REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 74 OF 2010

SUSAN KARANJA ……..……..1ST APPELLANT

NJAU KARANJA…….……2ND APPELLANT

VERSUS

KAWAWA MUSUMBA KILONZO…….……..1ST RESPONDENT

MAXWELL KIEMA KATIWA…….....2ND RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of the Chief Magistrate's court at Nairobi Milimani Commercial Courts delivered on 10th February 2010 by Honourable Mr Okato Senior Principal Magistrate in CM CC No. 4775 of 2008.

The genesis of the dispute is that on 7th August 2008 by a plaint dated 7th August 2008, the respondents herein who were plaintiffs in the trial court instituted proceedings against the appellants who were defendants mother and son claiming for an injunction to restrain the appellants from harassing, interfering with the tenancy, evicting or in any way terminating the plaintiffs tenancy and occupation of the flat on LR 37/246/5 Sumba Road Nairobi West, within Nairobi, damages for slander, in respect of the 1st plaintiff/respondent herein costs of the suit and interest.

It was alleged in the plaint that the respondents herein were tenants of the appellants pursuant to a tenancy agreement dated 28th June 2008 on the premises LR 37/246/5 Sumba Road Nairobi West whereof the respondents were to pay rent for kshs 15,000 per month together with deposit of kshs 15,000/- which they dutifully paid and occupied the tenanted premised but that at the time of filing suit, the appellants herein had threatened to evict the respondents after harassing them and even refusing to accept rent. It was further alleged that the 1st appellant had taken to insulting and demeaning the 1st plaintiff by calling him a filthy dog in the presence of his peers.

On 4th April 2008 the defendants/ appellants herein filed notice of appointment of advocates through Mungai Kalande and Company Advocates and on 17th April 2009, they filed defence and counterclaim. The defence denied any tenancy agreement alleged and contended that the respondents forcefully and without the consent of the landlord occupied the named premises and when the respondent were called upon to sigh a tenancy agreement, they refused and later the respondents attempted to settle rent arrears but issued a cheque for kshs 45,000/- in September 2008 which was dishonoured on presentation to the

bank.

In addition, that the respondents then secretly vacated the premises in October 2008 without paying rent arrears which has accumulated to kshs 60,000/- together with water and electricity consumed for the period. The appellants counterclaimed for kshs 123,402.45 inclusive of rent arrears, unpaid electricity and water bills and bank charges for unpaid cheque costs and interest.

The respondents filed reply to defence and defence to the counterclaim on 24th April 2009 denying all the averments in the defence and counterclaim. The record shows hat on 7th August 2008 the respondents filed a chamber summons dated 7th August 2008 seeking for injunctive orders against the appellants and orders allowing them to deposit rent in court until the application and suit are heard and determined and a mandatory injunction for restoration of water supply to the premises.

The record also shows that on 3rd June 2009 the appellants requested for judgment for the sum of kshs 123,402.45 in default of defence to counterclaim but on 16th June 2009 there is a note on the file that there was defence and counterclaim on record.

On 1st September, the appellants herein filed an application dated 28th August 2009 under Order V Rule 13(1) (b), (c) and (d) and Order VIII Rule 1(2) of the old Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking to have the plaint, reply to defence and defence to counterclaim filed to be struck out with costs as they were scandalous, frivolous and vexatious and that the reply to defence and defence to counterclaim were not filed and served upon the appellants' advocates within 7 days; and that the plaintiff's/respondent's pleadings were an abuse of the court process, a sham and merely meant to prejudice, embarrass or delay the fair trial of the suit.

The respondent opposed the application by the appellants seeking to strike out the reply to defence and defence to counterclaim.

In a ruling delivered by Honourable S.A. Okato Principal Magistrate on 10th February 2010, the court ordered:-

1. That the application be and is hereby dismissed with costs to the plaintiffs/respondents.
2. That the defence and counterclaim and the reply to defence and counterclaim filed on 7th April 2009 and 24th April 2009 respectively be and are hereby struck out.
3. That the chamber summons application dated 7th August 2008 supported by the affidavit sworn by Kawawa Musumba Kilango on 7th August 2008 purportedly with authority from the 2nd plaintiff be and is hereby struck out with no orders as to costs.
4. That what remains on record is the plaint and it is now up to the plaintiffs to proceed in the manner provided by the law

It is that ruling/order that prompted the appeal herein filed on 9th March 2010. The memorandum of appeal dated 8th March 2010 sets out 8 grounds of appeal namely:-

1. That the Learned Magistrate erred in law and in fact in failing to appreciate the serious triable raised in the appellant's defence and counterclaim and in striking out the appellant's pleadings.
2. That the Learned trial magistrate erred in law and in fact in striking out the entire pleadings filed by the appellant on an application for summary judgment against the respondents.
3. That the Learned trial magistrate erred in law and in fact in considering issues of service of summons on an application for summary judgment against the respondents.
4. That the Learned trial magistrate erred in law and in fact in striking out the appellant's defence and counterclaim when no formal application had been made by the respondents for the striking out.
5. That the Learned trial Magistrate erred in fact and in law in striking out the appellant's defence and counterclaim without giving the appellants an opportunity to defend themselves against

such action.

