



**Lavington Security Limited v Mung'ala & another (Civil Appeal 528 of 2018)
[2022] KEHC 16348 (KLR) (Civ) (16 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16348 (KLR)

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

CIVIL

CIVIL APPEAL 528 OF 2018

JK SERGON, J

DECEMBER 16, 2022

BETWEEN

LAVINGTON SECURITY LIMITED APPELLANT

AND

LUCY WANJIKU MUNG'ALA 1ST RESPONDENT

HERITAGE PROPERTY CONSULTANTS 2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable A.N. Makau (Ms.) (Senior Resident Magistrate) delivered on 12th October, 2018 in MILIMANI CMCC no. 2127 of 2014)

JUDGMENT

1. The 1st respondent in this instance instituted a suit before the Chief Magistrate's Court by way of the plaint dated 16th April, 2014 and sought for general and special damages in the sum of Kshs.758,440/= plus costs of the suit and interest thereon against the appellant and the 2nd respondent, arising out of a claim on negligence resulting in loss of the 1st respondent's properties from her premises namely Apartment Number B10 in Chestnut Apartments situated along Kayawe Road in Kilimani area ("the subject premises") as a result of a burglary.
2. Upon being served with summons, the 2nd respondent entered appearance and filed its statement of defence dated 12th June, 2014 to deny the averments made in the plaint.
3. Subsequently, the appellant filed the application dated 24th May, 2017 and sought for the dismissal of the 1st respondent's suit against it. The application was opposed by the 1st respondent.
4. Upon hearing the parties on the abovementioned application, the trial court dismissed it with costs vide the ruling delivered on 12th October, 2018.



5. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through its memorandum of appeal dated 1st November, 2018 the appellant put forward the following grounds:
 - i. That the learned trial magistrate erred in law and in fact in finding that the appellant had been served with summons to enter appearance on 01/05/2014 yet there was no evidence in support of such a finding.
 - ii. That the learned trial magistrate erred in law in holding that the appellant had been served with summons to enter appearance notwithstanding that the affidavit of service sworn on 02/08/2018 did not meet the requirements of Order 5, Rule 15(1) of the Civil Procedure Rules.
 - iii. That the learned trial magistrate erred in law and in fact in relying on an affidavit of service sworn on 02/08/2018 in support of service of summons allegedly effected on 01/05/2014 and one that is contrary to Order 5, Rule 15(1) of the Civil Procedure Rules.
 - iv. That the learned trial magistrate erred in law and in fact in holding that the appellant had received a valid invitation to defend the suit contrary to the court's records.
 - v. That the learned trial magistrate erred in fact in holding that the appellant never raised the issue of non-service of summons to enter appearance until the year 2017 yet the appellant knew of the suit on 27/03/2018 and filed its application on 24/05/2017.
 - vi. That the learned trial magistrate erred in law and in fact in failing to hold that the 1st respondent's suit against the appellant had abated.
6. This court gave directions on the filing of written submissions on the appeal. At the time of writing this judgment, only the submissions by the appellant were on record.
7. The record also shows that the 2nd respondent did not participate in the appeal.
8. The appellant vide its submissions dated 23rd December, 2021 argues that it was never served with summons to enter appearance in the suit contrary to the provisions of Order 5, Rule 1 of the Civil Procedure Rules ("the Rules") which express that:
 - "(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein."
9. The appellant has also cited among others, the case of Tana Trading Limited v National Cereals And Produce Board [2015] eKLR where the High Court rendered the following decision on the subject of service of summons to enter appearance:
 - "Order 5 of the Civil Procedure Rules has set procedures which parties must adhere to including the Plaintiff. Those procedural rules are not of a technical nature. They are the very essence of commencement of lawful proceedings. Without summons being issued to command a Defendant to appear and defend a Plaintiff's claim, a suit remains still born."
10. The appellant further submits that the affidavit of service on record and which alleges that service was effected was filed in 2018 following the filing of the application by the appellant seeking to have the suit against it dismissed, and yet such affidavit of service ought to have been filed after the alleged service took place.



11. It is the contention by the appellant that the aforementioned affidavit of service falls short of the requirements set out under the proviso of Order 5, Rule 15(1) of the Rules, thus:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons.

The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.”

12. The appellant contends that it only came to learn of the existence of the suit upon being served with a notice to attend court for the purposes of fixing a date for pre-trial directions, on 24th March, 2017.

13. The appellant also contends that owing to the non-service of summons upon it, the suit against it should abate, citing the provisions of Order 5, Rule 1(6) of the Rules which sets out the following:

“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.”

14. The appellant also makes reference to the reasoning taken by the court in the case of Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited [2016] eKLR when it held that:

“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...

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 15.7.2015 were therefore of no consequence.”

15. In view of the above, the appellant urges this court to allow the appeal and to order that the suit against it be struck out with costs.

