



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO 144 OF 2015

ROBERT KASAINA OLE PERTET.....PLAINTIFF

VERSUS

JOE MWANGI.....DEFENDANT

RULING

INTRODUCTION

1. In his Preliminary Objection dated 21st March 2017 and 22nd March 2017, the Defendant had sought to have the Plaintiff's suit that was filed on 17th April 2016 struck out with costs to it on the ground that the Summons that were issued herein and purported to have been served upon him by the Plaintiff was in breach of Order 5 Rule 1 and 2 of the Civil Procedure Rules, 2010.
2. His Written Submissions and List & Bundle of Authorities were dated 19th April 2017 and filed on 21st April 2017 while the Plaintiffs Written Submissions were dated and filed on 6th April 2017.
3. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

4. The Defendant submitted that a Preliminary Objection can be raised by any party to proceedings before a suit is determined and that if it is argued successfully, it voids a suit or action substantively and *in limine*. In this regard it placed reliance on the case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors [1969] EA 696** where it was held that:-

“...a Preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.” It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. He pointed out that the Plaintiff had admitted the lack of service of valid summons on him. He added that the issuance and service of summons was not procedural but rather, it was an integral, mandatory and crucial step in the process of litigation.
6. It was his argument that since Summons were issued on 23rd April 2015 and that by 23rd April 2016 they had not been served on him and the Plaintiff had not applied for their extension, the said Summons had expired and could not be revived.
7. He referred this court to the cases of **Zakaria Somi Ng'ang'a vs Kenya Commercial Bank Ltd & 3 Others [2008] eKLR**, **Julius Njoroge Muira vs Harrison Kiambuthi Mburu [2011] eKLR** and **Barclays Bank of Kenya Ltd vs Patrick Njuguna Kubai [2014] eKLR** where the common thread was that original summons that had not been extended could not be revived.
8. On its part, the Plaintiff submitted that Article 159(2) (d) of the Constitution of Kenya, 2010 provides that justice shall be administered without undue regard to procedural technicalities. He added that the court is duty bound to balance all applicable principles of law by weighing one against the other to see where the balance tilted.
9. In this respect, he relied on the cases of **Equity Bank Limited vs Capital Construction Ltd & 3 Others [2012] eKLR** and **Nicholas Kiptoo Arap Korir Salat vs IEBC & 6 Others [2012] eKLR** where the gist of the said cases was that in the new Constitutional dispensation, procedural technicalities ought not to be given undue prominence.

10. He relied on Section 1A of the Civil Procedure Act Cap 21 Laws of Kenya and the cases of **African Safari Club Limited vs Safe Rentals Club Limited [2010] eKLR** and **Deepak Chamanlal Kamani & Another vs Kenya Anti-Corruption Commission & 3 others [2010] eKLR** where the holdings were that the overriding objective of Civil Procedure Act was for courts to deal with cases justly.

11. It was his further contention that by entering appearance and filing a Defence, the Defendant acquiesced to the validity of the said Summons and therefore urged this court to apply the oxygen principle.

12. He therefore urged this court not to strike out his suit but to do substantive justice because he had a valid claim against the Defendant herein.

13. It was evident from the parties' submissions that the Summons that were served upon the Defendant were not valid. The question was whether or not the Defendant validated the same when he entered appearance and filed a Defence.

14. A perusal of the Affidavit of Service of John Gachau that was sworn on 2nd December 2015 and filed on 10th March 2016 showed that as at 5th May 2015, the Defendant's whereabouts could not be traced.

15. On 10th March 2016, the Plaintiff filed a Notice of Motion application dated 2nd December 2015 seeking to serve the Defendant by way of substituted service. The said application was allowed by Hon Wangila DR on 25th April 2016. As at this time, the Summons to Enter Appearance were invalid having expired on 22nd April 2016.

16. Notably, in paragraph 12 of his Defence dated 2nd August 2016 and filed on 4th August 2016, the Defendant contended that the Summons to Enter appearance had expired by the time he was served with the same.

17. Article 159 (2) (d) of the Constitution of Kenya, 2010 provides as follows:-

“justice shall be administered without undue regard to procedural technicalities.”

18. It is important to note that Article 159(2) (d) of the Constitution of Kenya is not a panacea of all technicalities. It may cure procedural technicalities that cause no prejudice to an opposing party but not substantive flaws that go to the root of a case.

19. It must be appreciated that the statute that the Plaintiff relied upon to buttress his argument that Section 1A of Civil Procedure Act calls upon the court to facilitate the just resolution of disputes prescribes an elaborate procedure as to how Summons to Enter Appearance should be issued, re-issued and served.

20. Order 5 Rule 1 and 2 of the Civil Procedure Rules stipulates as follows:-

" 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 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.

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

3. Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

4. Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

5. An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

6. As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

7. Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”

21. It is clear from the aforesaid that, just as this very court observed in the case of **Barclays Bank of Kenya Ltd vs Patrick Njuguna Kubai [2014] eKLR**, summons to enter appearance have to be extended before they expire.

22. The Plaintiff ought to have sought an order to extend his Summons to Enter Appearance before 22nd April 2016. He did not do so. In view of the fact that this court had arrived at a similar conclusion in **Barclays Bank of Kenya Ltd vs Patrick Njuguna Kubai** (Supra), it could not come to any different conclusion in this matter.

23. The Summons that were served upon the Defendant were not validated by his entry of appearance and filing of a Defence because in his Defence, the Defendant was very emphatic that the Summons he was served with had expired. His entry of appearance and filing of defence appeared to this court to have been merely precautionary and not that he acquiesced to the Summons to Enter Appearance which were already null and void by the time he was being served with the same. His action could not validate an already irregular or voided position.

DISPOSITION

24. For the foregoing reasons, the upshot of this court’s decision was that the Defendant’s Preliminary Objection dated 21st March 2017 and filed on 22nd March 2017 was merited and the same is hereby allowed.

25. The effect of this decision is that the Plaintiff’s suit be and is hereby struck out with costs to the Defendant for the reason that it had no legs to stand on, the Summons to Enter Appearance having expired on 22nd April 2016.

26. It is so ordered.

DATED and DELIVERED at NAIROBI this 26th day of September 2019

J. KAMAU

JUDGE