



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 91 OF 2016

FRANCIS NDEGWA MUHORO.....PLAINTIFF/APPLICANT

VERSUS

AHMEDNASSIR M. ABDULLAHI.....DEFENDANT

RULING

This suit was filed on 24th March, 2018. An application by way of Notice of motion and a certificate of urgency was simultaneously filed alongside the suit. It is instructive to note at this early stage that a number was allocated to the suit and the plaintiff verifying affidavit, witness statement of the plaintiff, the plaintiff list of witnesses and the application by way of Notice of Motion were all date stamped 24th March, 2018.

Order 5 rule 1 of the Civil Procedure Rules provides that when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein. Rule 1 (5) provides every summons shall be prepared by the plaintiff or his advocate and filed with a plaintiff to be signed in accordance with sub rule (2) of this rule.

I have perused the record of this case and noted that no summonses were ever presented alongside the plaintiff to be signed in accordance with the rules. That notwithstanding, the defendant was served with the application under certificate of urgency which as I have said was filed on 24th March, 2016. There is an affidavit of service by one Jimmy T. Ndirango an authorised court process server sworn on 29th March and filed on 30th March, 2016. There is then a notice of appointment of advocates dated and filed on 30th March, 2016 by Issa & Co. Advocates on behalf of the defendant.

The application under certificate of urgency dated and filed on 24th March, 2016 included the plaintiff, the verifying affidavit, the plaintiff witness statement, plaintiff's list of witnesses and all the annexures as required by order 3 rule 2 of the Civil Procedure Rules. The record also shows that interim orders were granted by the court relating to that application which was subsequently heard by Njuguna J.

By an application dated 11th July, 2019 the defendant moved the court seeking the order that the plaintiff's claim dated 24th March, 2016 be struck out. Before the ruling was delivered however, the plaintiff moved the court to be allowed to file a response to that application a request that was allowed.

The present ruling therefore shall address the issue of whether or not the plaintiff should be struck out as prayed. The main reason the defendant seeks to strike out the plaintiff is because the suit has abetted by dint of order 5 rule 1 (6) of the Civil Procedure Rules. It is true as at the time of filing the application the plaintiff had not served the defendant or his advocates on record with summons to enter appearance as provided under Order 5 rule 1 of the civil procedure rules.

The parties have filed their respective submissions which I have considered. Black's Law Dictionary defines summons as,

“A writ or process commencing the plaintiff's action and requiring the defendant to appear and answer.”

The provisions of order 5 relating to issuance and service of summons are couched in mandatory terms. It is now established that the word “shall” may not mean mandatory and it all depends in the contest in which it is used.

From the date of service of the application by the plaintiff dated 24th March, 2016 to the date the defendant filed the application to strike out the plaintiff, a period of over 3 years had lapsed. During that time the parties were litigating in relation to the application by the plaintiff. It is significant to observe the defendant and or his advocate was all this while aware of the plaintiff's case against him.

Service of court process is intended to inform or notify the other party of the case against him. In the litigation relating to the injunction application it is clear from the reply, filed and submissions made the defendant was aware of the plaintiff's case against him. The question that begs an answer is whether or not failure to serve summons caused any prejudice upon the defendant in the matter.

No prejudice has been alleged has or shall be visited upon the defendant for the reasons that summons were never served. Where a party actively participates in proceedings that go to the root of the cause of action notwithstanding the fact that no summons have been served may not benefit from such an omission.

Striking out pleading is a drastic measure which should be sparingly invoked. I say so because any adverse order to that effect drives a party out of the seat of justice thereby locking him out of any cause of justice. I know there are instances where such an action may prove necessary but in the instance case I am inclined to find the commission on the part of the plaintiff and or his advocate has not cause any injustice on the part of the defendant.

Having said so the order that commends itself is that the application to strike out the plaint is hereby dismissed with no order as to costs. The defendant shall file a defence within 14 days of service of the order of this ruling and thereafter parties shall comply with the pre-trial procedures to facilitate the haring of this case.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2021.

A. MBOGHOLI MSAGHA

JUDGE