16. I have considered the submissions and authorities cited on appeal. I have likewise re-evaluated the material which placed before the trial court. It is clear that the appeal fundamentally lies against the trial court’s decision to dismiss the appellant’s application seeking to have the suit against it struck out for non-service of summons. I will therefore deal with the grounds of appeal contemporaneously under the following limbs.

17. The first limb of the appeal concerns itself with whether the learned trial magistrate arrived at a correct finding on the issue of service of summons.

18. In her supporting affidavit to the application dated 24th May, 2017 Risper A. Obure who was at all material times the Corporate Affairs Manager of the appellant, stated that the appellant was never served with summons to enter appearance and/or the pleadings in the suit and only came to learn of its existence upon being served with a pre-trial hearing notice by the advocate for the 1st respondent.



19. The deponent further stated that no affidavit of service was ever filed to prove that service of the summons had been effected.
20. It is the averment by the deponent that consequently, the appellant was never granted an opportunity to put in its defence or adequately participate in the suit which is tantamount to an injustice.
21. In retort, the 1st respondent stated that service was properly effected upon the appellant on 1st May, 2014 and that there is an affidavit of service on record to that effect.
22. The 1st respondent also stated that the averments being made by the appellant therefore constitute falsehoods and inaccuracies.
23. Upon hearing the parties on the Motion, the learned trial magistrate analyzed that service had properly been effected upon the appellant and that there is evidence by way of an affidavit of service to prove so.
24. Upon my study of the record, it is apparent that the 1st respondent filed her suit on 17th April, 2014 following which she took out summons to enter appearance against the appellant and the 2nd respondent and which summons were issued on 22nd April, 2014.
25. Upon my further study of the record, it is apparent that the summons were served upon the 2nd respondent who then entered appearance and filed its statement of defence on 12th June, 2014.
26. Upon my re-examination of the pleadings and material on record, it is apparent that the appellant did not initially participate in the proceedings or come on record until 15th May, 2017 when its advocates filed a notice of appointment of advocates.
27. Upon my further re-examination of the pleadings and material on record, it is apparent from the court proceedings that the trial court had on previous occasions raised concerns regarding the status of the appellant and therefore directed the 1st respondent to regularize the same. There is nothing on the record to indicate that the 1st respondent complied with those directions.
28. From the record, I note that there are correspondences to indicate that it is more plausible than not that the appellant only came to learn of the existence of the suit upon the invitation to attend court for the pre-trial conference, which triggered the notice of appointment of advocates.
29. Furthermore, upon my perusal of the record, I note that upon the filing of the application dated 24th May, 2017 by the appellant, the 1st respondent annexed to her replying affidavit a copy of the affidavit of service sworn by Michael Mwashighire on 2nd August, 2018 indicating that service of the summons and pleadings had been effected upon the appellant and the 2nd respondent on 1st May, 2014.
30. It is apparent that the affidavit of service was sworn and filed over four (4) years from the time of filing the suit and the 1st respondent has not offered any explanation for the delay. There is also nothing to indicate that an affidavit of service was filed soon after the institution of the suit in order to ascertain that service of the summons had properly been effected.
31. In my view therefore, while it is apparent that the summons were taken out by the 1st respondent, there is no credible evidence to lead me to the conclusion that the summons and pleadings were served upon



the appellant soon after the institution of the suit and in compliance with the provisions of Order 5, Rule 1(6) of the Rules thus:

“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.”

32. There is also nothing on the record to indicate that the 1st respondent ever applied to have the validity of the summons extended.

33. Further to the foregoing, I find that the 1st respondent also did not comply with Order 5, Rule 15(1) of the Rules, thus:

“The serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons...”

34. For all the foregoing reasons, I am satisfied that the learned trial magistrate arrived at an erroneous finding on the issue of service and which finding ought to be disturbed.

35. This brings me to the second and final limb of the appeal touching on whether the 1st respondent’s suit against the appellant ought to have been struck out for having abated.

36. Without belabouring my findings above on the issue of service of summons and the pleadings, I reason that upon finding that there was no credible evidence of service of the summons and pleadings upon the appellant herein, I am satisfied that the suit against it abated and therefore ought to have been struck out on that basis.

37. I am supported by the case of *Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited* [2016] eKLR cited in the submissions by the appellant and where the court held that:

“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...
The suit has abated for lack of service of summons...”

38. Upon taking into account all the foregoing factors hereinabove, I find that it would be a proper exercise of my discretion to interfere with the impugned ruling.

39. In the end, I will allow the appeal. Resultantly:

- i. The ruling delivered on 12th October, 2018 in Milimani CMCC No. 2127 of 2014 is hereby set aside and is substituted with an order partially allowing the Motion dated 24th May, 2017.
- ii. The suit against the appellant (the 2nd defendant in the suit) is hereby ordered struck out with costs.
- iii. The appellant shall also have the costs of the appeal, to be borne by the 1st respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

