



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 65 OF 2012

FINA BANK LIMITED.....PLAINTIFF

VERSUS

SATYAM INDUSTRIES KENYA LIMITED.....1ST DEFENDANT

AISHA MUHAMED RAHAMTULLAH.....2ND DEFENDANT

ALIA COMMODITIES (K) LIMITED.....3RD DEFENDANT

MUMTAHINA AHMED MANFUDH JEIJAN.....4TH DEFENDANT

ADEY VYANAPYIL THOMAS.....5TH DEFENDANT

RULING

1. The Plaintiff's *ex parte* Notice of Motion application was brought pursuant to the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21 Laws of Kenya), Order 50 Rule 6, Order 5 Rule 2 (2) and 17 and Order 1 Rule 10 and 14 of the Civil Procedure Rules, 2010. It sought the following orders:-

1. THAT the time limited for applying for extension of validity of summonses (sic) to enter appearance against the Defendants be enlarged and this application be deemed to have been filed with such enlarged time.

2. a. THAT the validity of summonses (sic) to enter appearance against the Defendants be extended for a further period of 12 months.

ALTERNATIVELY

b. THAT the Honourable court be pleased to re-issue summonses (sic) to enter appearance against the Defendants.

3. THAT leave be granted to the Plaintiff to effect service of summons to enter appearance

upon the Defendant (sic) by substituted means through advertisement once in the Daily Nation Newspaper on a working day and further through affixing the same in the Notice Board of the Milimani Law Courts Nairobi.

4. THAT leave be granted to the Plaintiff to substitute its names, “Fina Bank Limited” with “Guaranty Trust Bank (Kenya) Limited.”

5. THAT the plaint dated 30th January 2012 be amended as per the annexed draft to reflect the new names Guaranty Trust Bank (Kenya) Limited.

6. THAT the costs of this application be in the cause.

2. The court will address the two (2) issues of extension of Summons to Enter Appearance and amendment of the Plaint under separate heads.

THE PLAINTIFF’S CASE

3. The Plaintiff’s application was supported by the Supporting Affidavit of Zakary Muturi Muchai that was sworn on 5th September 2014. Its Written Submission were dated and filed on 2nd February 2015.

4. The Plaintiff stated that its process server effected service of the Summons to Enter Appearance against the 1st and 3rd Defendants by way of registered post without leave of the court. Despite diligent efforts, it was unable to trace the 2nd, 4th and 5th Defendants to serve them with the Summons due to differences between them that “ **involved threats of violence, kidnapping and possible commission of crime against each other’s families.**” The Summons had therefore expired unserved.

5. It also averred that it had not been indolent in serving the said Summons and further that it had delayed in filing the present application as it had been unable to trace the 2nd, 4th and 5th Defendants. It contended that it was mete and just that its application to have the Summons to Enter Appearance re-issued and served by substituted means and Plaint amended as on 27th December 2013 as its name was changed to Guaranty Trust Bank (Kenya) Limited be allowed.

LEGAL ANALYSIS

I. EXTENSION OF SUMMONS TO ENTER APPEARANCE

6. The Plaintiff placed reliance on the case of **Kenya Commercial Bank Limited vs Ann Kajuju Magondu & Others [2012] eKLR** in which Mabeya J held that the provisions of Order 50 Rule 6 of the Civil Procedure Rules, 2010 empowered the court to enlarge time to extend Summons before and after their expiry. Its submission was that the said Order provided empowers the court to extend time for doing any act or taking any proceedings outside the time allowed for doing such act or taking proceedings.

7. Order 50 Rule of Civil Procedure Rules provides as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have such power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”

8. It referred the court to the provisions of Order 5 Rule 2(1) and (2) of the Civil Procedure Rules that stipulate as follows:-

1. A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of 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 it is satisfied that it is just to do so.

9. It was also its submission that Order 5 Rule 2 (7) of the Civil Procedure Rules was not stated in mandatory terms and that the court had a discretion not to dismiss a suit where no application had been made for extension of validity of summons at the expiry of the date of the original summons.

10. It referred the court to the cases of James Muniu Muchere vs National Bank of Kenya [2010] eKLR where Okwengu J (as she then was) stated as follows:-

“...there is a provision for extension of validity of the original summons to enter appearance, but there is no provision for re-issue. In my considered view, that does not inhibit the court from re-issuing fresh summons to enter appearance. The court has powers under Order IV Rule 3 of the Civil Procedure Rules to issue summons to enter appearance that power extends to re-issue of summons to enter appearance where this is necessary for the ends of justice to be met. Re-issue simply means to issue the summons to enter appearance again.”

11. In respect of the case of Mechanised Cargo Systems Limited vs Fina Bank Limited [2007] eKLR , the Plaintiff pointed out that Lesiit J had held that she had power to re-issue summons as she was satisfied that there were grounds for not having effecting summons upon the Defendant therein.

12. It further submitted that Odunga J gave priority to the overriding objective captured in the Civil Procedure Act in the case of Terry Wanjiru Kariuki vs Equity Bank Limited [2012] eKLR and extended the validity of the summons by a period of twelve (12) months.

13. It distinguished the decision of the Court of Appeal in the case of Udyakumar Chandulal Rajani & 4 Others vs Charles Thaithi [1997] eKLR on the ground that the said decision was delivered before the promulgation of the Constitution of Kenya, 2010 and inclusion of Sections 1A and 1B in the Civil Procedure Act.

14. Whereas the court has power under Order 50 Rule 6 of the Civil Procedure Rules to enlarge time within which to do an act or take proceedings, the provisions of Order 5 Rule 2 (1) of the Civil Procedure Rules cannot be any clearer on the mandatory nature of the same. Summons have to be valid before they can be extended. Extending summons which are no longer valid is a nullity.

15. It is on this ground that the court was not persuaded to concur with the decisions of Mabeya, Lesiit JJ and Okwengu J (as she then was) as they were made by courts of equal jurisdiction such as this court. The court had in fact distinguished their respective decisions in the case of Barclays Bank of Kenya Limited vs Patrick Njuguna Kubai [2014] eKLR where this court referred to the case of Zakaria Somi Nganga vs Kenya Commercial Bank Limited & 3 Others [2008] eKLR where Lesiit J had the following to say:-

“The summons to enter appearance in this case expired 12 months from the date of issue...it was not possible to revive them. That therefore means that the Plaintiff’s suit lapsed for reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules...”

16. In the case of Udaykumar Chandulal Rajani & 4 Others v Charles Thaithi (Supra), the court of Appeal held that:-

“...the court had no power to extend the validity of summons beyond twenty four months, when in fact there were no valid summons in existence...”

17. This is still good law that binds this court when placed against the case of Holme vs George Eliot &

Co (1944) KB 591 that was relied upon by the Plaintiff firstly because being English law, it is merely persuasive and secondly, the provisions of Order 5 (1) and (2) of the Civil Procedure Rules are mandatory in nature. Unless the Court of Appeal was to review its decision, this court is bound by the decision that was made in the case of **Udyakumar Chandulal Rajani & 4 Others vs Charles Thaithi** (Supra).

18. Indeed, the overriding objectives of the Civil Procedure Rules and the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 to the effect that the court has to administer justice without undue regard to technicalities cannot be an excuse for courts to validate actions that are null and void.

19. In the present case, this court was clear in its mind that the Summons to Enter Appearance in respect of the 2nd, 4th and 5th Defendants herein could not be extended for the simple reason that they were dead. As they were not in existence, there was nothing to extend. Consequently, having not been served and renewed within the life time of the original summons, the suit stood abated as against the 2nd, 4th and 5th Defendants herein.

20. In this regard, the court therefore had no hesitation in agreeing with the holding of Rawal J (as she then was) in the case of **Julius Njoroge Muira v Harrison Kiambuthi Mburu [2011] eKLR** in which she stated as follows:-

“...I shall thus without hesitation find that the original summons is not in existence and all the efforts to revive the same by reissuance were null and void. The original summons that has lost its life cannot be resurrected.”

21. For the foregoing reasons, the omission to extend the summons during the period they were valid was not a mistake that could be excused under the provisions of Order 50 Rule 6 of the Civil Procedure Rules as such failure had fatal consequences. Order 50 Rule 6 of the Civil Procedure Rules would only come to the assistance of a party if omission to do a certain act or to take proceedings which were within the confines of what court was permitted to do, circumstances that were distinct from this case.

22. It was immaterial that the Plaintiff had attempted to explain the delay in filing its application to extend the said summons timeously, or that the 2nd, 4th and 5th Defendants would suffer no prejudice if the orders it had sought were granted as prayed. The court therefore had no option but to reject the Plaintiff's submissions that it could re-issue summons against the said Defendants as the initial summons were no longer valid, a critical component in Order 5 Rule 1 of Civil Procedure Rules, 2010.

23. In respect of the 1st and 3rd Defendants, the court found that the time lapse between the time the Summons to Enter Appearance was served upon them and the time the Plaintiff applied to have the same re-issued and served was also outside the stipulated period of twelve (12) months when the court could have considered the mistake by the process server of serving the same by registered mail without leave of the court.

24. Litigation would be fraught with chaos if the court was to completely ignore the mandatory provisions of the conduct of civil cases. It was for this reason, the court found that it did not have any power or jurisdiction to order the re-issue of summons against the 1st and 3rd Defendants as the summons had been served. Order 5 Rule 2(2) of Civil Procedure Rules, 2010 is quite clear that only summons that had **not been served** (emphasis court) and which were still valid could be extended from time to time if the court was satisfied that it was just to do so. This was a defect that the court could not cure by merely relying on the provisions of Sections 1A and 1B of the Civil Procedure Rules or Article 159 (2) (d) of the Constitution of Kenya, 2010.

25. The court was not persuaded by the Plaintiff's submissions that Order 5 Rule 7 of the Civil Procedure Rules, 2010 implied that the court had discretion to re-issue summons. To the contrary, from the understanding of the court, the provision merely gives the court discretion to dismiss a suit if no application has been made under Order 5 Rule 2(2) of the Civil Procedure Rules, 2010 **without notice** (emphasis court) to the Plaintiff.

26. Having said so, the suit herein had not been struck out leading the court to find that the Plaintiff could still amend its Plaint. How it would prosecute its case against the Defendants herein was not an issue this court wished to delve into. It is the Plaintiff's case and it ought to be allowed to organise its affairs to be in tandem with the strict provisions of the law.

DISPOSITION

27. Accordingly, having considered the pleadings by the parties, the affidavit evidence, the written submissions and the case law in support of the Plaintiff's case, the court came to the conclusion that the Plaintiff's Notice of Motion dated 5th September 2014 and filed on 12th September 2014 could only be granted in terms of Prayer Nos (4) and (5) therein. The Amended Plaint shall be deemed to be duly filed upon payment of the requisite court fees. Costs shall be in the cause.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April 2015

J. KAMAU

JUDGE