



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION - MILIMANI**

**CIVIL SUIT NO. 454 of 2011**

**B E T W E E N:**

**WESTERN AIRWAYS LIMITED.....PLAINTIFF**

**VERSUS**

**UBA BANK KENYA LIMITED.....1ST DEFENDANT**

**COMMISSIONER OF LANDS.....2ND DEFENDANT**

**R U L I N G**

1. The Application before the Court is brought by the First Defendant to the suit, that is UBA Bank (Kenya) Limited. The Pleadings seem to transpose the words Bank and Kenya in the title.

2. The Application before the Court is brought by the First Defendant Bank. It was filed on 14th April 2015 and is brought under **Order 5 Rules 1, 2, 3 and 6 of the Civil Procedure Rules and Section 1A and 1 B of the Civil Procedure Act (Cap 21, Laws of Kenya)** It seeks the following Orders:

*(1) THAT the Honourable Court be pleased to strike out the Plaintiff's suit; and*

*(2) THAT the Plaintiff does pay the 1st Defendant the costs of this application and the costs of the suit."*

3. The Application is supported by the Affidavit of a Fred Chumo, who was at the time the Company Secretary of the First Defendant. He says he is well versed with the facts. He sets out that the suit was instituted by a plaint which was filed in Court on 1st November 2011 seeking an injunction against the bank over the suit property. 1st Defendant then filed a Notice of Appointment of Advocates on 8th November 2011 and later a Statement of Defence on 6th June 2013. He then states that *"the same is improperly before the court as the Plaintiff has not taken out summons"*. Surprisingly, Mr Chumo states at paragraph 8 firstly, *"THAT I am aware that the Plaintiff has not been keen in obtaining the said summons"* and secondly, *"that "there has been no indication that they have requested the Deputy Registrar to issue the summons"*. The Deponent does not explain the source of his knowledge about the Plaintiff's actions and state of mind.

4. The Deponent also sets out the advice of the First Defendant's *"Advocates on record that a summons is a judicial document calling a party to submit to the jurisdiction of the court and in the absence of summons the 1st Defendant cannot enter appearance or file a Defence as encapsulated under Order 5 Rule 1... Further that the Plaintiff is required to collect and serve the summons which it failed to do and*

as such the suit shall abate". If that is the case, why is this application necessary? He then goes on to say that collection and service of summons is "a mandatory term" and failure to do so "is a fundamental defect in the proceedings that the inherent powers of the Court under Section 3A of the Civil procedure cannot cure." (sic). The Deponent urges the Court to strike out the suit with costs to the Applicant.

5. When the Application was first listed for Mention on 29th May 2015, that is more than 6 weeks after the Application was filed, it still had not been served on the Plaintiff/Respondent. It was served subsequently. The Application is opposed. The Plaintiff filed a Replying Affidavit of one Bertha Odhiambo. A copy of that Replying Affidavit is not on the Court file, however it is clear from the Applicant's Submissions that it was served upon it. It was said to have been filed on 30th June 2015. The Respondent asks the Court to dismiss the Application because it lacks merit.

6. In evaluating the application it is instructive to consider the history of the suit and proceedings. By way of chronology, the Suit was filed on 10<sup>th</sup> October 2011 together with a Certificate of Urgency seeking an injunction to prevent sale of the suit property. The Plaintiff paid a fee of Kshs72,240/=. On 1<sup>st</sup> November 2011, the Plaintiff filed a second Certificate of Urgency Supported by the Affidavit of Bertha Odhiambo, together with an Amended Plaintiff. The Plaintiff paid a further fee of Kshs.2,050/-. Those documents were served upon the Defendant on 3<sup>rd</sup> November 2011. On 8<sup>th</sup> November 2011 the Defendant filed a Notice of Appointment of Advocates dated 5<sup>th</sup> November 2011.

7. On 1<sup>st</sup> November 2011 when the Certificate came before Hon Havelock J (as he then was), he made certain directions on how the matter was to proceed. The Court record shows that he said, *"From the Supporting Affidavit of the Plaintiff's Managing Director Bertha Odhiambo dated 28<sup>th</sup> October 2011, I am satisfied that this matter be certified as urgent. Although the relationship between the Plaintiff and the First Defendant is relevant to this matter, I am convinced that the proper procedures leading to the sale of the suit property by Regent Auctioneers on 11<sup>th</sup> October were followed. What Bertha Odhiambo has deponed to in her Affidavit which is Supported by the Affidavit of Tom Okongo bearing even date therewith, as to the goings on at the auction sale do not come over well with me as to methodology by which the sale was conducted. However, all parties should have their say in this matter before the Court can give a fair Ruling. Consequently, I order the Plaintiff to serve all the papers filed in Court including the Amended Plaintiff and the Notice of Motion filed today upon both Defendants who will have an opportunity of Replying thereto. Inter parties hearing will be on the 8<sup>th</sup> November 2011 at 11 am Orders accordingly..."*. The Documents were served as Ordered on 3<sup>rd</sup> November 2011. On 8<sup>th</sup> November 2011, the Matter came before the Court and the Learned Judge gave further directions and further ordered that the status quo on the ground be maintained and so it went on. On 16<sup>th</sup> December 2011 the Learned Judge Ordered that "Parties to take a date at the Registry for the hearing of this suit in 2012 on a priority basis". It was so listed on 23<sup>rd</sup> April 2012. It was taken out By Consent on that day. On 23<sup>rd</sup> April 2013, Hon Havelock J took the matter out of the Hearing List and directed that it be sent before any other Judge of the Division, probably because his was due to retire shortly after. No hearing date was taken in the ensuing 12 months, however, it was listed before him again. He then directed it to be placed before the Presiding Judge of the Division. The First Defendant filed its Witness Statements on 4<sup>th</sup> June 2013 and its Defence on 6<sup>th</sup> June 2013. Various dates were fixed and vacated but no hearing date was ever fixed. On 30<sup>th</sup> March 2015, the First Defendant filed the Application now before the Court. That Application seeks an Order dismissing the suit. It first came before this Court on 29<sup>th</sup> May 2015, when it was readily apparent that the Application had not been served on the Plaintiff/Respondent.

8. The crux of the Application is that the suit should be dismissed for failure to serve a Summons to Enter Appearance pursuant to Civil Procedure Rules Order 5. The Applicant relies on Rules (1), (2), (3) and 6 which provide:

ORDER 5

ISSUE AND SERVICE OF SUMMONS

[Order 5, rule 1.] Issue of summons.

(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 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 issue or notification, whichever is later, failing which the suit shall abate.

[Order 5, rule 2.] Duration and renewal of summons.

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

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

(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

[Order 5, rule 3.] *Service on a corporation.*

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.

[Orders, rule 6.] Mode of service.

6. Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge, or such officer as he appoints in this behalf, and sealed with the seal of the court.

9. The Parties filed Written Submissions and were accorded the opportunity to highlight. The Second Defendant has not participated in the proceedings. Mr Wilson chose to highlight the arguments for the Applicant/1<sup>st</sup> Defendant. Mr Okeyo for the Plaintiff/Respondent was happy to rely on his submissions.

10. The Applicant filed Written Submissions on 12<sup>th</sup> October 2016. They set out a version of facts that are challenged by the Plaintiff as being inconsistent with the Supporting Affidavit. The Application is dated 17<sup>th</sup> March 2015. The Supporting Affidavit is dated 30<sup>th</sup> March 2015 and it was issued on 14<sup>th</sup> April 2015, making that the effective date. The Application was not served until after the Court ordered service (twice). The direction for filing a return of service has not been complied with. The Replying Affidavit was filed on 30<sup>th</sup> June 2016. The Plaintiff's Written Submissions were filed on 1<sup>st</sup> November 2016 which means the Court is deciding the matter 5 years after Justice Havelock ordered the suit be listed for hearing as a priority.

11. The Application is based on the assertion that the Plaintiff has failed to take out Summons. The Applicant relies on a number of authorities which it has quoted from extensively in submission. In each of those cases the Court struck out the suit. The Applicant also relies upon **Section 19 of the Civil Procedure Act (Cap 21)** which provides; “**19. Every suit shall be instituted in such manner as may be prescribed by rules.**” The Applicant argues that in this case the rules that apply are Order 5 Rules 1 and 3.

12. The first authority relied upon; **Civil Case 133 of 2005 Alfred Makhongo and 2 Others –v- Bishop Zablon Nthamburi and 2 Others** was brought under Order 6 Rule 13(1)(a)-(d) of the **Civil Procedure Rules**. In that case, the Learned Judge set out that the Rules require compliance with timelines for a suit to be and remain valid. He then goes on to say; “*would there be a valid suit without a valid summons in place, I think not. Issuance and service of summons to enter appearance is not a mere formality. It brings a defendant into a suit. Without bringing a defendant into the suit there cannot be any final determination of the Plaintiff's claim. That is why the Rules set out a definite time span within which summons must be served, or extended and served, upon a defendant. It is really an issue of jurisdiction. The court would not be properly seized of the matter until the defendant has been brought into the suit by service of summons*”. The Learned Judge then went on to strike out the suit although the Defendant had entered an appearance.

13. In the second case on the Applicant's List, **Anthony Wechuli Odwisa vs Alfred Khis Munyangayi [2006] eKLR, the** Judge struck out the suit suo moto due to the absence of service of summons to enter

appearance. He expressed the view that the absence of a summons makes the entering of appearance a nullity in law. In the third case **Chesoni & Another vs Silverstein & Another 2006** Justice Visram, as he then was, considered that a suit without a summons was void and therefore a nullity. All the authorities put forward by the Applicant are from the High Court and pre-date the Constitution of Kenya 2010. The Applicant also assets delay in relation to the failure, such delay being 5 years.

14. The Plaintiff/Respondent opposes the Application. An Affidavit in Reply and opposition was filed. Unfortunately, it is not on the Court File, however it is referred to in Submissions so it is clear it exists. The Applicant itself tells the Court that the Plaintiff's Director depones that a Summons was provided to the Court to complete to allow for service and that was not done. That statement is verified by the fact that at the time of drafting there are three copies of the summons on file that have not been signed by the Deputy Registrar and therefore are not "issued" the Plaintiff's response is to contend that to aver that the suit has abated is to ignore the fact it is the Court that has failed to sign and release the Summons to the Plaintiff. The Plaintiff urges the Court to consider the matter in light of **Sections 1A, 1B and 3A of the Civil Procedure Act**, namely the overriding objective and its wide discretion. It also relies on **Article 159(2)(d)**.

15. The Plaintiff has filed Written Submissions and Authorities. They are set out below, starting with the case of **Terry Wanjiru Kariuki -vs- Equity Bank Limited & Another 2012)** eklr, where the Plaintiff argues the Learned Judge made reference to the case of **Stephen Boro Gitiha -vs- Family Finance Building Society & 3 Others Civil Application Number. Nai. 263 of 2009**, Nyamu JA on 20/11/2009 who said;

*"the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."*

16. The Plaintiff also relies on **Kenya Commercial Bank Limited -vs- Kenya Planters Co-operative Union Civil Application No. Nai. 85 of 2010** where it was held that:

*"where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfill them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case. "*

The Plaintiff also relies on **Kenya Commercial Finance Company Limited -vs- Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** where the Court of Appeal expressed itself as follows;

*"the applicant's submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of Section 3A and 3B of the Appellate Jurisdiction Act.. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out. In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal, the only difference now is that the Court has wider powers and will*

not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”. (EMPHASIS OURS)

17. The Plaintiff submits that there is an alternative remedy available in event of default thus; Whereas **Order 5 Rule 2 (7)** provides that where no application has been made under **subrule (2)** (to extend the validity of the summons) the court may without notice dismiss the suit at the expiry of twenty –four months from the issue of the original summons, that provision is discretionary and must be applied in light of the circumstances of a particular case as well as the overriding objective as was held by Odunga J in **Terry Wanjiru Kariuki -vs- Equity Bank Limited & Another [2012] eKlr.** The Learned Judge also went ahead to point out that;

*“Therefore taking into account the unique circumstances of this case, I am not inclined to adopt the more drastic approach of terminating these proceedings for failure by the plaintiff to comply with the dictates of the rules of procedure. I have also perused the Court file and I have not been able to find how the first advocates for the defendants brought themselves on record. Whereas the defendants had no obligation to enter appearance without being summoned to do so, the practice that is common in this jurisdiction is for one to enter appearance under protest... Taking into account the foregoing circumstances, it is my considered view that this is a case which in my view should be saved under the provisions of Article 159(2) (d) of the Constitution.”*

18. The Plaintiff contends that summary procedure should be discouraged unless in the clearest of circumstances and cases. This is not one of those clear and plain cases for such discretion to be exercised as the Applicant has been actively involved throughout all the proceedings and has not given evidence of any loss or prejudice they may have suffered, beyond redemption. **Article 50 and 159 of the Constitution 2010** enjoins courts to dispense substantive justice without undue procedural technicalities. In the case of **Geminia Insurance Company Limited -vs- Kennedy Otieno Onyango [2005] eKLR** where Musinga J ( as he then was) had the following to say:

*“An act of striking out of pleadings by the court should therefore be exercised cautiously and with a lot of restraint. Reasons advanced to the court for striking out a pleading must be so cogent and water-tight and the pleading must be so useless prima facie that any reasonable or prudent man would confidently find the pleading so be so baseless and a waste of time... The main aim is to sustain rather than terminate a suit, striking out a suit is a draconian step which must be used as a last resort. This was a position that was espoused in “ It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”*

### Reasoning and Decision

19. The Applicant’s argument for striking out the suit is attractive by its simplicity, however it cries out for further analysis. Can it be correct that a Party can be penalised for, and effectively shut out from the seat of justice for failing to serve a document the production of which is beyond its control? Add to that Article 50 of the CoK 2010 which enshrines the right to access to justice by saying “....” . The Respondent also prays in aid Article **159(2)(d)** which provides that “*d) justice shall be administered without undue regard to procedural technicalities*”.

20. The Applicant’s position is that by reason of **Section 19 of the Civil Procedure Act (Cap 21)** the Plaintiff has failed to comply with the Rules for instituting a suit. In fact, the Rules for instituting a suit are contained in **Order 3**. If there was any doubt about that then the heading “Frame and Institution of Suit” would clear up any doubt. **Order 3 Rule 2** Lists the Documents which must accompany a suit. It provides:

[Order 3, rule 2.] Documents to accompany suit.

2. All suits filed under rule 10) including suits against the government,

*except small claims, shall be accompanied by —*

*(a) the affidavit referred to under Order 4 rule 1 (2);*

*(b) a list of witnesses to be called at the trial;*

*(c) written statements signed by the witnesses excluding expert witnesses; and*

*(d) copies of documents to be relied on at the trial including a demand letter before action:*

*Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.*

[Order 3, rule 3.] Register of civil suits and filing.

3. (1) *A register of suits, to be called the register of civil suits, shall be kept at every registry; and the particulars of every suit filed in a registry shall be entered in the register and all such suits shall be numbered in each year according to the order in which they are instituted in that registry.*

*(2) Every plaint to be filed shall be presented to the registry during office hours together with any fee payable on its filing and each such plaint shall be date-stamped with the date on which it was so presented which shall be the date of filing the suit notwithstanding any dispute as to the amount of the fee payable.*

It is noteworthy that the List does not include Summons to enter appearance. Looking at the scheme of the Rules, the next Order – **Order 4** deals with the form and content of the Plaint. We then come to **Order 5** which is entitled “Issue and Service of Summons”. It is clear that relates to notifying the prospective defendants of the suit and cause of action. That is consistent with the Constitution and also the rules of natural justice that a party should know the case against him and have the right to defend it.

21. That interpretation of the Rules is supported by its own wording **Order 5 Rule 1** provides: “1. (1) *When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein....*”.

It says clearly “when a suit has been filed...” that suggests the filing of the suit comes before the Summons not after nor at the same time. Therefore, the argument for the Suit being void and/or a nullity *ab initio* cannot be sustained. It is correct that non compliance as enumerated in the later rules and sub-rules renders the suit susceptible to being struck out. However, that does not mean it was void when it started out. According to Rule 3 and 4 the suit was filed as appropriate.

22. Should the Court then, now 5 years after the event strike out the suit for a procedural shortcoming? In **DT Dobie -vs- Joseph Muchira & Another** the Court cautioned against striking out a suit too readily. The Plaintiff relies on that authority and also as well as **Geminia Insurance Co Ltd vs Kennedy Otieno Onyango [2005] eKLR** The Applicant argues against those cases on the basis that they apply to different rules. The case of **Terry Wanjiku Kariuki vs Equity Bank** is distinguished because in that case the Summons had been issued by not served so could be extended. It is said in this case the Summons has not been issued. Again, the argument comes back to who is responsible for issuing the summons? In this Division the practice is for summons to be signed and therefore issued by the Deputy Registrar. It is clear from the Court File that the Plaintiff paid the requisite fees at the time. Also clear is that sufficient copies of the Summons were provided for issuing. That was not done.

23. Under **Article 47 of the CoK 2010**, “Every person has the right to administrative action that is

expeditious, efficient, lawful, reasonable and procedurally fair. That is closely followed by **Article 48** which provides, “*The state shall ensure access to justice to all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice.*” The Fair Administrative Action Act No 4 of 2015 at Section 4 provides, “*Administrative action to be taken expeditiously, efficiently, lawfully etc.*”

*Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*

*Every person has the right to be given written reasons for any administrative action that is taken against him.*

*Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-*

*(a) prior and adequate notice of the nature and reasons for the proposed administrative action;*

*(b) an opportunity to be heard and to make representations in that regard;*

*(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*

*(d) a statement of reasons pursuant to section 6;*

*(e) notice of the right to legal representation, where applicable;*

*(f) notice of the right to cross-examine or where applicable; or*

*(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.*

The Plaintiff does not appear to have been given any reason for the failure to issue the Summons. The Defendant/Applicant asserts that the Plaintiff took no attempts to follow up the matter. That statement must be evaluated against the fact that the Defendant could not have known. The Defendant/ Applicant has not set out the source of that information. In the circumstances, it is of very little if any evidential value at all.

24. The Respondent invites the Court to consider what prejudice the First Defendant has suffered. The First Defendant filed an Notice of Appointment. Although that is not the same as a Memorandum of Appearance, in this case it was treated the same. The Applicant attended several hearings before Hon Havelock J, through Counsel. The Suit was listed for final hearing. At stage, there was no mention of appearance being under duress or being opposed, so much so that the Applicant even filed a Statement of Defence and Witness Statements. If there was an issue as to jurisdiction, the Applicant fully submitted to the jurisdiction repeatedly before Justice Havelock. Had the Defendant raised the issue then, the Respondent could either have remedied it, or not. The fact that the Applicant did not raise the issue meant that the Plaintiff proceeded on the basis of that conduct. The First Defendant/ Applicant is therefore now estopped from raising that argument, having failed to do so at the several earlier opportunities presented. Why did the Applicant consent to take a further date for hearing of the suit. Is that not a clear indication that no objection was taken at the time?

25. As to direct prejudice, the Applicant is aware of the suit, as intended by **CPR Order 5**. The Applicant has appeared and defended both the suit and the applications for status quo orders. The Applicant has complied with **Order 7 Rule 5** in so far as it relates to Witness Statements and Lists of Documents. The Applicant was not prevented from filing a Statement of Defence even though it was filed several months after the event. In the circumstances no prejudice is readily apparent. For that reason and the reasons set out above, the Application is dismissed with costs.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**DATED 13<sup>th</sup> December 2016**

**SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>th</sup> DAY OF DECEMBER 2016.**

**In the Presence of:**

**Plaintiff/Respondent : No Appearance**

**First Defendant/Applicant : Mr Mbugua Holding Brief for Mr Wilson**