Jobanputra v Paramount Universal Bank Limited & 4 others (Civil Suit 828 of 2010) [2022] KEHC 15738 (KLR) (Commercial and Tax) (25 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15738 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 828 OF 2010

EC MWITA, J

NOVEMBER 25, 2022

BETWEEN

BHAVNA HARISHCHANDRA JOBANPUTRA ..... PLAINTIFF

AND

PARAMOUNT UNIVERSAL BANK LIMITED ..... 1ST DEFENDANT

SHREE KRISHA HARDWARE & PAINTS LIMITED ..... 2ND DEFENDANT

SURESH GHEDIA ..... 3RD DEFENDANT

RAJESG GHEDIA ..... 4TH DEFENDANT

DANIEL NJOROGE KIHIKO ..... 5TH DEFENDANT

RULING

1. This is a notice of motion dated February 8, 2021 brought under section 3A of the *Civil Procedure Act* orders 5 rule 1, and 8 rule 3(1)(2) of the *Civil Procedure Rules*. The motion seeks an order for issuance of summons to enter appearance and the defendants be ordered to enter appearance within 15 days after service of the summons and leave to further amend the plaint.

2. The main grounds on which the application is premised are that summons were not issued and the 1st defendant has sold the suit property making it necessary to further amend the plaint to enable the court adjudicate on the real issues in dispute.

3. The motion is supported by affidavit sworn on February 8, 2020 and submissions dated January 6, 2022. The applicant states that in 2006, together with her husband (now deceased), they were approached by the 3rd and 4th defendants and agreed to guarantee the 2nd defendant's loan taken from

the 1st defendant. They executed a charge over the suit property they jointly owned guaranteeing not more than Kshs 4,400,000.

4. That guarantee notwithstanding, the 1st defendant went ahead to advance the 2nd defendant more loans without their knowledge or consent and without them executing a further charge. They did not know that their liability had been increased until 2010 and when they sought explanation from the 1st defendant none was forthcoming. This suit was filed together with an application for injunction and the application was allowed on April 8, 2011.

5. The 1st defendant later applied to discharge the injunction and in a ruling delivered on November 21, 2014, the court gave the applicant one month to prepare the suit for hearing and in default the injunction would be discharged. Their advocate did not do much and the demise of her husband also affected her leading to the discharge of the injunction which opened up their property for sale to the 5th defendant on February 22, 2019.

6. Due to communication breakdown between the applicant and her former advocates, she had to instruct the current advocates to pursue the matter. The advocate advised that there was need to further amend the plaint to bring out the real issues for determination by this court.

7. The applicant asserts that summons to enter appearance was not issued and the defendants have not filed defences to the suit, as parties were engrossed in the numerous applications that were filed. It is the applicant's case that there is good reason to allow the application.

8. The applicant argues that the respondents would not suffer prejudice if the application is allowed and relies on *Lenisi Akorile v Eldoret Express Company Limited* [2019] eKLR, on the significance of the overriding objective in civil process and the need to hear and determine suits on merit.

9. The applicant again relies on *Gulam Rasul Murdat v Daima Enterprises Limited* [2015] eKLR where the court applied the overriding objective principle and the just determination of disputes and allowed an application for extension of validity of summons. The applicant maintains that summons had not been issued in this suit and, therefore, the court should order summons to issue.

10. On leave to further amend the plaint, the applicant asserts that the property having been sold, there is no option but to further amend the plaint given that pre- trial steps have not concluded. It is the applicant's case that amendments should be allowed except where the prejudice to the other side cannot be compensated by costs. The applicant cites *John K. Kabuchi v Sure Motor Company Limited & 2 others* [2005] eKLR and *Martin Wesula Machayo v Housing Finance Company of Kenya Limited & another* [2015] eKLR to support this position.

Response

11. The 1st respondent has opposed the application through a notice of preliminary objection dated November 26, 2021 and written submissions dated October 2, 2022. In the objection the 1st respondent asserts that the suit and application offend order 5 rule 1(6) of the *Civil Procedure Rules* and that the suit and application are grossly incompetent and a blatant abuse of the process of the court.

12. The 1st respondent contends that the court lacks jurisdiction to grant the order for issuance of summons to enter appearance. According to the 1st respondent, order 5 rule 1(5) places an obligation on a plaintiff to prepare summons to enter appearance for signature by the Deputy Registrar. The rule does not envisage issuance of summons to enter appearance through a court order.

13. The 1st respondent also argues that summons cannot issue ex post facto as the suit has already abated. According to the 1st respondent, it is fatal to a suit where a plaintiff does not collect and serve summons

on a defendant within 30 days of filing the suit, and relies on order 5 rule 1(6). The 1st respondent relies on *Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited* [2016] eKLR and *Peek Woods Limited v Bank of Africa Kenya Limited* [2021] eKLR, that the suit had abated for lack of service of summons. The 1st respondent takes the view, that since the applicant did not prepare summons and several years having passed, the suit abated and the court cannot allow thee application.

14. Regarding leave to further amend, the 1st respondent posits that the suit having abated, there would be no need to grant leave to further amend. The 1st respondent also argues that since the suit is founded on contract, and 6 years having lapses, an amendment that would deny a party a defence of limitation of actions should not be allowed. The 1st respondent relies on *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, that the power of the court to order amendments is to determine the true, substantive merits of the case and amendments should be timeously sought and in good faith.

15. The rest of the respondents did not take part in the application.

Determination

16. This application seeks two main orders: an order for issuance of summons to enter appearance and leave to further amend the plaint. The application is opposed on the ground that the suit has abated since summons were not issued as required by order 5 rule 1 (5) as read with sub rule (6) of the Rules.

Summons

17. The applicant argues that her former advocates did not take out summons to enter appearance and, therefore, summons have never issued and no defence has been filed as parties concentrated applications. The applicant therefore urges the court to order issuance of summons. The 1st respondent contends, that the suit abated once the applicant failed take out summons as required by order 5 rule 1(5 and (6). In the view of the 1st respondent, the court cannot grant the orders sought.

18. There is no denial that summons did not issue. The suit was filed under certificate of urgency together with an application for injunction. Pleadings were served and the 1st respondent filed a response to the application. A ruling was delivered on April 8, 2011, allowing the application for injunction. The 1st respondent later filed an application seeking to discharge the injunction. In a ruling was delivered on November 21, 2014, the court gave the applicant one month (30 days) to prepare the suit for hearing and, in default the injunction would stand discharged. Even then the 1st respondent did not file a defence to the suit. The injunction seemed to have lapsed and, as the applicant stated, the property was sold to the 5th defendant on February 22, 2019. The issue, therefore, is whether the court should order summons to enter appearance to issue for service on the defendants.

19. Order 5 rule 1 (5) of the Rules places upon a plaintiff the duty to prepare summons for signature by the Deputy Registrar at the time of filing the suit. The consequential provision, sub rule (6), states that every summons, except where the court is to effect service, should be collected for service within thirty days of issue, failing which the suit shall abate.

20. There is divided opinion on the true import of order 5 rule 1(6) where a party fails to take out and serve summons. One school takes the view that such failure leads the suit abating, while another school holds that the failure is not fatal. In the former, the view was expressed in *Grace Wairimu Mungai v Catherine Njambi Muya* [2014] eKLR, *Karandeep Singh Dhillon & another v Nteppes Enterprises*

Limited & another [2010] eKLR and *Tana Trading Limited v National Cereals and Produce Board* [2014] eKLR, to mention just a few cases.

21. The latter school's view that the failure is not fatal was expressed in *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR, *Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another* [2017] eKLR, *Nairobi Aviation Limited v Nation Media Group Limited* [2020] eKLR and *Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another* [2021] eKLR, again to mention just a few cases.

22. In *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* (supra) Aburili, J. agreed with the observation by Gacheche, J. in *Fredrick Kibet Chesire v Paymond W. Bomet* [2006]eKLR, that the sole purposes of summons to enter appearance is to notify a defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint which is to be served together with the summons. The summons is a notice informing a defendant of the mode of action to take, including the time within which he should enter appearance and file his defence and consequences for failure to comply.

23. In *Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another* (supra), Tuiyoti J, (as he then was), also agreed with the latter view and observed:

> [W]here, even without the issuance and service of summons, a defendant enters appearance, 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...it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.

24. I fully agree with this position that, first; the purpose of summons is to notify a defendant that a suit has been filed against him. The summons contains particulars of the suit, namely; the court where the suit has been filed, the case number, the name of the plaintiff who has sued and the nature of the claim against the defendant. Second, where a party has been served with the pleadings and has actively taken part in the proceedings, he is deemed to be fully aware of all the particulars that he needs in order to defend himself against the claim filed against him. It would, therefore, really be preposterous to demand that a plaintiff should take out and serve summons on a defendant who already has knowledge about the particulars of the case and has, in fact, actively participated in the proceedings, whether interlocutory, or not.

25. This view is in tandem with the constitutional requirement of the right of access to justice, fair hearing and that suits be determined without delay and undue regard to technicalities of procedure in articles 48, 50 and 159 of the *Constitution*. The court should also bear in mind the overriding objective in sections 1A and 1B of the *Civil Procedure Act*. A litigant should not, therefore, be driven from the seat of justice because of a momentary lapse in taking out and serving summons to a party who has actively participated in the suit. There would no more technical approach to determination suits than holding a suit to have abated merely because summons was not served yet no prejudice has been caused to that party.

26. It is in that spirit that Sir Charles Newbold observed in *Meru Farmers' Co-operative Union v Abdul Aziz Suleiman* [1966] EA 436, that rules of procedure are designed to assist the court in carrying out its functions in the administration of justice.

27. That said, I find it necessary to make an observation with regard to order 5 rule 1(6). The sub rule states that every summons, except where the court is to effect service, should be collected for service

within thirty days of issue, failing which the suit shall abate. The sub rule does not state that the suit shall abate thirty days after it is filed. The suit would only abate if summons is not collected for service within thirty days after issue.

28. The question then would be: when does summons issue? in my view, summons is issued once signed by the officer responsible; the Deputy Registrar, in the case of the High court. That is the only time summons is ready for collection and service. The summons should be collected for service within thirty days from the date it is signed, and what is important, is that summons be collected. That does mean the summons must be served within thirty days given that the life of summons is twelve months from the date of issue. It then follows that if no summons has been issued, the suit cannot abate.

29. Applying the above view to this application, I do not think the 1st respondent's argument that the suit has abated holds sway. The 1st respondent knows for certain, that no summons was issued so that order 5 rule 1 (6) could be called into play. More importantly, the 1st defendant were served with pleadings and has all along been aware of the plaintiff's claim against it. The 1st respondent has actively participated in the proceedings and even applied to set aside injunctive orders granted against it. If the argument that the suit has abated was to carry the day, then the orders issued in favour of the 1st respondent discharging the injunction were not founded on any suit and could not, therefore, issue.

30. In the circumstances, I do not see the reason for ordering that summons issue to the 1st defendant who has all along been aware of the suit and has actively participated in the proceedings since the suit was filed. However, there is need to have summons issue and served on the 2nd to 5th defendants as no prejudice will be suffered by the 1st respondent.

Leave To Further Amend

31. The next issue is whether to grant leave to further amend the plaint. The applicant states that following sale of the suit property, it has become necessary to further amend the plaint to give the court an opportunity to resolve the real issue between the parties. The 1st respondent on its part argues that the amendment sought would deny them an opportunity to plead the defence of time bar.

32. Order 8 rule 3(1) of the *Civil Procedure Rules* gives the court wide discretion to allow amendment to pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. The court, therefore, has discretion to grant leave to amend subject to costs and on terms that it considers just.

33. In *Central Bank of Kenya Limited v Trust Bank Limited & 5 others* [2000] eKLR, it was held that a party is allowed to make such amendments as may be necessary for determination of real questions in controversy, or to avoid a multiplicity of suits, provided there is no undue delay; no new or inconsistent cause of action is introduced; no vested interest or accrued legal right is affected and the amendment can be allowed without injustice to the other side. (See also *National Bank of Kenya Limited v Classic Furniture Mart Limited & 2 others* [2015] eKLR.

34. In *East Bakery v Castelino* [1958] E A 461, the court again held that an amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.

35. Similarly, in *Clarapede v Commercial Union Association* (883) WLR 262, Brett, M. R stated that however negligent or careless a party may have been in the first omission, and however late the proposed amendment, the amendment should be allowed if it can be done without injustice to the other side. There would be no injustice if the other side can be compensated by costs.

36. The jurisprudence emerging from the decisions above, is that the court should freely allow an application to amend if it will not cause injustice to the other party and where injustice, if any, can be compensated by costs. This is the cardinal principle of the right to a fair hearing now in our *Constitution*. The only caveat is that an amendment should not be allowed where a distinct cause of action is to be substituted for another, or to change by means of amendment, the subject matter of the suit.

37. I have perused the draft further amended plaint and considered the opposition thereto. There is no argument that the proposed amendments will introduce a distinct cause of action. There is also no argument that the amendments will cause injustice to the respondents that cannot be compensated by costs. There is again no denial that this matter has not been heard and no defence has been filed. For that reason, there can be no argument that the application for amendment is not properly before court or that it is intended to delay the hearing of the suit.

38. The 1st respondent has also not argued that allowing the amendments would cause prejudice that cannot be compensated by costs. As the court stated in *Lalji Gangji v Nathoo Vassanjee* [1960] EA 315, where the court is called upon to exercise discretion the judge exercises unfettered discretion subject only to the implied fetter upon all such discretions, namely, that they should be exercised judicially.

Conclusion

39. Having considered the application and the response, the conclusion I come to is that the suit has not abated as the 1st respondent argues. The 1st defendant has been aware of the suit and indeed actively participated in the proceedings in defence of its position in the matter. The 1st defendant was even a beneficiary of the orders that eventually led to lifting of the injunction. There would be no need to issue summons for service on the 1st defendant, a party that has been aware of the case and has actively participated in the proceedings. There is however need to serve summons on the 2nd, 3rd, 4th and 5th defendants.

40. Regarding leave to amend, taking into account the totality of the circumstances of this case, and the reasons why the law allows amendments, it is the view of this court that the application for leave to further amend is for allowing. Consequently, the court makes the following orders:

    a. Summons do issue for service on the 2nd, 3rd 4th and 5th defendants.

    b. Leave is granted to Bhavna Harishchandra Jobanputra to further amend the plaint.

    c. Further amended plaint be filed and served on all defendants within 14 days from the date hereof.

    d. The defendants do file defences, witness statements and bundle of documents, if any, within 14 days after service of the further amended plaint.

    e. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF NOVEMBER 2022

E C MWITA

JUDGE