



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 91 OF 2016**

**FRANCIS NDEGWA MUHORO .....PLAINTIFF**

**VERSUS**

**AHMEDNASIR M. ABDULLAHI .....DEFENDANT**

**RULING**

This suit was filed by the plaintiff on 24<sup>th</sup> March, 2016 claiming damages against the defendant based on some communication allegedly made by the defendant and which was considered libellous by the plaintiff. Alongside the said plaint there was filed an application by way of Notice of Motion seeking injunctory orders.

Going by the record before me, that application has never been determined. By a notice of motion dated 11<sup>th</sup> and filed on 12<sup>th</sup> July, 2019 the defendant has moved the court for an order that the plaint dated 24<sup>th</sup> March, 2016 be struck out with costs. The reasons advanced by the defendant for seeking the said orders are that to date the plaintiff has not served the defendant or its advocates on record with summons to enter appearance as provide under order 5 rule of the civil procedure rules. The plaint served upon the defendant was not accompanied by summons as required under Order 5 Rule 1 (3). Further no summons to enter appearance have been served upon the defendant as required for a period of 3 years since the suit was filed. In that regard therefore the suit has abated by dint of order 5 rule 1 (6) of the civil procedure Rules aforesaid.

There is a supporting affidavit sworn by the defendant herein.

The application was served upon the advocate for the plaintiff and on 8<sup>th</sup> October, 2019 the said advocate sought leave to file a reply to the Notice of Motion herein. Leave was granted to comply within 10 days with corresponding leave given to the defendant to file a supplementary affidavit within 7 days of service of the reply. The hearing was then set for 13<sup>th</sup> November, 2019.

When the matter came up for hearing on the said 13<sup>th</sup> November 2019 the advocate for the plaintiff was absent abut that for the defendant was present. At as that date, no reply had been filed as ordered on 8<sup>th</sup> October, 2019 and the advocate for the defendant had not received any such reply.

The advocate for the defendant then prosecuted the application leading to the present hearing.

Two authorities have been filed by the defendant and this are **Lee Mwathi Kimani VS. National Social Security Fund and another (2014)e KLR** and **Abdulbasit Mohamed Ahmed Dahman vs. Fidelity commercial Bank Limited (2016) eKLR**. These I have read.

Order 5 of the Civil Procedure Rules provides a comprehensive procedure to be followed upon filing of a suit and issue of summons. Rule 1 provides as follows,

**“ORDER 5**

**ISSUE AND SERVICE 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.”*

It is the duty of the plaintiff or his advocate to prepare the summons to be signed by the Judge or officer appointed by the Judge. Upon being signed and sealed, the summons is to be served within 30 days of issue or notification. It is clear from the rules that if this is not done, then the suit shall abate.

I have perused the record before me. The plaintiff or the advocate did not prepare any summons for signature as required under the rules. that is to say they are not part of this record. It is clear that there has been noncompliance of this very crucial provision of civil procedure. It has been three years down the line since the suit was filed yet no summons have been served upon the defendant. There has not been any application for the issue of such summons and extension thereof. The foregoing being the case the provisions of sub rule 6 are applicable. The suit has abated. It follows therefore, that the plaint must be struck out. Accordingly the defendants application is allowed as prayed with costs of the application and the suit.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 21<sup>st</sup> Day of November, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**