REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 2 OF 2009

THE ANGLICAN CHURCH OF KENYA

A.C.K GUEST HOUSE..APPELLANTS

-VERSUS-

ALFRED IMBWAGA MUSUNGU.. RESPONDENT

JUDGMENT

(Being an appeal against the Ruling of the learned Magistrate R. Kirui, PM made on the 13th November 2008 in Chief Magistrate's Civil Case No. 624 of 2000 between Alfred Imbwaga Musungu (Plaintiff) –Vs- The Anglican Church of Kenya and ACK Guest House (Defendants) refusing to strike out the Summons to enter appearance and all subsequent orders in the suit)

INTRODUCTION

1. This appeal emanates from the ruling of R. Kirui, P.M ("**the Learned Magistrate"**) delivered on 13th November 2008 in Mombasa **CMCC No. 624 of 2000** ("**the lower court case**") in which the Learned Magistrate had declined to strike out the Summons to Enter Appearance and all subsequent orders in the suit.

2. The appeal is premised on the four grounds reproduced as follows:

i. The Learned Magistrate erred in fact in finding that the Summons to Enter Appearance issued in the said suit provided for 15 days and not 10 days.
ii. The Learned Magistrate further erred in fact in finding that the Summons to Enter Appearance was signed by a duly authorised officer as required by law.
iii. The Magistrate erred in law in holding that since the defendant had responded to the Summons to Enter Appearance by filing an appearance and statement of defence this cured the defect, if any, in the Summons to Enter Appearance.
iv. The Magistrate further erred in finding that there was a judgment capable of execution.

3. The background of this appeal is that the Respondent filed the lower court case against the Appellants seeking damages for wrongful termination of his employment with the Appellants. Judgment was entered in favour of the Respondent on 10th December 2002 in which the Learned Magistrate found that the Respondent's employment was unlawfully terminated. The Appellants were ordered to pay damages.

4. The Appellants then filed a Notice of Motion application dated 25th September 2008 seeking to strike out the Summons to Enter Appearance and to set aside all orders including the judgment issued in the lower court case. The Appellants also filed a Chamber Summons application for stay of execution pending hearing and determination of the said Notice of Motion application.

5. The two applications were heard together and by a ruling delivered on 13th November 2008, the Learned Magistrate found that no proper decree had been extracted and therefore ordered stay of execution until a proper decree was extracted. The application seeking to strike out the Summons to Enter Appearance and to set aside the proceedings taken in the matter was dismissed with costs. The Appellants being aggrieved, filed this appeal against the said ruling.

<u>The Appellant's/Applicant's Case</u>

6. It is the Appellants' case that the Summons to Enter Appearance were invalid *ab initio* for the following reasons:

i. The Summons to Enter Appearance provided for **<u>10</u>** days service instead of the **<u>15</u>** days provided for in **Order 5 Rule 1 (4)** of the Civil Procedure Rules.
ii. The Summons to Enter Appearance was not signed as required by **Order 5 Rule 1 (2)** of the Civil Procedure Rules .

7. To support their case that the Summons to Enter Appearance was invalid the Appellants relied on the case of **<u>Ceneast Airlines Ltd –Vs- Kenya Shell Limited (2000) 2 EA 364</u>** where the Court of Appeal held that the time for entering appearance cannot be less than 10 days or within 10 days of service of the summons.

8. The Appellants further relied on the High Court decisions of **<u>Maimuna Ali Mohamed Soud –Vs- Omar Said Mbarak (MOMBASA HCCC NO. 283 OF 2001</u>, hereinafter "the Maimuna Ali Case")** and **<u>Equatorial Commercial Bank V. Mohansons (K) Limited (MOMBASA HCCC NO. 524 OF 1998</u>, hereinafter "the Mohansons Case")**. In both cases, **Mwera, J.** (as he then was) followed the decision in of the Court of Appeal in the **Ceneast Case (supra)** and found that Summons to Enter Appearance was invalid for having required the defendant to enter appearance within 10 days.

9. The other issue raised by the Appellants is that the judgment delivered by the Learned Magistrate is not capable of execution because the same did not have any monetary award capable of being executed. That there was no indication of the amounts payable or the time span under the Respondent's claim of damages in lieu of notice, unpaid leave, unpaid service charge, unpaid overtime and severance pay for 23 years worked.

10. To support their claim about incapability to execute the judgment, the Appellants relied on the case of **<u>Kenya Revenue Authority –Vs- Mengiya Salim Murgani (Nairobi Civil Appeal No. 108 of 2009</u>)** where the Court of Appeal held that assessment of both an award and the level of quantum of damages is a judicial function which the superior court (High Court) cannot delegate to the Deputy Registrar.