6. That the Learned trial magistrate erred in law and infact in considering issues of failing to file authority to sue by the 2nd appellant on an application for summary judgment against the respondents whereas the respondents had never raised any objection in this regard.
7. That the Learned trial magistrate erred in law and in fact in failing to recognize that the court's role was that of an umpire restricted to the determination of issues raised by the parties and not to act as a litigant in the proceedings by raising external issues of fact and law which issues the appellants were not given a chance to defend.
8. That the Learned trial magistrate erred in law and in fact in striking out the appellants' defence and counterclaim on technicalities whereas such anomalies were curable by amendment.

The appellants proposed that this appeal be allowed; the ruling of 10th February 2010 in CMCC 4775/2008 be set aside. The application dated 28th August 2009 be allowed and the costs of this appeal be awarded to the appellants.

The appeal herein was admitted to hearing on 11th July 2012 by Honourable Angawa J and on 7th May 2014 Honourable Waweru J gave directions as to the hearing of the appeal.

The appeal was canvassed before me by way of oral submissions on 2nd March 2015 by the appellant's advocate only. The respondent's counsel had been duly served with a hearing notice on 26th January 2015 but they did not attend court and this court allowed the appellant to argue this appeal.

Mrs Macharia counsel for the appellant submitted, relying on the Memorandum of Appeal, record of appeal and supplementary record of appeal that the respondents herein did not serve any pleadings upon the appellants who only learnt of the suit when they were served with orders restraining eviction. That the respondents were tenants who had refused to pay rent and the appellants/landlords attempted to distress for rent when they were restrained by a court order.

That the appellants defended the suit and filed counterclaim but that the respondents did not file any reply to defence or defence to the counterclaim within the stipulated period so on 17th June 2009 the appellants obtained judgment in default and served notice of entry of judgment but curiously, the appellants were served with reply to defence and defence to counterclaim filed on 24th April 2009. It was contended by the appellants that there was mischief on the part of the respondents to file an application dated 28th August 2009 to have the pleadings by the respondents struck out as the respondents failed to prove when they filed their defence to the counterclaim before judgment was entered against them. That the application was opposed by the respondents who filed grounds of opposition and the entire application canvassed by way of written submission. That the outcome of the application was that the trial magistrate struck out the defence and counterclaim;That the appellants complained against the trial magistrate to Judicial Service Commission albeit he is since deceased.

The appellants prayed that the appeal be allowed, striking out the reply to defence and defence to counterclaim to enable them recover rent arrears from the respondents. They also prayed for costs of the appeal.

This being the first appeal, this court is enjoined by Section 78 of the Civil Procedure Act to evaluate, analyse, examine and interrogate the pleadings, evidence and decision of the lower court and arrive at its own independent conclusion bearing in mind that it never had the opportunity to see or hear the parties in the first instance. **See Selle Vs Associated Motor Boat Company Ltd.**

I have carefully considered the lower court record, the Memorandum of Appeal and arguments in proposition of the appeal herein. The issue for determination, in my view is whether the trial magistrate was correct in dismissing the appellants defence and counterclaim

In my analysis of the court record below, I have established that the primary suit was instituted on 7th August 2008 simultaneous with the application for an injunction under certificate of urgency. No

summons to enter appearance were ever collected for service until 7th September, 2009, by which time one year had already lapsed hence, the summons had expired and their validity was never sought and or obtained . Under Order 5 Rule 1 of the Civil Procedure Rules-

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. ……
5. Every summons shall be prepared by the plaintiff of 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.

Under Order 5 Rule (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 if 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 it is just to do so.
3. ……
4. ……..
5. ……
6. ……
7. Where no application has been made Under Sub Rule 2 the court may without notice dismiss the suit at the expiry if twenty four months from the issue of the original summons.

In this case, it is not undisputed that by the time the summons were issued on 7th September 2009, under Order 5 Rule (1) (2) and (6) , the suit had abated and therefore there was nothing to be prosecuted or defended until a cross suit or counterclaim was lodged by the appellant.

The counterclaim and defence were filed on 17th April 2009, nearly five months after the defendants/appellants filed notice of appointment of advocates on 4th November 2008, as they had not been served with any summons to enter appearance.

Surprisingly, after the defendants/appellants had applied for the striking out of the plaintiffs/respondent suit, in the submissions filed by the plaintiff's/respondent counsel on 16th December 2009, the respondents attached a photocopy of summons to enter appearance purportedly issued on 7th October 2008 and at the back thereof, there is a purported acknowledgment of the summons by an unnamed recipient on 29th September 2009 at 12.20 and with remarks at the bottom of the said reverse page reading " served at Hotel Salama Milimani next to Sagret Hotel Equatorial, declined to sign."

In my view, the plaintiff's /respondent's advocates must have forgotten that the original summons was still in the court file and it was given and issued on 7th August 2008 with an original seal of the court. The same was never collected for service upon the defendants/appellants herein. There are also other summons to enter appearance issued on7th September 2009. There is no application for reissue of the same. Even assuming that the photocopied summons were genuinely issued on 7th October 2008, there is no affidavit of service to show that they were served on 29th September 2009 at 12.20 and by who.

Then there is the issue of filing of defence and counterclaim on 15th April 2009. As at that time, the record is clear that there were no summons to enter appearance collected issued and served therefore

the question is whether there were any valid claims in court by the respondent upon which the defendants could have filed a defence.

In my view, there was no suit as at that time and the defence invalidly on record as the plaint and summons to enter appearance had not been served or at all, leave alone being issued since as I have stated, the duplicate copy of Summons to enter appearance on record shows that it was issued on 7th September 2009 one year after institution of suit by which time the suit had already abated, since the 1st summons to enter appearance were never collected for service within 30 days. A suit that abates dies and can only be revived by an order of the court reissuing the summons to enter appearance or extending the validity of such summons.

It therefore follows that indeed there was no suit as at 15th April 2009 as the Rules required that there must have been summons to enter appearance issued and collected for service within 30 days from the date of institution of suit and served together with the plaint.

In this case, the suit abated one month after its institution. In addition as there were no summons to enter appearance issued and served within the stipulated period, there were no such summons upon which an appearance and defence could be founded.

It therefore follows that the purported reply to defence and defence to counterclaim was also a nullity.

The defendants (appellants) allege that they were never served with reply to defence and defence to counter claim. In my view, there was nothing filed capable of being served upon the defendants/appellants for the above reason that there was no suit in existence upon which, the defence pleadings were being filed and secondly, that the plaintiffs in essence were using their position and especially the 1st defendant judicial officer, to steal a match on the appellants by engaging in fraudulent activities. I say fraudulent because I have examined the official receipts for payment issued to the appellants/defendants and the ones issued to the respondents/ plaintiffs at the time of purported filing of the reply to defence and defence to counterclaim and made the following revelations:

There is a receipt No. 2424499 dated 17th April 2009 for 6725 being court fees for defence and counterclaim issued to the appellants, which pleadings were served on the plaintiff/respondents' counsels on 17th April 2009 at 4.50 p.m. On the other hand, there is a receipt No. 2485868 issued on 3rd June 2009 for kshs 325/- paid by Mungai Kalande advocates for the defendants/appellants being fees for request for judgment which act was also documented but there are remarks on the proceedings side that-" I note that there is a defence to counterclaim on record 16th June 2009." Then, the receipt for reply to defence and defence to counter claim is serial No. 2514637 dated 24th April 2009.

With utmost respect to the court officials and the respondents' counsels, there is no way a receipt that was issued in 24th April 2009 from the same series can have a serial number that is bigger than the receipt issues on 3rd June 2009 from the same series as can be seen from the physical receipts which I have examined and compared. In this case, however, anything was possible in that on 17th April 2009 a receipt was issued bearing serial No. 2424499 and six days later on 24th April 2009 it had jumped up to serial No. 2514637 and then 2 months later on 3rd June 2009, it had gone down to 2485868!

It follows that the defendant/appellant's fears were justified, that indeed the respondents/plaintiffs were stealing a match on them. The trial magistrate was therefore in my view, justified in finding that there were a myriad of unprocedural irregularities on record and in my view, not just in terms of failure to file and serve the pleadings but also fraudulent filing and or purporting to file pleadings by the respondents.

I nonetheless fault the trial magistrate for finding that what remained on record was the plaint. This is because the suit had abated as at 10th February 2010 when the ruling was being made striking out the defence and counterclaim and reply to defence and defence to counterclaim, the subject of

complaint in this appeal.

In **Sam Sam Homad and 23 Others V Kamusini Investment Ltd HCC 529/008** Kimaru J struck out suit where one of the parties had sworn a verifying affidavit purportedly with authority on behalf of the others yet such authority had never been filed together with the suits.

In this case the trial magistrate noted that the 1st appellant had purported to swear an affidavit with authority of the 2nd defendant but no such authority was filed and that neither did she state that she had sworn it on her own behalf.

I have examined the supporting affidavit sworn by Susan Karanja on 28th August 2009 in support of chamber summons dated the same day. albeit there is no authority from the 2nd respondent filed with the suit/application, it is clear that the affidavit was sworn in the first person and she deposed that what was deposed was true to her information and belief save where otherwise so stated. She also deponed that she was the landlady of the suit premises and conversant with the facts of the case hence competent to swear the affidavit.

In my view, the trial court was under a duty to decide the matter on merit since the 1st appellant /deponent had sworn the affidavit in her own right as a party to the suit. There was no evidence that the two defendants/appellants were so intertwined that they were inseparable and that if one swore an affidavit without the written authority of the other party then the affidavit would be a nullity. The court would still have held that the 2nd appellant had no cause of action before court since he had not given any written authority to the1st appellant to swear an affidavit whether a verifying affidavit accompanying the counterclaim or a supporting affidavit to the chamber summons dated 28th August 2009.

It should also be noted that the respondents herein by their grounds of opposition dated 1st October 2009 conceded that they had not served summons to enter appearance upon the appellants. They therefore contended that the application to strike out their plaint, reply to defence and defence to counterclaim was premature.

In **Tery Wanjiru Kariuki V Equity Bank Ltd & Another [2012] e KLR** where the defendants sought the striking out of the suit on the basis that no summons to enter appearance were ever applied for , issued or served on the defendants thereby abating the suit that had been filed in 2008 and sought to discharge the injunctive orders that had been issued in the suit, with the plaintiffs arguing that the failure to serve the summons was only a technical omission, and that as the defendants had filed defence, no prejudice would be suffered since they fully participated in the proceedings and that the omission did not go to the root of the matter, invoking the provisions of Sections 1A and 1B and 3A of the Oxygen Civil Procedure Act and Article 159 (2) (d) of the Constitution as curing the procedural defects, the court allowed the application and struck out the suit citing several decisions inter alia Mobil Kitale Station Vs Mobil (K) Ltd & Another [2004] 1 KLR where it was held:

" the issuance and service of summons to enter appearance go to the jurisdiction of the court and failure to comply therewith cannot be cured by Section 1A and 1B of the Civil Procedure Act."

It must however be noted that in that case the court was dealing with both failure to issue and serve summons to enter appearance.

In this case, however, the summons to enter appearance were indeed issued but not served. They were purportedly issued again after one year after the suit had abated. They were therefore groundless. The court would have extended them if they had been issued and not served, and an application made for their extension. It is the summons to enter appearance that are the instrument upon which a suit can be activated that is why the rules require that a plaint shall be accompanied by summons to enter appearance.

Order V Rule 1 (1), (2) provide for duration of extension of relevant summons. In the 1st instance, valid for 12 months from date of issue.

(2) Where not served court may extend from time to time their validity if justified or its just to do so.

(3) Where no application made under Rule (2) court may without notice dismiss the suit after 24 months from the date of issue of original summons.

It is for the above reasons that I find as follows:

1. That albeit the plaint raised triable issues, there was no suit upon which a defence could be filed or was anchored. The suit had abated as the summons to enter appearance were never collected for service within 30 days from the date of first issue on 7th August 2008 when suit was instituted. The latter summons issued on 7th September 2009 were invalid since there was no application for extension or reissue of the same. The other summons purportedly issued on 7th October 2008 and allegedly served on 29th September 2009 were equally invalid as there is no record showing that any summons were applied for and reissued on 7th October 2008 after the 1st summons to enter appearance of 7th August 2008 which were never collected for service .
2. There being no plaint, and there being no validly filed defence to counter claim, the appellant's cross suit was uncontroverted and since what it sought was a liquidated demand, the trial magistrate had no reason to decline to grant the orders.
3. There was no basis upon which the trial magistrate struck out defence and counterclaim.
4. The failure by the 2nd appellant to file a written authority authorizing the 1st appellant to swear verifying affidavit or supporting affidavit did not invalidate the suit or claim by the 1st appellant.
5. The courts role is that of an umpire but is not restricted to determining matters of fact but of both law and fact. In the consideration of facts, the court is obliged to search for the applicable law to those facts stated and interpret the law.
6. Accordingly, I set aside the ruling of the trial magistrate S.A. Okato (Mr) made on 10th February 2010 and substitute it with an order allowing the appellants' application dated 28th August 2009. I Strike out the plaint filed by the respondents, their reply to defence and defence to counter claim and proceed to enter judgment in favour of the 1st appellant as prayed in the counter claim for the sum of kshs 123,402.45 together with costs of the counterclaim and interest thereon from 17th April 2009 until payment in full.
7. I also award the appellants costs of this appeal.

Dated, signed and delivered in open court at Nairobi this 22nd day of October 2015.

R.E. ABURILI

JUDGE

22/10/2015