



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO 28 OF 2018

PECKER WOODS LIMITED.....DEFENDANT/RESPONDENT

VERSUS

BANK OF AFRICA KENYA LIMITED....DEFENDANT/APPLICANT

R U L I N G

1. The application before me is the Notice of Motion dated 27th January 2020 (the subject application) filed by the defendant, Bank of Africa Kenya Limited. The prayers in that application are two pronged. They are:

a. That this suit be dismissed for want of prosecution.

b. That in the alternative, this suit be deemed to have abated from want of service of summons.

BACKGROUND

2. The plaintiff, Peckerwood Limited filed this action, on 20th August 2018, by its plaint dated 16th August 2018. The plaintiff, simultaneously with the filing the plaint also filed a Notice of Motion application, similarly dated 16th August 2018. By that application it sought interlocutory injunction to restrain the defendant from selling its property, L.R. No. Kiambu/Municipality Block 111/167 Runda Mumwe Estate, Kiambu County. That property is charged to the defendant. On 29th August 2018 the court granted the plaintiff *ex parte* interim injunction. The matter was fixed for *inter partes* hearing, of the injunction application, on 5th September 2018. On that day the learned counsels for the plaintiff and the defendant extended the *ex parte* injunction, by consent, to 12th September 2018. On that day at the request of the plaintiff's learned counsel the application and the matter were stood over generally to enable parties engage in negotiations. The court file does not reflect any other activity until 5th February 2020 when the defendant fixed the subject application for hearing on 18th March 2020. The application was finally heard by way of adoption of parties written submission on 18th November 2020 and hence this Ruling.

PLAINTIFFS ARGUMENTS

3. The plaintiff opposes the subject application. In so doing it was submitted that when parties began to engage in negotiations the summons to enter appearance had not been processed, retrieved, released or served upon the defendant. That the defendant having acquiesced the negotiation it cannot file the subject application. It is plaintiff's view that the subject application is intended to deny the plaintiff the right to be heard. The plaintiff cited cases whose jurisprudence is to the effect that the court should not "summarily and hastily shut its doors to litigants before hearing the evidence." Plaintiff cited the cases **Kivanga Estates Limited -V- National Bank of Kenya Limited (2017) eKLR** and **Crescent Construction Co. Ltd. -V- Delphis Bank Ltd. (2007) eKLR** in advancing that argument.

4. The plaintiff further submitted that Order 5 Rule 1 of the Civil Procedure Rules (the Rules) is directory and not mandatory. That the defendant was not prejudiced by the plaintiff's omission to serve the summons to enter an appearance, because the defendant had actively and fully participated in this matter and in the application for interlocutory injunction. In other words, that the defendant was aware of the existence of this suit.

5. On the issue of summons the plaintiff relied on a High Court case, **Azhar Mohammed Sheik & 8 Others -V- Velji Narshi Shah & Another (2017) eKLR**. In that case the plaintiff was found to have filed and served summons, *albeit* out of time, and the court in exercise of its discretion, declined to strike at the suit.

6. The other case the plaintiff relied upon is **Invesco Assurance Company Limited -V- Oyange Barrack (2018) eKLR** where the court

found that 12 months had not lapsed since the last action was taken in the suit. The court therefore declined to strike the suit for want of prosecution under Order 17 Rule 2 of the Rules.

DEFENDANT'S ARGUMENTS

7. Although the defendant submitted that the plaintiff withdrew the interlocutory application for injunction that indeed is not the correct position. The court on the application of the plaintiff, on 12th September 2018, marked that application as stood over generally. In my view, therefore, the interlocutory application remained on record to date, though not prosecuted.

8. The defendant relying on Order 17 Rule 2 of the Rules submitted that the plaintiff had failed to prosecute its suit for over two years which was inordinate and inexcusable delay which the defendant terms as abuse of the process of court. The defendant cited the case **Nilani –V- Patel & Others (1969) EA** where the court held the plaintiff should take all steps to achieve expeditious disposal of his claim.

9. The defendant faulted the plaintiff in only providing the letters written on its behalf, by which letters it was alleging the outstanding amount owed to the defendant was disputed. The defendant stated that the defendant had responded to those letters denying such dispute of amount outstanding and that the plaintiff failed to annex them to its affidavit.

