



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.397 OF 2014

MOMBASA CEMENT LIMITED.....PLAINTIFF

VERSUS

MONICA HARDWARE LIMITED.....DEFENDANT

RULING

The Plaintiff filed this suit by plaint dated 17th November 2014 seeking the following main reliefs: -

1. Judgment against the defendant in the sum of Kshs. 3,917,820/00 being accrued debt and general damages for breach of contract.
2. Interest on the above and costs.

Statements of Defence were subsequently filed by a certain David Mureithi, Anthony Mwangi Mbuthia And Daniel Kamau Mbuthia on 2nd April 2015 and 10th April 2015 respectively ‘under protest’ as according to them, they were served with summons to enter appearance while they are not defendants in the suit. That the summons therefore are bad in law, null and void and mischievously issued with ulterior motives and interest.

This was followed by two applications, the first is the Notice of Motion dated 17th July 2015. It is brought pursuant to Section 1A, 1B, 3, 3A, 11, 15, 17, and 18(1)a of the Civil procedure Act (the Act) and Order 51 rule 1 of the Civil Procedure Rules (the Rules). It seeks transfer of this suit to the Milimani Chief Magistrate’s Court filed by the Plaintiff. It is based on the grounds that the subject matter of the suit relates to breach of contract on payment of goods at a liquidated sum of Kshs. 3,917,820/-; that pecuniary limit and the lowest grade of the court competent to try this matter is the Chief Magistrates Court Commercial law Courts Nairobi; that the matter was inadvertently filed in this Court instead of the Chief Magistrates Court; that the Defendant will not suffer any harm or prejudice by the transfer.

The second application is the Notice of Motion dated 30th September 2015 brought under Section 3A of the Act and Order 51 rule 1 of the Rules for orders that the suit against the Defendant be struck out with costs and summons to enter appearance be declared null and void. The court will deal with this application first and the application for transfer of suit will follow.

The grounds for the application as they appear on the face thereof are as follows: -

- a. That the defendant is an independent legal entity from its directors and ought to be sued in its own capacity.
- b. That no summons to enter appearance for the defendant herein have ever been issued and or taken out by the plaintiff since 2014 when the suit was filed against it and the suit is therefore bad in law

- and a non-starter.
- c. That the summons to enter appearance with respect to the instant suit, issued to Daniel Kamau Mbutia And David Mureithi Mbutia are impotent, bad in law, null and void and ought to be invalidated.
 - d. That the suit is fatally defective, incurable in law and legally incompetent and ought to be struck off with costs.
 - e. That it is in the interests of justice that the orders sought be granted.

There is a supporting affidavit annexed to the application sworn by one David Mureithi. He has described himself as a “DIRECTOR” of the Defendant. It constitutes the factual basis of the grounds for the application.

The Plaintiff has opposed the application by a replying affidavit sworn on 14th October 2015. Grounds of opposition emanating therefrom include –

1. That summons to Enter Appearance issued against a Company are to be served against the principal officers of the company who are its Directors.
2. That the Defendant was properly served as the purpose of the issue of summons is to inform a Defendant of existence of a case filed against it.
3. That the said principal officers actually entered appearance thus they were duly informed as required.
4. That it is in bad faith for the Directors to seek to have the matter against the Defendant dismissed yet they are not parties to the case. This is despite the fact that a memorandum of appearance has been filed on behalf of the Defendant.
5. That the plaintiff having suffered breach of contract and deprivation of property should not be condemned to more loss by striking out the suit due to an error occasioned by its Advocate.
6. That the application has been overtaken by events as new summons have already been issued and the same served on the Defendant.
7. That the suit cannot be said to be fatally defective as the proper parties are before it.
8. That the orders sought to strike out suit are draconian and should only be exercised in those exceptional cases that cannot be salvaged by amendment of pleadings.
9. That the defect on the summons is only fatal where ex-parte judgment in default of appearance by a defendant has been obtained.
10. That it is in the interest of justice that the application be dismissed as the Directors of the Defendant have suffered no prejudice and none has been pleaded.
11. That the court is usually at liberty to re-call and re-issue summons which are erroneously issued and should deem the summons issued subsequently as duly issued and served.

I have considered the submissions of the learned counsels appearing, including the cases cited. The main issue in this application is whether or not the Defendant was duly served with summons to enter appearance and copy of the plaint.

There is no dispute that the Defendant is a limited liability company incorporated and domiciled in Kenya. It is the Plaintiff’s case that the Defendant was duly served with summons to enter appearance and copy of the plaint on 30th April 2010 at the Plaintiff’s offices in Nairobi through the Defendant’s Directors named in the summons to enter appearance albeit erroneously.

What is the law regarding service of summons upon a corporation in Kenya? Order 5, rule 3 of the Rules provides as follows: -

“3. subject to any other written law, where the suit is against a corporation the summons may be served:-

- a. **on the secretary, director or other principal officer of the corporation; or**
- b. **if the process server is unable to find any of the officers of the corporation mentioned in rule**

3 (a)-

- i. by leaving it at the registered office of the corporation;**
- ii. by sending it by prepaid registered post or by a licensed courier service provider approved by the court to the registered postal address of the corporation; or**
- iii. if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business; or**
- iv. by sending it by registered post to the last known postal address of the corporation.”**

In terms of a corporation thereof, a Director is certainly one of the officers that can receive summons on behalf of the corporation.

There was thus proper service upon the Defendant, as the Directors were served despite the error on the face of the summons which is curable upon amendment. This has already been done as summons to enter appearance were subsequently re-issued by the Deputy Registrar upon being made aware of the initial error. The service in Kenya was lawful, as it was authorized by Order 5, rule 3 of the Rules. In any case, the said Directors entered appearance and filed statements of defence indicating that they were well aware of the suit.

For all the above reasons, the application by Notice of Motion dated 30th October 2015 is hereby dismissed. There issued Summons to enter appearance and copy of the plaint shall be served upon the Defendant’s advocates on record. Everything else shall flow from such service.

The notice of motion seeking transfer of suit from this court to the Chief Magistrates Court has been opposed through Grounds of Opposition filed on 26th November 2015. These are –

- i. that the application is frivolous, vexatious and lacking in merit as no good reason has been given to warrant the orders sought;
- ii. That the application is res-judicata as Onyancha J. struck out a similar application seeking transfer of suit. Failure to disclose this material fact means the Plaintiff has not come to court with clean hands.
- iii. That the application is an abuse of the court process and it ought to be dismissed.

Indeed upon perusal of the Court file it is evident that the application has been canvassed in this court before and a ruling delivered on the same by Onyancha J. on 14th July 2015. However, the application was not decided on merit as the Judge noted in his decision –

“the result is that the failure to date the application together with the failure to name the court to which the suit should be transferred, renders the application invalid and incompetent and thus fit only for striking out, which I hereby do with costs.”

The Plaintiff has since corrected the above anomalies in the current application. For that reason the application cannot be said to have been adjudicated upon. If and when a suit finds itself in the wrong court, it is in the interests of justice and of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated upon.

The Defendant has not pleaded any prejudice as only grounds of opposition have been filed and none is apparent. After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes. I will in the circumstances allow the application.

The costs shall be in the cause. Those shall be the orders of the court.

Dated, signed and delivered at Nairobi this 21st day of March, 2016.

A. MBOGHOLI MSAGHA

JUDGE