



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 639 OF 2003

BASE (E.A) LTD.....APPELLANT

- V E R S U S -

JULIUS THEODERE MUIYORO.....RESPONDENT

(Being an appeal from the ruling of Hon. H. A. Omondi (Mrs) in Nairobi CMCC No. EJ 653 of 2001 delivered on 12/9/2003)

JUDGEMENT

1. Base (E.A) Limited the appellant herein, filed a compensatory suit against Julius Theodere Muiyoro, the respondent herein, seeking for special damages amounting to ksh.463,201/=. It was alleged by the appellant in its plaint dated 31st August, 2001 that on 2nd April, 1999 the appellant's driver was driving motor vehicle registration no. KAG 795L along Outering Road in Nairobi, when his car was rammed into by the respondent motor vehicle registration no. KAC 193N, an Isuzu matatu, at the Kamunde junction, causing the appellant's car extensive damage. The appellant states that the cost of repair was ksh. 463,201/= comprising of:

- i. Cost of repairs ksh.448,307/=
- ii. Assessors fees ksh.2,800/=
- iii. Towing charges ksh.4,300/=
- iv. Investigators fees ksh.7,614/=
- v. Police abstract ksh. 100/=

2. The respondent filed his defence dated 16th May, 2003 denying the appellant claim.

3. The respondent then filed the chamber summons dated 21st May 2003, in which it sought for inter alia, the appellants' suit to be struck out as the summons to enter appearance were served when they had already expired.

4. Hon. H. A. Omondi, the learned trial magistrate, found merit in the respondents' application and held that service of expired summons by the appellant is an abuse of the court process within the meaning of Order VI rule 13 1(d) of the Civil Procedure Rules and struck out the plaint and the chamber summons.

5. Aggrieved, the appellant preferred this appeal and put forward the following grounds in its memorandum of appeal:

1. The trial Senior Principal Magistrate erred in law and in fact by dismissing the plaintiff's suit on grounds that the summons were invalid while the same had been stamped and given to the plaintiff's advocate for service by the court.

2. The trial Senior Principal Magistrate erred in law and in fact by striking out the suit under the provisions of order VI rule 13(a) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act while Order V rule 1(7) of the Civil Procedure Rules could have been used.

3. The trial Senior Principal Magistrate erred in law and in fact by basing his ruling on the fact that the process server's affidavit did not disclose the date of service while in actual act the process server appeared in court and stated the date of service of the summons as being a date before the summons had expired.

4. The trial Senior Principal Magistrate erred in law and in fact by dismissing the appellants suit on the grounds that

summons had expired at the time of service when there is a provision for extension of validity of summons for a further 24 months and not for striking out the suit.

5. **The trial Senior Principal Magistrate erred in law and in fact by striking out the plaintiff's suit on the ground that the affidavit of service filed on 9th July 2003 was defective as it did not state the date and time of service while this was not fatal in law.**

6. **The trial Senior Principal Magistrate erred in law and in fact by not appreciating the evidence given by the appellants process server one Thomas Kaveva on the date of service but struck the suit on the ground that the affidavit of service was defective in as it did not disclose time and date of service which defect could be rectified by filing another affidavit of service.**

7. **The trial Senior Principal Magistrate erred in law and in fact by denying the appellant an opportunity to prosecute its case even when the defendant had entered appearance and filed defence and had even comprises any defect in the affidavit of service and no prejudice was to be caused to the respondent.**

6. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the case that was before the trial court. I have also considered the appellants' written submissions, the respondent not having filed his submission.

7. It is the appellant's submission that the summons to enter appearance had expired at the time of service. The appellant further submits that the process server did testify that he served the summons dated 20th March 2002 on 17th March 2003 at around 10.15 am on a Monday before the alleged summons expired on the 26th March 2003. Hence the respondent's averments that the summons were served on 7th May 2003 after having expired is not true. The respondent has argued that the summons were served before expiry and was done regularly under Order 5 Rule 2 of the Civil Procedure Rules.

8. The appellant submits that striking out the suit, because the affidavit of service by process server did not state the time and the date of service was a mere procedural technicality to which the trial court acted harshly. The appellant cited article 159 (2) (d) of the constitution of Kenya, 2010 which directs courts to adjudicate on matters without undue regard to procedural technicalities.

9. From the record, summons to enter appearance were issued on 10th September, 2001 for service against the respondent. A further summons were issued on 20th March 2002. They are the summonses, the subject of this contest.

10. The summons dated 20th March 2002 bore the seal and stamp of the executive officer of Milimani Commercial Courts, Nairobi. The respondent stated that service of summons was of the summons dated 20th March, 2002 and was effected upon his house help on 7th May 2003, by which time the summons had expired.

The requirements of the law on validity of summons is order 5 Rule 2(1) and (2) of the Civil Procedure Rules which provided as follows:-

“A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of 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.

Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if it is satisfied that it is just to do so.”

11. The question is whether or not the summons bearing no signature of the executive officer, but with the stamp and seal is invalid. **Order 5 Rule 1 (2)** of the Civil Procedure Rules requires every summons to be signed by the judge or an officer appointed by the judge and to be sealed with the seal of the court. In my view the mere fact that the Executive Officer does not appear to have signed the summonses using a pen does not invalidate the same. It is clear from the stamp that the person issuing the summonses was the Executive Officer. Since Order 5 Rule 1 (2) of the Civil Procedure does not specify the nature of the signature, it is in my considered view that the purpose of that rule is simply to ensure that it is ascertainable which officer issued the summons and the stamp is adequate to achieve that. It would have been different if the summonses only bore the seal of the court without the stamp of the executive officer because it would not be possible to tell which officer had issued them.

12. The process server, Thomas Kareva in his replying affidavit stated that the summons were served upon the respondents' househelp on 17th March 2003 at around 10.15am and not 7th May 2003 at 11.00am as alleged by the respondent. That the househelp declined to acknowledge service by appending her signature and therefore he wrote at the back "by process server and left his telephone number of contact by the respondent in case he needed any clarification.

13. The trial magistrate found the summons to have been invalid without a signature, expired and not extended. The learned Magistrate stated that service was improper and with all these ingredients any action on it will be illegal, and proceeded to strike out the suit.

14. The house help's evidence is clear on when the summons were served upon her, on behalf of her employer, the respondent. She stated that the summons dated 20th March, 2002 were served on 7th May, 2003. By this time, it is clear that the summonses had already expired.

The case of **James Muniu Muchere vs National Bank of Kenya [2010] eKLR** held inter alia that

“...there is a provision for extension of validity of the original summons to enter appearance, but there is no provision for re-issue. In my considered view, that does not inhibit the court from re-issuing fresh summons to enter appearance. The court has powers under Order IV Rule 3 of the Civil Procedure Rules to issue summons to enter appearance that power extends to re-issue of summons to enter appearance where this is necessary for the ends of justice to be met. Re-issue simply means to issue the summons to enter appearance again.”

15. The summons dated 20th March, 2002 were served on 7th May 2003, by the time they had expired without having been extended. I agree with the trial magistrate’s decision in striking out the appellant’s suit. In the end, I find no merit in this appeal. The same is dismissed with costs to the respondent.

16. Dated, Signed and Delivered in open court this 23rd day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent