already expired hence the reason why the courts therein determined that the purpose of summons had not been served.
19. For the foregoing, I find and hold that the Applicants’ Notice of Motion dated 29<sup>th</sup> October 2019 lacks merit and is hereby dismissed with costs to the Plaintiffs.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE 2022.**

**J. N. MULWA**

**JUDGE.**