<u>The Respondent's Case</u>

11. The Respondent opposed the Appeal. The Respondent's case is that since the Appellants entered appearance, filed defence and participated in the proceedings in the lower court, they cannot at this stage turn round and challenge the Summons to Enter Appearance.

12. The Respondent submits that the Summons to Enter Appearance was duly signed by an authorised officer and as such the same is not defective. The Respondent relied on the case of **<u>Baumann & Co. (Uganda) Ltd –Vs- Nadiope [1968] E.A 306</u>** in which the High Court of Uganda held as follows at page 310:

> **“As I read the rule there is nothing to prevent a judge handing a file over to an officer of the court and saying, 'Please sign this summons for me.'”**

13. On the question of whether the judgment is proper and capable of execution, the Respondent submits that the lower court entered judgment in terms of paragraph 6 of the Plaint which specified the nature of the claim ascertainable under the terms of the Respondent's employment. The Respondent's case therefore, is that the terms of the judgment could be ascertained by referring to paragraph 6 of the Plaint and the terms of the employment contract.

ISSUES FOR DETERMINATION

14. Having studied the Memorandum of Appeal, the Record of Appeal, the lower court proceedings and the rival submissions of the parties herein, it is my view that the issues for the court's determination are:

i. Whether the Summons to Enter Appearance issued in the lower court case was invalid and if so, what is the consequence of the invalidity; and
ii. Whether the judgment of the lower court is incomplete and incapable of execution.

ANALYSIS/ DETERMINATION

Validity of the Summons to Enter Appearance and the Consequence thereof

15. There were two defendants to the Plaintiff's case in the lower court.

The record shows that each defendant was issued with a Summons to Enter Appearance. The Summons to Enter Appearance issued for the 1st Appellant, Anglican Church of Kenya is at page 43 of the Record of Appeal while that for the 2nd Appellant A.C.K Guest House is at page 4 of the Record of Appeal. Both Summonses bore the stamp of the executive officer and the subordinate court's seal.

16. **Order 5 Rule 1 (2)** of the Civil Procedure Rules requires every summons to be signed by the judge or an officer appointed by the judge and to be sealed with the seal of the court. In my view the mere fact that the Executive Officer does not appear to have signed the summonses using a pen does not invalidate the same. It is clear from the stamp that the person issuing the summonses was the Executive Officer. Since Order 5 Rule 1 (2) does not specify the nature of the signature, it is my considered view that the purpose of that rule is simply to ensure that it is ascertainable which officer issued the summons and the stamp is adequate to achieve that. It would have been different if the summonses only bore the seal of the court without the stamp of the executive officer because it would not be possible to tell which officer had issued them. The Appellants' claim on account of signature must therefore fail.

17. The second issue raised by the Appellants concerning the Summonses is that the same provided for **10** days service instead of the **15** days provided for in Order 5 Rule 1 (4) of the Civil Procedure Rules. **Order 5 Rule 1 (4)** provides as follows:

> **“(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.”**

18. As already observed, the Summons to Enter Appearance in respect of the 1st Appellant is at page 43 of the Record of Appeal. It is very clear on the face of the Summons that the 1st Appellant was **required to enter appearance within 15 days from the date of service**. The claim that the Summons to Enter Appearance was invalid on that account must therefore fail as far as the 1st Appellant is concerned.

19. Regarding the 2nd Appellant, the Summons to Enter Appearance at page 4 of the Record of Appeal clearly shows that the 1st Appellant was required to enter appearance **within 10 days of service**. That was in breach of the provisions of **Order 5 Rule 1 (4)** which require that the time for appearance shall not be less than ten days of service. In my view, therefore, the Summons to Enter Appearance issued in respect of the 2nd Appellant was invalid.

20. Having found that the Summons to Enter Appearance in respect of the 2nd Appellant was invalid, the next question is what is the consequence of such invalidity? Should the invalidity lead to the nullification of the entire proceedings in which the 2nd Appellant participated and to the setting aside of the consequent judgment as against the 2nd Appellant?

21. I have considered the authorities referred to above and cited by the Appellants in support of their position that the Summons to Enter Appearance was invalid and therefore the subsequent proceedings should be declared null and void. The leading decision is the **Ceneast Case (supra)** in which the Court of Appeal held as follows:

> **"This mandatory provision means that the time for entering appearance cannot be less than 10 days or within 10 days of the service of the summons. It must at least, be on the tenth day of service or any day thereafter, as may be specified in the summons. The summons which was served on the Appellant in its pertinent part is as follows:**
>
> **'You are required within 10 days from the date of service hereof to enter appearance in the said suit...'**
>
> **This is a clear breach of Order 4 Rule 3 (4) and makes the summons invalid and of no effect."**

22. The Court of Appeal decision in the **Ceneast Case** has been cited by the High Court in various subsequent decisions with some courts following the decision while others distinguishing it.

23. **Mwera, J.** adopted the decision in the **Maimuna Ali Case** and the **Mohansons Case** and not only held that the summonses were invalid for requiring the respective defendants to enter appearance within 10 days but also declared the subsequent proceedings and orders null and void and set the same aside.

24. In the case of **Jimmy M. Mutua v Wilfred Gitonga [2006] eKLR**, **D.K. Maraga, J.** also adopted the said decision and held as follows:

> **"Though obiter, that authority, coming from the Court of Appeal, is very persuasive. I am sure if the issue of the summons to enter appearance was a live one the Court of Appeal could have been even more emphatic in its decision. I followed it in Lualenyi Ranching Company Limited vs. William Mlenga Wasike Mombasa HCCC No. 188 of 2003 and so did Mwera J in Equitorial Commercial Bank vs. Mahansons (K) Ltd, Mombasa HCCC No. 524 of 1998 and Ringera J (as he then was) in Abraham Kiptanui vs. The Delphis Ban Limited & Another, Nairobi Milimani Commercial Courts HCCC No. 1864 of 1999. The summon to enter appearance in this matter is therefore a nullity and so are all the proceedings, decree and or orders based on it."**

25. In the case of **Kenya Commercial Bank –Vs- Agro Complex (K) Ltd & 2 Others [2001] eKLR**, **P.J Ransley**, (Commissioner of Assize) distinguished the said decision of the Court of Appeal on the basis that its finding on the validity of the summons was an obiter and not the *ratio decidendi*. The Commissioner of Assize then went ahead to state as follows:

> **"Although the Learned Judges of the Appeal held that service in this Caneast Case was of no effect, it is my view that if no prejudice has been occasioned to the Defendant, the summons although expressed in the terms used in this case must be**

> **allowed to stand.**
>
> **The summons is not per se invalid it is only that the time stated is expressed with ambiguity namely are the words 'within 10 days' limited or does this give the Defendant 10 days within which to enter an appearance. In practice the Defendant has 10 days from the date of service to enter appearance.**
>
> **I would add that in every case that I have dealt with in this court the summons has been expressed in the terms of the summons in this suit, although now advocates are putting 15 days as a general rule in their summonses. The result would be that every summons issued since Legal Notice 5/96 when the rule was altered, if defective would be bound to be set aside. This of course the courts can not allow.**
>
> **In the circumstances I find that the summons in this case is not invalid and I therefore do not allow the application on this point."**

26. In the case of **Hussein Mohamed Awadh v. First American Bank of Kenya Ltd [2006] eKLR**, **Sergon, J**. stated as follows:

> **"The summons accompanying the plaint was served. The same indicated that the defendant was requested to enter appearance within 10 days. This is admitted by the Plaintiff that the summons contravened Order IV Rule 3(4) of the Civil Procedure Rules. The defendant entered an unconditional appearance on the 17th day pf March 2001. A defence was filed on 2nd October 2001.**
>
> **The question which must be answered now is what is the effect of such summons? The consequential effect of such summons is that they are invalid. If the summons are invalid then the summons must be set aside. However this court must look at the purpose of fixing time to enter appearance in the summons. This is to enable the defendant sufficient time to enter appearance. If the time specified in the summons is below that specified in the rules, lapses and an interlocutory judgment is entered in default of appearance, the court is bound to set aside such summons and the resultant exparte judgment. But where the defendant enters appearance within or outside the period specified in the summons before judgment, then it makes no sense to set aside the summons and then direct for re-issue and service. I am of the view that where the defendant has not suffered any prejudice the summons should not be set aside. The defect in such a case should be excused and treated as a mere irregularity which irregularity is waived a defendant enters unconditional appearance. The two decisions cited by the defendant are in respect of situations where judgment in default of appearance had been entered. This is different from the position obtaining in this matter where no default judgment is in place. The crux of the matter is that the defect in the summons will be regarded as fatal when there is an exparte judgment in default of appearance hanging over the defendant's head."**

27. It appears there is no consensus from the High Court on whether summons requiring the defendant to enter appearance within 10 days is invalid. I would agree with the position adopted by the Court of Appeal in the **Ceneast Case** (which is binding on this court) that summons requiring the defendant to enter appearance within 10 days of service is invalid and of no effect. However, my view on whether such invalidity should lead to the setting aside of all the subsequent proceedings depends on the particular circumstances of each case.

28. I agree with the approach adopted by **Sergon, J**. in the **Hussein Mohamed Awadh Case (supra)**, that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless there it is demonstrated

that the defendant suffered some prejudice occasioned by the invalidity of the summons.

