



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 447 OF 2013

CONSOLIDATED MEDIA LIMITED.....PLAINTIFF

VS.

MAGNATE VENTURES LIMITED.....1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND DEFENDANT

RULING

1. The Notice of Motion dated 29th May 2017 is not opposed. It bespeaks the striking out of the Plaint dated 4th October 2013 and filed on 16th October 2013. It also seeks the dismissal of the Plaintiff's suit.

2. The application is supported by the affidavit of Nelson Havi Advocate whose dispositions are not controverted. The suit herein was filed on 16th October 2013. No summons to enter appearance were taken out, issued or served upon the 1st Defendant. For that reason the Applicant seeks an order that the suit be deemed to have abated for want of issuance and service of summons to enter appearance. It is further contended that the subsistence of the abated suit may prejudice, embarrass or delay fair trial of the action and is otherwise an abuse of process of Court.

3. The Court has given due regard to the oral submissions by Counsel of the Applicant and the authorities cited to this Court.

4. Order 5 rule 1 of the Civil Procedure Rules is an issue of summons and reads:

[Order 5, rule 1.] Issue of summons.

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.

5. To be discerned from the above provisions is that it is the responsibility of the party filing suit to prepare summons and to file it alongside the Plaint. Once that is done, then the Judge or officer appointed by the Judge signs the summons and a seal of the Court is affixed thereon.

The signing or sealing should be done without delay. Except where the Court is to effect summons, the summons shall be collected for service within 30 days of issue or notification, whichever is later. In default of collection as provided then the suit abates.

6. In the matter at hand, summons do not seem to have been prepared or filed either alongside the plaint or even later. Summons have not been prepared or taken out at all. At the time of the Application over 4 years would have passed since the filing of the suit. Whilst from a technical viewpoint abatement of suit is an incident of non-collection of summons within the prescribed time (Order 5 Rule 6), it may even be worse here where the Plaintiff has failed to prepare and/or file the summons for over 4 years.

7. Such inaction oppresses and prejudices a Defendant. The Notice of Motion of 29th May 2017 has merit and is allowed as prayed.

Dated, delivered and signed in open Court at Nairobi this 24th day of September 2019.

F. TUIYOTT

JUDGE

PRESENT:-

Renee for Havi for 1st Defendant

No appearance for Defendant

Court Assistant: Nixon