10. In the defendant's view the fact the plaintiff failed to file the summons and failed to serve the defendant with such summons was fatal to its suit. Defendant relied on the case **Frenze Investment Limited vs Kenya Way Limited [2001] eKLR** thus:

“A summons to enter Appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the timetable of pleadings and the Rules governing Issuance and Service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of appeal in CA 85/96 UDAY KUMAR CHANDULLAL RAJANI & ORS T/A LIT PETROL STATION vs. CHARLES THAITHI (UR)

the Court of Appeal held that:

“Order V r 1 (now order 5 of the Rules) provided a comprehensive Code for the duration and renewal of summons and therefore the non -compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under S.3A of the Civil Procedure Act cannot cure”.

It was declared that there was no valid summons in existence and the suit was dismissed. And so it is with the summons issued and served herein.”

ANALYSIS AND DETERMINATION

11. The plaintiff, as stated before instituted this suit on 20th August 2018. This matter was before court on three occasions, on 29th August, 5th September and 12th September 2018. Although when the matter was before court those three times it was for the hearing of the interlocutory injunction application that application was never heard *inter partes*. On 12th September 2018 the plaintiff informed the court that the defendant had filed replying affidavit and then requested parties be given opportunity to negotiate the matter. That is the last time the matter was before court until the plaintiff was awoken from its slumber by the defendant's application (the subject application).

12. The plaintiff opposes the prayer for dismissal of its suit for want of prosecution on the ground that parties were negotiating. The defendant has denied that any negotiations have been taking place. Indeed, even the correspondence, the plaintiff attached as proof of such negotiation do not prove that any such negotiations were going on. Even if negotiations were going on the plaintiff had a burden to prove that it should be excused from proceeding with this Case for more than two years. Order 17 Rule 2 of the Rules is well met, here. That Rule provides:

2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.

13. The holding in the case **Nilan –V- Patel & Others (1969) EA** reveals plaintiff's responsibility clearly, thus:

"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by their applying for its dismissal or settling down the suit for hearing."

14. That responsibility was also echoed in the case **Ochola Kamili Holdings Limited –V- Guardian Bank Limited (2018) Eklr** where the

court stated:

“19. In the case of Bernard Ochola Ngani & Others Vs Mathayo Ndo & 2 Others (2001) it was held: -

“The plaintiff ought to show sufficient and/or credible excuse if they want to resist an application for dismissal of their suit by the defendant and/or court. It is my opinion that the plaintiff must avail genuine reasons to enable the Court to exercise its discretion in their favour. It is the duty of the plaintiff and his advocate to bring the suit for trial and they cannot shift that primary burden to the defendant by saying the plaintiff has no lesser burden. Usually the burden is on their shoulders and failure to discharge that onus would be detrimental to their case.”

15. The plaintiff failed to show cause why this Suit, which has not been prosecuted for over two years, should not be dismissed for want of prosecution. In that regard I can but only cite the case **Beverage Bottlers (SA) Ltd (in Liquidation and ARVO -V- Abode Enterprise PTY LET (2009) SASC 272.**

“There must come a time when the party has so conducted the litigation that it would be appropriate to shut that party out of that party’s litigation even if the point is arguable. Justice delayed can be justice denied. Both the Plaintiff and the Defendant are entitled to justice.

If the Plaintiff has conducted his or her case so that the Defendant has suffered prejudice or will suffer injustice in defending the case then the Defendant is entitled to justice, and justice can only be achieved by shutting the Plaintiff out of his or her case.”

There comes a time when (the Defendant) is entitled to have some piece of mind and to regard the incident as closed.

The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.”

16. This suit is dismissed for want of prosecution, in view of the above finding.

17. In addition to the above holding I do find and hold that this suit abated due to the plaintiff’s failure in filing this suit to have the plaintiff accompany the summons to enter appearance. Order 5 Rule 1 and 2, of the Rules, is the Rule that makes it mandatory for every plaintiff to accompany the summons. That Rule provides that the summons should invite the defendant to appear in the suit; obligates the plaintiff to prepare the summons and to collect those summons for service; and provides for renewal of the summons.

18. That Rule is in the following terms:

- (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
- (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
- (3) Every summons shall be accompanied by a copy of the plaintiff.
- (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
- (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaintiff 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.

2. Duration and renewal of summons [Order 5, rule 2.]

- (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.
- (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so

19. Order 5 of the Rules makes it abundantly clear that it is the summons that are accompanied by the plaintiff. In other words, the summons is the primary document in a suit. The plaintiff is secondary. That order of preeminence of the summons is obvious when one considers what the summons and the plaintiff require the defendant to do. The plaintiff simply sets out the claim against the defendant. It does not invite the defendant to do anything in respect to the claim. The summons on the other hand informs the defendant that the claim has been filed against him then it requires the defendant to appear and warns the defendant if he does not enter an appearance within the period set the plaintiff may proceed with suit and judgment would be entered in default of that appearance. The summons are in the following format:

“To xxxxx

P. O. Box xxx

Kiambu

WHEREAS the above named plaintiff has instituted a suit against you upon the claim, the particulars of which are set out in the copy plaint with annexures attached thereto.

YOU ARE HEREBY REQUIRED within15..... days from the date of service hereof to enter an appearance in the said suit. Should you fail to enter an appearance within the time mentioned above, the plaintiff may proceed with the suit and judgment may be given in your absence.”

20. I have belaboured the point of the important role the summons play in a suit because the plaintiff submitted that Order 5, requiring a party to take out summons, is directory and not mandatory. That in my view is erroneous. Granted that there are some decided cases that indeed have held that the requirement of summons is not mandatory. I find that such a view is not supported by Order 5 of the Rules. A plaint on its own may inform a defendant there is a claim against him but does nothing more than that. It does not direct the defendant what to do and when to do it if he does not accept that claim. It is the summons however, making reference to the plaint, which invites the defendant to file, within a specified period, his appearance. The summons further warns the defendant that if he does not file an appearance within the specified period the suit may proceed in his absence and judgment may be entered against him as prayed in the plaint. In my view, it is plainly clear that a suit, which does not have summons inviting the defendant to enter appearance, may remain in perpetuity without being defended by the defendant and without judgment being entered for the Plaintiff for lack of summons inviting the defendant to participate in it. Summons are the heart and soul of a suit.

21. The Court of Appeal in the case **Misnak International (UK) Limited -V- 4MB Mining Limited c/o Ministry of Mining. Juba Republic of South Sudan & 3 Others (2019) eKLR** adopted that point of view when it upheld the high court thus:

“we concur with and adopt the following sentiments of Aburili, J. in *Law Society of Kenya vs Martin Day & 3 Others (supra)*:

“It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked.”

22. The High Court also shared the same point of view in the case **Abdulbasit Mohamed Ahmed Dahman & Another -v- Fidelity Commercial Bank Limited (2016) eKLR** thus:

“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.....”

The plaintiffs’ suit has abated for lack of service of summons upon the defendant.”

23. Another case supporting that point view is in the case **Firenze Investment Limited -v- Kenya Way Limited (2001) eKLR** thus:

“ A summons to enter Appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the timetable of pleadings and the Rules governing Issuance and Service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of appeal in CA 85/96 UDAY KUMAR CHANDULLAL RAJANI & ORS T/A LIT PETROL STATION vs. CHARLES THAITHI (UR)

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It was declared that there was no valid summons in existence and the suit was dismissed. And so it is with the summons issued and served herein.”

24. What then is the fate of this case where the plaintiff filed the plaint without the summons despite the provisions of Order 5 Rule 1 (1), (3), (5) and (6) of the Rules. Its fate is clearly stated in Order 5 Rule 1(6) of the Rules, the suit has abated.

25. The defendant therefore succeeds in the second prong of its application, that this Suit is hereby deemed to have abated for want of summons.

CONCLUSION

26. In the end in respect to the Notice of Motion dated 27th January 2020 I grant the following orders:

- a. This suit is hereby dismissed for want of prosecution.
- b. This Suit has abated for want of summons to appear contrary to Order 5 Rule 1 of the Civil Procedure Rules.
- c. The defendant is awarded costs of this Suit and costs of the Notice of Motion dated 27th January 2020.

SIGNED AND DELIVERED VIRTUALLY THIS 18th DAY OF MARCH 2021.

MARY KASANGO

JUDGE

18th March 2021

Before Justice Mary Kasango

C/A - Kevin

Applicant -

For the Plaintiff – Ms Omwega holding brief for Ombega

For the Defendant – Mr. Maondo

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE