



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC APPEAL CASE NO. 2 OF 2020**

**FAULATA RAMADHANI RAJABU.....1<sup>ST</sup> APPELLANT**

**GEORGE WILLIAM MWEMA.....2<sup>ND</sup> APPELLANT**

**AMAL RAMADHAN.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**LARS EHRHADT.....1<sup>ST</sup> RESPONDENT**

**EDWIN MITSANZE SULUBU RARUA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

This is an Appeal against the Ruling and Order of the Principal Magistrate Honourable Wambugu delivered on the 11<sup>th</sup> day of December, 2019 at Kwale in ELC NO. 46 of 2019 Lars Ehrhart, Edwin Mitsanze Sulubu Rarua vs Faulata Ramadhan Rajabu & 2 Others. The Appellants herein, Faulata Ramadhan Rajabu, George Williams Mwema and Amal Ramadhan being dissatisfied with the whole of the said Ruling and/or Orders of Hon. P.M. Wambugu Principal Magistrate delivered on 11<sup>th</sup> December 2019 hereby appeals to this Honourable Court on the following grounds, inter alia:-

1. That the Learned trial Magistrate erred in law and in fact in finding that the Appellants preliminary objection raised on the issue of Summons lacked merits thereby dismissing the same;
2. That the Learned trial Magistrate erred in law and in fact by failing to appreciate that summons to Enter Appearance in a suit are very fundamental as they are the ones which sets in motion the other processes thereby arriving at a wrong decision;
3. That the Learned trial Magistrate erred in law and in fact by failing to hold that failure to take out summons to enter appearance is a procedural requirement and not just a technicality which can be cured by Article 159 of the Constitution;
4. That the Learned trial Magistrate erred in law and in fact by failing to appreciate that the Appellants filed a Notice of Appointment to this suit only for the sole purpose of seeking audience when the preliminary objection was raised but did not enter appearance.

The Appellants sought orders that;

1. The Appeal herein be allowed the orders of the Court made on 11<sup>th</sup> December 2019 be set aside and/or overturned and the same be substituted with an order that the suit be struck out in its entirety.
2. The costs of this Appeal and that of subordinate court be allowed to the Appellants.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Appellants submitted that the Respondents herein filed a suit against the Appellants on the 14<sup>th</sup> June 2019 and served the same to the Appellants without summons to enter appearance accompanying the plaint. That on the 31<sup>st</sup> of June 2019, the Appellants raised a Preliminary objection to the entire suit on the grounds that the same offended express provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010. The same is as irredeemably incurable as it is fatally defective hence ripe for striking out with costs. On the same day, the parties herein made their oral submissions in respect to the Preliminary Objection raised, and on 11<sup>th</sup> of December 2019, Hon. P.M Wambugu issued a ruling dismissing the Preliminary objection raised on 31<sup>st</sup> June 2019 for reasons that dismissal of suits by way of

preliminary objection serves no substantial justice, the court is beholden by Article 159 of the Constitution of Kenya 2010 to administer justice without undue regard to technicalities and that the right to be heard is fundamental to administration of justice.

The Appellants being dissatisfied with the whole ruling and/or orders of Hon. P.M. Wambugu delivered on 11<sup>th</sup> December 2019 filed an appeal to this Honourable Court on grounds that the Learned Trial Magistrate erred in law and in fact in finding that the Appellants' preliminary objection raised on the issue of summons lacked merits thereby dismissing the same. It is their submission that the Respondents' suit is fatally defective and incompetent as no summons to enter appearance have been filed together with the plaint and none so far has been served to the Appellants for the last 19 months since the suit was filed on the 14<sup>th</sup> of June 2019. Order 5 rule 1 (2), (3) and (5) of the Civil Procedure Rules 2010 are couched on the mandatory terms "shall" and the same clearly state that every summons shall be prepared by the plaintiff or his advocate and filed together with the plaint. The summons shall then 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.

The Respondents' advocates herein filed the plaint in issue without summons to enter appearance, hence the ripple effect was that the summons were not signed by the Magistrate or an authorized officer and sealed with the seal of the court and eventually the Respondents served the Appellants with the plaint without summons accompanying it hence making the plaintiffs' suit fatally defective and incompetent. This makes the suit herein ripe for striking out and we submit that the Learned Trial magistrate erred in law and fact when he did not hold as such. That the filing of a notice of appointment and grounds of opposition do not at all constitute entering appearance.

The Appellant prays that this Honourable Court administers justice by allowing the appeal herein, setting aside the order made on 11<sup>th</sup> December 2019 and substituting the same with an order striking out the Respondents' suit with costs to the Appellants as the suit in itself offends the express provisions of Order 5 Rule 1 of the Civil Procedure Rules 2010, making it irredeemably incurable as it is fatally defective.

This court has considered the appeal and the submissions therein. The Respondents were served but filed no response. Order 5, rule 1(1), (2), (5) and (6) of the Civil Procedure Rules, 2010 (the new Rules) provide as follows;

*"(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.*

.....

*(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (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."*

In **Nanjibhai Prabhudas & Company Ltd vs Standard Bank Ltd (1968) EA (K) 670**, the Court of Appeal held, that:

*"(i) Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.*

*(ii) Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;"*

**Sir Charles Newbold** at page 681 and 683 of **Prabhudas'** case (supra) observed;

*"The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant."*

*"The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."*

He further observed at page 684:

*"In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MACDUFF J, in the Jethalal case (supra) is an incorrect statement of the law and should not be followed." I consider that the defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred. I also consider that in as much as these two irregularities have clearly not prejudiced the defendant in any way he has not shown good reason why*

*the service of the summons should be set aside on the ground of those irregularities and, accordingly, I would not set it aside.”*

In **Equatorial Commercial Bank Ltd vs Mohan Sons (K) Ltd (2012) eKLR** where the Court of Appeal similarly stated:

*“Considering the facts and circumstances before us can summons be treated as void though because it has not complied strictly with the statutory provisions? Can a litigant after having fully participated in the legal process on service of such summons, resale on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to find so. We shall find that the respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties.”*

*... We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter. The following passages from the Halsbury’s Laws of England, Vol. 16(2) at Paragraph 907 on page 390 stipulate the meaning of ‘waiver’ and we reproduce it:-*

*“The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.”*

*“A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist*

*Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent.”*

In the instant case the Appellant stated that they never entered appearance in this matter and only filed a notice of appointment and grounds of opposition for the sole purpose of defending the notice of motion dated 14<sup>th</sup> June 2019 as it sought orders of injunction which if granted would have prejudiced the Appellants. Secondly it was to raise the preliminary objection. I find that even if the Appellants never entered appearance, their active participation in the matter can be construed to have waived its right to insist on strict adherence of procedural matters. In addition, Order 5 Rule (1) provides the function of summons as being to order the Defendant to appear within a specified time. In my view, where a Defendant gets notice of a suit against him through other means other than summons and participates in subsequent proceedings, there is no prejudice occasioned by the this that would warrant the dismissal of a suit. I am persuaded in this regard by the decision in the case of **Laserview Systems Limited vs Crissam Acres Limited & Another, (2012) eKLR**, where summons to enter appearance though filed together with the Plaintiff had not been signed and sealed, and the court declined to find that the suit had abated stating that the consequences of making such a finding were drastic, and would see the Plaintiff punished for a mistake which was not of his own making. I concur with the decision in the case of **Sealink Holdings Limited vs Barclays Bank of Kenya Limited (2021) eKLR** the court held that;

*“While in this matter the Defendant never entered appearance, still its active and unconditional participation in the proceedings can be construed to be that it waived its right to insist on the strict compliance of the provisions of Order 5 Rule 1(6) CPR. The dictates of justice does not allow the Defendant to use the failure of issuance and service of summons as a reason to have the matter dismissed.”*

Article 159 (2) (d) of the Constitution of Kenya makes it clear that when called upon to administer Justice, the courts or any other tribunals which exercise judicial authority, shall not be blindly enslaved by procedural technicalities. The Constitution does not urge the courts to disregard procedural rules. It only says that the courts should not have undue regard to procedural technicalities. I find that the Learned Trial Magistrate did not err in law and in fact when he dismissed the preliminary objection. This court appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>rd</sup> DAY OF FEBRUARY 2022.**

**N.A. MATHEKA**

**JUDGE**