



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 261 OF 2015**

**BETWEEN**

**CRISSAM ACRES LIMITED.....PLAINTIFF**

**AND**

**CFC STANBIC LIMITED.....1<sup>ST</sup> DEFENDANT**

**MAURICE OMUSEE BUSURU.....2<sup>ND</sup> DEFENDANT**

**RULING NO. 2**

1. The 1<sup>st</sup> defendant's Notice of Motion dated 24<sup>th</sup> February 2020 is made under **Order 5 rules 1(6)** of the *Civil Procedure Rules* ("the **Rules**") and it seeks the following orders:

[1] *THAT the Plaintiff's suit has abated.*

[2] *THAT in the alternative the Plaintiff's suit against the 1<sup>st</sup> Defendant herein be struck out for want of summons to enter appearance,*

[3] *THAT the Plaintiff do bear the costs of this application and the costs of the suit.*

2. The application is supported by the affidavit of Fiona W. Maina, the plaintiff's advocate, sworn on 24<sup>th</sup> February 2020. The application is opposed by the 1<sup>st</sup> respondent on the basis of the replying affidavit of Christine Mutile Mwangi, a director of the plaintiff, sworn on 14<sup>th</sup> July 2020.

3. The 1<sup>st</sup> defendant's case is that the Plaintiff failed to comply with the mandatory provisions of **Order 5 rule 1(2)** and **(6)** of the **Rules**. Counsel submitted that the Plaintiff never prepared and filed the plaint with the Summons. That it never applied for, took out or even effected service of Summons on the 1<sup>st</sup> Defendant and thus the suit has abated in the absence of the Summons. To support its case, the 1<sup>st</sup> defendant relied on several cases; *Sammy Mwangi Thiongo and Another v Indar Singh Gill* HCCC No. 300 of 2013, *Bishop Isaiah Challo v The Registered Trustees of Redeemed Gospel Church and Another* ELC No. 45 of 2011, *Halima Kasi Tonui & Others v The Board of Trustees Teleposta Pension Scheme and Another* MSA HCCC No. 111 of 2012 and *Nathan Lloyd Ndungu v Themis Investment Ltd and 6 Others* [2018] eKLR where the courts held that compliance with the provisions of **Order 5 rule 1(6)** is mandatory and that the suit abates where summons are not taken and served within the prescribed time.

4. In her deposition, Ms Mwangi stated that she was unable to tell whether the Summons had been issued by the court. She stated that she was ready and able to prosecute the suit and that it was in the interests of justice that the matter be heard on merit. Counsel for the plaintiff argued that the suit had not abated as the 1<sup>st</sup> defendant had not shown that the summons had been signed and the plaintiff duly notified to collect the Summons. Counsel cited *Paulina Wanza Maingi v Diamond Trust Bank Limited* NRB HCCC No. 603 of 2009 [2015] eKLR and *Colour Planet Limited v Safaricom Limited and 2 Others* ML HC COMM No. 314 of 2015 [2019] eKLR to argue that the suit could not abate if the plaintiff has not been notified to collect the Summons.

5. This matter in issue is to be determined by application of **Order 5 rule 1** of the **Rules** which provides as follows:

*1(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 plaint.*

*(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 plaint to be signed in accordance with subrule (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. [Emphasis mine]*

6. Under **Order 1 rule 3** aforesaid the plaintiff or his advocate is required to prepare the Summons and file the same with the plaint. The duty to sign and seal the Summons and notify the plaintiff that the Summons are ready for collection falls squarely on the court. Under **Order 5 rule 1(6)** of the **Rules**, the suit can only abate once the court notifies the plaintiff that the Summons are ready for collection.

7. I have gone through the file and there is no record of the Summons having been issued or collected although the receipt for payment when the plaint was filed shows that Summons were paid for. There is also no evidence that the court issued a notification to the plaintiff to collect summons. Since I entertain considerable doubt on the issue, I decline to exercise the court's draconian power to strike out the plaint particularly in view of the fact that this application has been brought 5 years later and the 1<sup>st</sup> defendant has participated in the interlocutory proceedings.

8. In view of what I have stated I dismiss the Notice of Motion dated 24<sup>th</sup> February 2020 and direct as follows:

(a) The Plaintiff shall file Summons to Enter Appearance within 14 days from the date hereof.

(b) The Deputy Registrar of this Court is directed to sign and seal the Summons in accordance with **Order 5 rule 2** of the **Rules** within 7 days of filing.

(c) Thereafter the Plaintiff shall serve the defendant within 14 days of receipt of the Summons.

(d) The Plaintiff shall pay costs of the suit.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of AUGUST 2020.**

**D. S. MAJANJA**

**JUDGE**

Mr Were instructed by Odera Were and Company Advocates for the plaintiff

Ms Maina instructed by Wainaina Ireri and Copany Advocates LLP for the 1<sup>st</sup> defendant

C M Ongoto and Company Advocates for the 2<sup>nd</sup> defendant.