



**Flightsource International v Nation Media Group Limited;
Family Bank Ltd (Interested Party) (Civil Appeal E003 of 2021)
[2022] KEHC 11947 (KLR) (Commercial and Tax) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11947 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E003 OF 2021**

**WA OKWANY, J
JULY 28, 2022**

BETWEEN

FLIGHTSOURCE INTERNATIONAL APPELLANT

AND

NATION MEDIA GROUP LIMITED RESPONDENT

AND

FAMILY BANK LTD INTERESTED PARTY

(Being an appeal from the ruling of Honourable D.W. Mburu (SPM) delivered on the 29th November 2019 CMCC No. 890 of 2016, pursuant to the leave of court granted on 15th October 2020 in Miscellaneous Civil appeal No. 78 of 2020)

JUDGMENT

Background

1. The plaintiff instituted a suit against the defendant in the Lower Court through the plaint dated February 18, 2016 seeking orders for a permanent injunction to restrain the defendant from claiming, *inter alia*, monies arising out of the bank guarantee.
2. Simultaneously with the plaint, the plaintiff also filed an application for injunction under certificate of urgency. The application was heard and a ruling was delivered on 28th July 2016. Upon service with the plaint and the application, the 1st and 2nd respondent filed notices of appointment of Advocates on 24th March and February 20, 2016 respectively.



3. The 1st respondent then moved the court on July 31, 2019 seeking orders to strike out the suit on the basis of failure to serve Summons to Enter Appearance. In a ruling delivered on November 29, 2019, the court struck out the suit by thus giving rise to the instant appeal.

The Appeal

4. Aggrieved by the ruling of D. W Mburu (SPM) delivered on November 29, 2019, the Appellant lodged the instant appeal and listed the following grounds in the Memorandum of Appeal:-
 - i) That the trial Magistrate erred in fact and in law in finding that the suit has abated for lack of extracting of summons to enter appearance.
 - ii) That the trial Magistrate erred in fact and in law in finding that the suit has abated whereas the Respondent had filed pleadings and participated in proceedings before court.
 - iii) That the Learned trial Magistrate while delivering his judgment did not take into consideration the testimony, evidence and submissions of the Appellant.
 - iv) That the Learned trial Magistrate erred in fact and in Law by finding that the suit had abated without looking at the substratum of the matter herein.
 - v) That the Learned trial Magistrate erred in fact and in law in dismissing the suit with costs to the Defendant yet neither the Defendant nor interested party had filed a defence to the suit.
 - vi) That the Learned trial Magistrate erred in fact and in law in failing to consider conventional decisions in cases of similar nature which state that
 - I. The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.

" And

"The circumstances of this case the Court should not dismiss the suit as prayed. That would be too drastic a step to take."

Analysis

5. I have carefully considered the record of appeal, and the submissions by counsels. The main issue for determination is whether the trial magistrate erred in law and fact in finding that the suit had abated as a result of the failure to extract Summons to Enter Appearance.
6. Order 5 Rule (1) (5) (6) of *Civil Procedure Rules* provides that:-
 - " 1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
 - (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 or notification, whichever is later, failing which the suit shall abate."
7. The appellant argued that even though the plaint was served without the Summons to Enter Appearance, the respondents participated in the proceedings and therefore acknowledged the existence of the suit. It was the appellant's case that the respondents did not demonstrate that they suffered any prejudice from the failure to serve the Summons to Enter Appearance.
8. The respondents, on other hand, opposed the appeal and argued that failure to serve Summons to Enter Appearance was fatal and could only be cured by striking out the suit. The 1st defendant submitted that no valid reasons had been advanced for the failure to extract the Summons to Enter Appearance. The 2nd respondent, on its part, argued that the Order 5 rule 1 of the *Civil Procedure Rules* is couched in mandatory terms and that failure to comply with the order was fatal to the appellant's case. It was submitted that the plaint alone was not enough to direct the defendant on what to do as it only informs the other party that there was a claim against it.
9. It was not disputed that the appellant did not to serve the respondents with Summons to Enter Appearance. I have perused the authorities cited by the parties in this case and I note that it is evident that courts have held two views with regard to the issue of service of summons. One school of thought holds that the provisions of Order 5 of the *Civil Procedure Rules* are mandatory and that failure to observe them leads to automatic abatement of the suit. The 1st respondent relied on the case of *Abdulbasit Mobamed Ahmed Dahman & another vs Fidelity Commercial Bank Limited*[2016] where it was held that:-

The Black's Law Dictionary defines "summons" as a writ or process commencing the plaintiff's action and requiring the defendant to appear and answer or a notice requiring a person to appear in court.

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 plaint. The plaint simply states a party's case. The summons calls upon the cited party to enter appearance within the period stated in the summons. If summons are not served within thirty (30) days of issue or notification, the suit stands abated. The Collins English Dictionary indicate that if a writ abates, it is null and void.

In the current case, the summons were signed by the court on 15.7.2015 but were not served. The suit itself was filed on 18.12.2014. The plaint was not served with the summons. There is an affidavit of Rashid Jeneby, a manager with the defendant company, who avers that he was served with the pleadings but was not served with summons to enter appearance. No appearance was filed. The defence was filed way back on May 6, 2016. The plaintiff could not request judgement for non-appearance as no appearance was called upon by way of service of summons. The summons issued by the court on 15.7.2015 have since lapsed. There is no application for extension of the summons.

Taking into account the fact that the suit property has already been sold and there has been no objection to the sale and noting that no summons were served upon the defendant which makes the suit herein to have abated, I find no reason to have this matter hanging over the defendant. The suit has abated for lack of service of summons. In law, the suit is null and



void as it has terminated on its own. I will add that the suit abated thirty (30) days after the suit was filed. Order 5 rule 1 calls for the signing of the summons not more than thirty (30) days after the date of filing the suit. Order 5 rule (5) calls upon a plaintiff or his advocate to prepare and file summons together with the plaint. No summons seems to have been filed with the suit. The summons issued on July 15, 2015 were therefore of no consequence.

10. The other school of thought, relied upon by the plaintiff, is of the view that depending on the circumstances of the case, the provisions of Order 5 of the Civil Procedure Rules was not mandatory. For this argument, the appellant referred to the case of *Paulina Wanza Maingi vs Diamond Trust Bank Limited & another* [2015] eKLR where the court observed that:-

“35. 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 traversity of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in Fredrick Kibet Chesire V Paymond W. Bomet (supra) case (2006) e KLR- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply.”

11. In reaching the above outcome, the Hon. Judge observed:-

“42. As earlier stated, there are two schools of thought on this issue of whether failure to issue and serve summons to enter appearance is fatal to the plaintiff's case and having considered the circumstances of this case, I am not persuaded by the decisions relied on by the 1st defendant namely; *Wairimu Mungai V Catherine Njambi Munya, Karandeep Singh Dhillon & Others V Nteppes Enterprises Ltd & Another, Tana Trading Limited V National Cereals & Produce Board; Anthony Wechuli Odwisa V Alfred Munyanganyi* [supra], which are all decisions of this court hence none of them is binding on me and circumstances for each case are different. Although the rules are couched in mandatory terms, each case has to be decided on its own merits and circumstances vary. While in one case the court may proceed and dismiss the suit for want of summons, in another, the circumstances may dictate



otherwise. As was held by Ringera J (as he then was) on issues of the mandatory or directory language used by the statutes and or rules, in *Standard Chartered Bank Ltd V Lucton (K) Ltd HCC 462 of 1997* (unreported).

“There appears to be a common belief by many in those courts that the use of the word “shall” in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word “ shall” in a statute only signifies that the matter is prima facie mandatory . The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.”

12. Guided by the above cites cases, I am of the view that in deciding whether or not the suit has abated for failure to observe the provisions of Order 5 of the *Civil Procedure Rules*, the court should be guided by the circumstances of each case.

13. *Amina Hersi Moghe & 2 others vs Diamond Trust Bank Kenya Limited & another* [2021] eKLR

““This Court identifies with the latter views. It takes the position that where, even without the issuance and service of summons, a Defendant enters appearance or files defence or otherwise actively participates in defending its position in proceedings without protesting that it has not been served then it will be taken to have waived its right to challenge the validity of the suit on account of failure to comply with order 5 rule 1. Unless, and this is the condition, it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.”

14. In *Paulina Wanza Maingi vs Diamond Trust Bank Limited & another* [2015] eKLR Aburili J held:-

“ 35. 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. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in *Fredrick Kibet Chesire V Paymond W. Bomet* (supra) case (2006) e KLR- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which



he should enter appearance and file his defence. It also informs him of the consequences for failure to comply.”

15. The suit herein was instituted on 18th February 2016. The 2nd respondent filed a notice of appointment of advocates on 20th February 2016 while the 1st respondent filed a notice of appointment of Advocates on 24th March 2016. The respondents participated in the application dated 18th February 2016 after which the suit was fixed for hearing. It is at this point that the 1st respondent filed the application dated 31st July 2019 to strike out the suit for having abated.
16. I find that the respondents, having actively participated in the suit, were aware of the suit and that their conduct therefore precludes them from invoking the provisions for Order 5 of the Civil Procedure Rules. It is also noteworthy that the respondents have not demonstrated the prejudice that they will suffer if suit is allowed to proceed and if such prejudice cannot be cured by as award of costs.
17. Having regard to the findings and observations that I have made in this judgment, I find that the appeal has merit and I therefore allow it in the following terms: -
 1. The Subordinate Court’s ruling allowing the application dated 31st July 2019 is hereby set aside and substituted with an order dismissing the same.
 2. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JULY 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Janmohammed for 1st Respondent.

Mr. Kerika for the Interested Party.

Ms Musebe for the Appellant.

Court Assistant- Sylvia

