



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 310 OF 2015

MOHAMED ALI ABDALLA.....PLAINTIFF

VERSUS

MORRIS GUCHURA NJAGI.....DEFENDANT

RULING

Order 5 Rule 1 of the Civil Procedure Rules provides as follows:-

1. (1) ***“Where 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 sub-rule (2) of this rule.***
6. ***Every summons, except where the Court is to effect service, shall be collected for service within thirty days of issuance or notification whichever is later, failing which, the suit shall abide”***

Citing the above provisions, the defendant has raised a Preliminary Objection in limine that the plaint and all subsequent proceedings be struck out and dismissed with costs as the suit is fatally incompetent by virtue of the said provisions.

That Preliminary Objection is the subject of this ruling.

What is the background to this case? The facts are largely un-contested. The plaintiff filed this suit on 11th June 2015 at the High Court in Embu but it was transferred to the High Court in Nyeri where on 16th June 2015 Justice Waithaka gave some orders on the urgent application and ordered that the defendant be served with the case. On 22nd July 2015, the plaintiff served the defendant with the application and plaint but not with summons. On 7th August 2015, the defendant’s advocate filed a notice of appointment together with a Notice of Preliminary Objection and the summons were signed by the Deputy Registrar on 4th September and the same were served upon the defendant’s advocate on 15th September 2015. The issues for determination are therefore:-

1. ***Whether this suit was validly filed without the summons and whether the failure to extract the summons within 30 days renders the suit fatally defective.***
2. ***Whether the summons were properly served upon the defendant.***
3. ***Whether the defendant has failed to enter appearance within the prescribed time and therefore a default judgment should be entered against him.***

When counsels appeared before me on 13th October 2015, it was agreed that the Preliminary Objection be canvassed by way of written submissions which both parties have now filed.

I have considered the Preliminary Objection, the pleadings herein and the submissions filed.

It is the submission of counsel for the plaintiff that a suit can properly be commenced by way of plaint and the absence of summons does not render the suit non-existent. On the other hand, counsel for the defendant has submitted that failure to comply with the rules renders the suit defective and even Article 159 (2) (d) of the Constitution cannot aid the plaintiff. Reliance has been placed on words of **Kiage J.A** in the case of **NICHOLAS KIPTOO Arap KORIR SALAT VS I.E.B.C & 6 OTHERS 2013 e K.L.R** where the Learned Judge stated as follows:-

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all Courts, must never provide succor and cover to parties who exhibit scant respect for rules and technicalities. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules”.

Those words by **Kiage J.A.** however, were the minority voice because **Ouko J.A** (with whom **Mohammed J.A** agreed) delivered the following majority decision:-

“The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Yet the period prior to 2010, when the overriding objective principle and the Constitution were promulgated, striking out of pleadings, as demonstrated by the cases cited by the respondent, for reasons that were purely technical was the rule rather than the exception”

The Judge went on to observe as follows:-

“Deviations from and lapses in form and procedure which do not go to the jurisdiction of the Court or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings”.

I would agree with those general principles because the trend now is not to apply the words of the statute in such a way as to cause an injustice to the other party but rather to enforce the spirit and core values of the law especially where no prejudice has been caused to the other party. That is not to say that rules should not be followed. Rules should be followed because they aid in the orderly and efficient processing of judicial adjudication. To that extent, I would agree with **Kiage J.A** that a party ***“who exhibits scant respect for rules and timelines”*** should not benefit from the Court’s discretion. However, Courts should be able to excuse lapses that are explained satisfactorily and which do not go to the

substance of the dispute or prejudice the other party. In the case now before me, the defendant was subsequently served with summons through his advocate on 15th September 2015 after the summons were signed by the Deputy Registrar on 4th September 2015. I am un-able to see that there was any deliberate attempt to circumvent the adjudication process in this case. I can only reiterate the words of the Court in **GITHERE VS KIMUNGU 1976 – 85 E.A 101** as follows:-

“.....the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case”

Looking at **Order 5 Rule 1 (1) of the Civil Procedure Rules**, it does not actually provide that a suit shall be filed together with the summons. That order which I have already cited above says:-

“When a suit has been filed, a summons shall issue to the defendant ordering him to appear within the time specified therein” - emphasis added.

It is not the law that the filing of a plaint and the issuance of summons must be done simultaneously. A plaint can be filed and the summons issued later because the purpose of the summons is to order the defendant to appear and answer the claim. In any event, a suit is not instituted by the plaint and summons. **Order 3 Rule 1 (1) of the Civil Procedure Rules** is very clear that a suit is only instituted by presenting a plaint or any other prescribed manner. It reads:-

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed” emphasis added.

I would not therefore sustain the Preliminary Objection that this suit is defective and should be struck out.

With regard to the service of the summons upon the defendant’s advocate, it is common ground that the summons were only signed by the Deputy Registrar on 4th September 2015. They could not therefore be served before they were signed by the Deputy Registrar and the period between 4th September 2015 and 15th September 2015 when they were served upon the defendant’s appointed advocate was well within the thirty days period provided for under **Order 5 Rule (16) of the Civil Procedure Rules**. If there was any delay in the signing of the summons, that was a lapse on the part of the Deputy Registrar for which the plaintiff should not be blamed.

Finally, as to whether a default judgment should be entered against the defendant herein, the plaintiff has not applied for such judgment and therefore that issue does not arise for my determination. Even if the defendant thought that there was no suit to defend, a defence raising that very issue should have been filed. I say no more on that except that the defendant should file his defence, if any, within 15 days of this ruling.

Ultimately therefore, upon considering the matters herein, I find no merit in the Preliminary Objection which I dismiss.

Costs in the cause.

B.N. OLAO

JUDGE

16TH MARCH, 2016

Ruling delivered in open Court this 16th day of March 2016

Mr. Macharia for Mr. Opondo for Plaintiff present

No appearance by the firm of Onyoni Opini & Gachuba for Defendant.

B.N. OLAO

JUDGE

16TH MARCH, 2016