



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 95 OF 2018

JUJA COFFEE EXPORTERS LIMITED.....PLAINTIFF

VERSUS

- 1. NATIONAL BANK OF KENYA LIMITED**
- 2. VIRGIN PACKAGING LIMITED**
- 3. BAKHRESA GRAIN MILLING (K) LIMITED**
- 4. GRAIN BULK HANDLERS LIMITED.....DEFENDANTS**

RULING

1. This file was scheduled today for hearing of an application for injunction pursuant to the orders issued on 27/11/2018 when the court said:-

“Without going to the merits of the plaintiffs case and that by the defendants, I consider it just and fair that I don’t allow the substratum of the dispute be dissipated if there has to be sustained a dispute to be determined and resolved by the court. I consider it just and expedient that the subject matter of this litigation be preserved in that no further steps be undertaken to alienate the property pending further orders of the court.

Having so said, and it appearing to court that the sums in dispute is colossal, I do direct that the matter be fast-tracked and heard before the term ends on 20/12/2018”.

2. The directions also included an order granting leave to the plaintiff to amend and serve an Amended Plaint within 7 days. All was done with the understanding that the plaintiff came to court under a certificate of urgency and pleaded to be heard.

3. However once the order was granted, the urgency was never observed by the plaintiff. It did not file the amendments till the 13/12/2018, some 16 days later, totally contrary to the letter and spirit of the court orders and in departure from the statutory obligation under Section 1B Civil Procedure Act.

4. On account of that delay and violation for duty to court, the 4th defendant was served late and needed time to file a response to the application. It cannot be over-emphasized that the plaintiff has acted without and outside the court’s overriding objectives a conduct that must be frowned upon.

5. However more critical was the complaint by the defendants that ever since the suit was filed no summons to enter appearance have issued and served as at today being the 41st day thereafter.

6. To the defendants it was the plaintiffs’ duty and obligation to prepare and lodge summons with the plant and that even on that duly there was a failure. Mr. Lumatete stressed the point that Order 5 Rule 2(5) 7 (6) are expressed in mandatory terms and that failure to prepare and lodge summons denied the court the chance to issue same nor could there be a notification to the plaintiff. He therefore sought that the suit be struck out with costs contending that there is no valid suit. Those sentiments were echoed by Mr. Busieka for the 4th defendant.

7. To such submissions Mr. Kongere, while expressing surprise that there were no copies of the summons in the court file, took the view that the purpose of the summons is to notify parties of the dispute and that having come to court and filed papers there was no prejudice visited upon them to warrant the court inviting the draconian remedy of striking out. In addition, Mr. Kongere submitted that the law did not give jurisdiction to court to strike out a suit on account of lack of summons but did provide a self-executing mechanism of the suit abating. He

submitted that the proper way and procedure to seek striking out is by a formal application.

8. That is the summary of the submissions by parties. I discern the parties to ask the court to declare what becomes of the suit now that summons were not prepared and issued pursuant to Order 5 Rule 1(5) & (6) Civil Procedure Act.

9. First I do not agree with Mr. Kongere that the only purpose of a summons to enter appearance is to notify the defendants of the suit. To the contrary I consider a summons to enter appearance to be an integral part of the proceedings and pleadings for it is the issuance and service of summons that is the ultimate accelerator and conductor of how fast the defendant move to file own pleadings with serious repercussions and consequence in the event of failure to act within the timelines commanded by the summons. [1] where no summons to enter appearance are lodged, issued and served, the court has no inherent power to save the suit[2].

10. Here there being no summons issued due to non-compliance with Order 5 Rule 1(5) there is no obligation upon the defendant to enter appearance and file defence. One may even say that before summons are issued the suit remains yet to the property instructed[3]. I say that summons to enter appearance are not mere decoration or unmerited disturbance to the plaintiffs. They are very important for the matter to be moved forward, particularly in this era of active case management and the constitutional dictate that court disputes be handled expeditiously for justice delayed is justice denied.

11. For this matter, the default by the plaintiff to prepare and lodge summons have invited the operation of Order 5 Rule 1(6). Summons have not been issued some 41 days after the suit was filed. The only reason the same have not been issued and served is the plaintiffs default. No plausible reason has been advanced to merit excuse for the default. It can only be said that the plaintiff may be content with the fact that it enjoys some interim orders issued by the court. To remove it from that conformant it must be reminded that failure to comply with the law and court orders invite sanctions. The sanctions provided for this matter by the law is that the suit has abated.

12. I hold it so and noting that the 1st & 4th defendants have incurred costs by appointment of counsel, I order the suit abated and that the plaintiff shall pay to the 1st & 4th defendants the costs incurred so far.

13. It is so ordered.

Dated and delivered at **Mombasa** this **19th** day of **December 2018**.

P.J.O. OTIENO

JUDGE

Ruling delivered in open court in the presence of:-

Mr. Kongere for the plaintiff

Mr. Lumatete for the 1st defendant

Mr. Busieka for the 4th defendant

P.J.O. Otieno J

19/12/2018

[1] Frenze Investments Ltd vs Kenya Way Ltd [2015] eKLR

[2] David Njuguna Karanja vs HFCK [2009] eKLR

[3] Fina Bays Ltd vs Satyam Industries (K) Ltd & 4 Others [2015] eKLR