29. In my view, in deciding whether to set aside the proceedings subsequent to the issuance of an invalid summons, the court should be guided by the overriding objective of the Civil Procedure Act, Cap. 21 of the Laws of Kenya and the rules made thereunder which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes as provided for in **Section 1A** of the Act. The court must consider whether any prejudice has been occasioned to the Defendant by the invalidity of the summons. Again, I agree with the holding of **Sergon, J**. in the Hussein **Mohamed Awadh Case (supra)** that where the defendant is not able to comply with the time limit set in the invalid summons and judgment is entered in default of appearance, then that defendant is entitled to have all proceedings set aside. That, in my view, should not apply in this case where the Appellants not only entered appearance in compliance with the invalid summonses and filed defence but also participated in the subsequent proceedings by cross examining the Respondent's witnesses and calling their own.

30. The upshot of the foregoing therefore is that the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice.

<u>Whether the judgment of the lower court is incapable of execution</u>

31. The Appellants case is that no monetary award was made by the trial court rendering the judgment incapable of execution. The Learned Magistrate stated as follows in the impugned judgment:

> **“Paragraph 6 of the amended plaint is allowed and ordered by this court to be paid. With respect to paragraph 7 (a) and (b) the same will not be paid by the Plaintiff as that period has been taken over by paragraph 6. Paragraph 9c of the plaint is allowed. Consequently, I enter judgment for the Plaintiff against the Defendant as prayed in paragraph 6 of the amended plaint. Plus costs and interest from the date of filing suit until payment in full.”**

32. Paragraph 9 c was for interest on damages awarded. The main content of the judgment therefore was in respect to paragraph 6 of the Amended Plaint which was as follows:

> **“The Plaintiff states that the dismissal was wrongful and was not in accordance with the KUDHENIA Agreement as he was not guilty of any misconduct and was not given any notice of such dismissal. He claims damages in lieu of notice, unpaid leave, unpaid service charge, unpaid overtime and for severance pay for 23 years worked. The Plaintiff also claims his unpaid salary from the date of dismissal.”**

33. The Respondent's claim under paragraph 6 was for <u>payment in lieu of notice</u>, <u>unpaid leave</u>, <u>unpaid service charge</u>, <u>unpaid overtime</u>, <u>severance pay</u> and <u>unpaid salary</u> from the date of dismissal. The said paragraph was couched in general terms without any specific figures. It was incumbent upon the trial court to listen to the evidence produced before it in order to ascertain whether the claims had been proved. The claims required specific proof of how much the Respondent was entitled to by way of, for instance, payslip or any other documentary evidence.

34. The record shows that a payslip was produced as well as a Collective Bargaining Agreement relating to the Respondent's employment. It appears it is on the basis of those documents that the trial court arrived at the judgment. However, the trial court did not particularize what specific figures the Respondent was entitled to under the claimed heads. The Learned Magistrate was under obligation to ensure that the judgment was clear on what specific monetary awards the court had made. Instead, the trial court made general awards without specific figures or indication of how the same were to be quantified and by whom.

35. I am guided by the holding in the case of **Kenya Revenue Authority -Vs-Menginya Salim Murgani (NAIROBI COURT OF APPEAL CIVIL APPEAL NO. 108 OF 2009)** where the Court of Appeal held as follows:

> **"A judgment must be complete and conclusive when pronounced and therefore it cannot be left to the Deputy Registrar to perfect it."** (emphasis mine)

36. In my view, the judgment as pronounced was not complete and conclusive. The court made general awards without clear direction on who was to perfect the judgment and calculate the specific amounts that the Appellants were to pay the Respondent. A judgment, especially one that awards damages, must be clear on how much damages a party is entitled to. Making general awards without specific monetary figures would make it impossible to comply with or execute the judgment.

37. The record shows that after the judgment, the Respondent did his own calculation of what he believed he was entitled to and acted on the same to extract Warrants of Execution. To allow the claimant to do his own quantification of damages is not only tantamount to giving the claimant a blank cheque but also amounts to delegation of judicial functions to unauthorised persons. In my considered opinion, therefore, the judgment pronounced by the trial court was lacking in material particulars and the same is incapable of execution. It is for setting aside.

CONCLUSION

38. In conclusion, from the foregoing analysis, the finding of the court is that the Summons to Enter Appearance issued for the 1st Appellant was valid. The Summons to Enter Appearance issued for the 2nd Appellant was invalid but the invalidity does not render the subsequent proceedings, judgment and order taken in the trial court null and void.

39. The judgment pronounced by the trial court was lacking in material

particulars of the damages awarded and the same is incapable of execution. The fourth ground of appeal therefore succeeds.

40. The Court therefore orders the lower Court case, **CMCC No. 624 of 2000** be hereby remitted back to the Chief Magistrate's Court, Mombasa for the determination of the amount of judgment in favour of the Respondent, **ALFRED IMBWAGA MUSUNGU** as set out in paragraph 6 of the amended plaint. Such determination shall be done by another Magistrate other than R. Kirui, PM.

41. Since both parties have partially succeeded each party shall bear their own costs for this appeal.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE