



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 14 OF 2013

TARIQ BAMAHIRIZ PLAINTIFF

V E R S U S

1. ALIYA SALIM SOUD

2. SEIF SAID AL-BUSAIDY (sued in their capacity as the administrators of the estate of

the late LAILA MOHAMED SEIF JENEBY aka KHOLA MOHAMED

SEIF AL-BUSAIDY alias LAILA MOHAMED SEIF BUSAIDY

(Deceased)

3. THE CHIEF REGISTRAR OF TITLES

4. THE ATTORNEY GENERAL DEFENDANTS

RULING

1. Plaintiff filed this action on 22nd February 2013. On filing the plaint the Plaintiff did not attach the summons as required by Order 5 Rule 1(3). That Rule provides-

“Every summons shall be accompanied by a copy of the plaint.”

2. The Plaintiff todate has not provided the summons for signature by a Judge or Officer appointed by a Judge as provided in Order 5 Rule (1) (2). Plaintiff has therefore undoubtedly breached the provisions of Order 5 Rule 2(1) which provides-

“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.”

3. 1st and 2nd Defendants have brought before Court Notice of Motion dated 14th October 2013. That application is not opposed. 1st and 2nd Defendant seek the striking out of the suit on the ground Plaintiff has failed to serve Defendants with the summons.

4. As correctly submitted by learned Counsel for the 1st and 2nd Defendant it is the Summons that invite the Defendant to defend an action. This is because the plaint merely lays down the allegations or claim against the Defendant but it is the summons that invite that Defendant to defend the action within a given period set out on the Summons. I am therefore in agreement with the holding in the case **MBSA HCC 25 OF 2005 ABEID S. ABEID & OTHERS –VS- MOHAMED R. ABDULKARIM & OTHERS** where the Court stated-

“The Plaintiff has gone out to defy the rules as to filing summons and serving summons accompanied by a copy of the plaint. In fact as no summons prepared or filed or served it is in breach of the principle that “hear the other party.”

5. Plaintiff has not todate filed summons against any of the Defendants hereof now in excess of thirty (30) days provided in Order 5 Rule 1 (6) and accordingly.
6. I therefore find and hold that this suit has abated against all the Defendants. The costs of the suit and of the Notice of Motion dated 14th October 2013 are awarded to the 1st and 2nd Defendant to be paid by Plaintiff.

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

MARY KASANGO

JUDGE