



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 703 OF 2011

TEJPRAKASHA SHEM.....PLAINTIFF

VERSUS

PETROAFRIC COMPANY LTD.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI..... 2ND DEFENDANT

LAND REGISTRAR NAIROBI3RD DEFENDANT

RULING

The 1st Defendant's Application

The application before the court is a notice of motion dated 16th April 2013, brought by the 1st Defendant under Order 5 Rule 1(6) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The 1st Defendant is seeking orders that the court does find that the suit herein has abated or in the alternative, that the court does dismiss the suit for want of summons to enter appearance with costs.

The application is supported by an affidavit sworn by counsel for the 1st Defendant, Mr. Kennedy O. Ochieng' on 17th April 2013. The 1st Defendant has stated that since the Plaint was served upon him on 9th December 2011, the Plaintiff has never served him with summons to enter appearance. According to the 1st Defendant, the suit has abated pursuant to Order 5 Rule 1(6) of the Civil Procedure Rules. The 1st Defendant has averred that the Plaintiff is no longer interested in prosecuting the suit and further, that the suit is fit for dismissal as provided for by the Civil Procedure Rules. Lastly, the 1st Defendant has contended that it is unfair and unjust for him to have this suit hanging over his head as a liability indefinitely, and that the suit should be found to have abated or dismissed with costs.

In a supplementary affidavit filed on 29th July 2013, the 1st Defendant argued that the Plaintiff admitted to having taken action to get summons when they were served with the motion under consideration and further, that the issued summons do not cure or revive the suit. According to the 1st Defendant, the summons were served on 4th July 2013, nearly 2 months after the notice of motion dated 16th July 2013 was filed and served upon the Plaintiff's advocates. It is the 1st Defendant's case that since the case was filed on 9th December 2011, service of summons should have been affected within one (1) year and further, that the suit has thus abated.

The Plaintiff's Response

The application was opposed by the Plaintiff through a replying affidavit sworn on 5th July 2013 by his Counsel, Mr. Martin Gitonga. The Plaintiff has averred that the plaint was filed on 13th December 2011 together with accompanying documents provided for under Order 11 of the Civil Procedure Rules as well as an interlocutory notice of motion. Further, the Plaintiff has stated that pursuant to the provisions of Order 5 Rule 1(5) of the Civil Procedure Rules, his advocates prepared summons whose copy has been annexed as evidence. It is the Plaintiff's claim that upon being served with the motion under determination, a letter dated 3rd July 2013 whose copy has been exhibited was written to the Deputy Registrar noting that the summons were yet to be signed and sealed as required.

Counsel for the Plaintiff has averred that he appeared before the Deputy Registrar where it was established that the summons which were prepared and filed together with the Plaint were yet to be signed and sealed. Further, Counsel has stated that pursuant to the powers granted to the Registrar under Order 49 Rule 7 of the Civil Procedure Rules, and in furtherance of the overriding objective of the Civil Procedure Act, the Deputy Registrar enlarged the time prescribed under Order 1 Rule 1(2) to enable the signing and sealing of summons.

The Plaintiff stated that the Deputy Registrar signed and sealed the summons and issued them on 4th July 2013, and a copy of the summons was attached as evidence. It is the Plaintiff's case that since summons to enter appearance have since been issued and served upon the 1st Defendant, the suit is incapable of being dismissed for want of summons. Further, Counsel urged that the 1st Defendant's application was incompetent for reasons that since Order 5 Rule 1(6) requires that the summons must have been issued or notification given, failure to have the summons issued deprived the application of the requisite ingredients necessary to have the suit declared as having abated.

Counsel for the Plaintiff contended that were the suit to be declared to have abated or dismissed summarily, an injustice would be visited upon the Plaintiff whereas the situation was caused by the inadvertence of the court's registry staff which was remedied by the Deputy Registrar. Lastly, it was contended that no prejudice would be occasioned against the Defendant if the present application was dismissed and the suit allowed to proceed to hearing on merit.

In a further affidavit sworn by Martin Gitonga on 19th August 2013, the counsel contended that under Order 5 of the Civil Procedure Rules, summons can only be issued or notification given by the court and not the Plaintiff. According to the Plaintiff, the suit can only abate under Order 5 Rule 1(6) of the Civil Procedure Rules where the Plaintiff fails to collect summons for service within 30 days of issue or notification whichever is later. It is the Plaintiff's case that since summons had not issued or notification thereof given due to inadvertence on part of the registry staff, the issue of failing to collect the summons and serve them on the Defendant does not arise.

Further, Counsel averred that under Order 5 Rule 2(1) of the Civil Procedure Rules, the period of one year runs from the date of issue of the summons. Lastly, it was contended that leave could not be sought to extend the validity of summons or period of service where summons had not issued or notification given in the first place.

The Submissions

The parties were directed by this Court to file and exchange written submissions. The 1st Defendant in submissions dated 25th July 2013 stated that summons to enter appearance were never taken out by the Plaintiff until 4th July 2013, and were served on the 1st Defendant on 8th July 2013 after the 1st Defendant's application to have the suit dismissed for want of summons. Counsel for the 1st Defendant made reference to Order 5 Rule 1 of the Civil Procedure Rules and argued that it is mandatory for the Plaintiff to take out summons and serve them simultaneously with the Plaint.

Counsel relied on the cases of **Mobile Kitale Service Station -vs- Mobil Oil Kenya Ltd & Another, HCCC No. 204 of 1999**, **Raphael Denis Nyingi -vs- Barclays Bank of Kenya Ltd, HCCC No. 586 of 2008**, **Anthony Wechuli Odwisa -vs- Alfred Khisa, (2006) eKLR**, **Masinde & Others -vs- Kamau & 4 Others, HCCC No. 1033 of 1994** and **Trenton (K) Ltd -vs- Nairobi House Ltd & Another, HCCC No. 1184 of 2005**, where the gist of the findings therein was that failure to serve summons was not a mere irregularity, but a fundamental vice which made a suit liable for striking out.

Lastly, the 1st Defendant submitted that the suit having been filed 16 months ago, no summons was served upon him until 8th July 2013 making it difficult for him to respond to the claim against her.

The Plaintiff's counsel filed submissions dated 6th May 2014 where he argued that for a suit to abate under Order 5 Rule 1(6), the Plaintiff must have failed to collect the summons for purposes of service within 30 days of issue or notification, whichever is later. Counsel for the Plaintiff submitted that he discharged his obligation under Order 5 Rule 1(5) by preparing the summons and filing them with the Plaintiff on 13th December 2013. He further argued that the onus of signing the summons was borne by the judge or an officer appointed by the judge and not the Plaintiff as stipulated under Order 5 Rule 1(2) of the Civil Procedure Rules.

Counsel relied on the cases of **Mobile Kitale Service Station -vs- Mobil Oil Kenya Ltd & Another, HCCC No. 204 of 1999** for the submission that it was the responsibility of the Plaintiff or his advocate to prepare the summons so that the court would sign the document to give it validity. It was submitted that until the court signs summons in accordance with Order 5 Rule 1(2) of the Civil Procedure Rules, the summons are not valid and are incapable of service upon the Defendant. It was the Plaintiff's submission that having prepared and filed the summons with the Plaintiff on 13th December 2011 as required by law, the court inadvertently delayed in discharging its responsibility of signing and sealing the summons. Counsel argued that under Order 5 Rule 1(2), the Deputy Registrar exercises the powers of signing and sealing the summons pursuant to Order 49 Rule 1 of the Civil Procedure Rules.

While arguing that Order 50 Rule 6 of the Civil Procedure Rules grants the court the power to enlarge time where a limited time has been fixed for doing any act or taking any proceedings despite expiry of the allowed time, counsel contended that under Order 49 Rule 7(1)(b)(iii) of the Civil Procedure Rules, the Deputy Registrar has power to hear and determine an application for enlargement of time under Order 5 Rule 1(2). It was argued that a suit can only abate under Order 5 Rule 1(6) where the Plaintiff has failed to collect the summons for service.

Counsel submitted that since summons were not valid until 4th July 2013 when they were signed and sealed, the summons were not available for collection as envisaged under Order 5 Rule 1(6) of the Civil Procedure Rules. It is the Plaintiff's submission that he does not claim that the validity of the summons was extended at any time since for extension to occur, the summons ought to be valid in the 1st instance.

Counsel referred the court to the case of **Central Bank of Kenya -vs- Uhuru Highway development Ltd & 3 Others, Civil Appeal No. 75 of 1998** for the proposition that where a defendant becomes aware of the suit other than through formal service, there is nothing that precludes him from filing a defence to the claim against him. Further reliance was placed on the case of **Unga Ltd -vs- Amos Kinuthia & Gabriel Mwaura, Civil Appeal No. 175 of 1997** from the submission that a deviation from the prescribed procedure which does not affect the substance of the matter, and which is not calculated to mislead, is not fatal to a suit or motion in court. Reliance was also placed on the case of **Kimonjo Family Court Ltd -vs- Kimonjo Family & Partners Ltd and 3 Others, (2005) e KLR** in this regard.

The Plaintiff's counsel also sought to distinguish the authority in the case of **Udaykumar Chandulal Rajani & Others -vs- Charles Thaithi, Civil Appeal No. 85 of 1996**, and contended that the case related to extension of validity of summons beyond 24 months from the date of issue and was therefore inapplicable in the present case. The Plaintiff also distinguished the case of **Raphael Denis Nyingi -vs- Barclays Bank of Kenya Ltd, HCCC No. 586 of 2008** and **Anthony Wechuli Odwisa -vs- Alfred Khisa, (2006) eKLR** by stating that contrary to the instant suit, there was no indication from the court file

that summons had been filed with the Plaintiff as required by Order 5 Rule 1(5) of the Civil Procedure Rules. Lastly, Counsel submitted that the case of **Trenton (K) Ltd -vs- Nairobi House Ltd & Another, HCCC No. 1184 of 2005** is also distinguishable as summons were held not to be valid where they had been issued on a date prior to the filing of suit and had also expired after the initial twelve months from the presumed date of issue.

The Issues and Determination.

I have carefully considered the pleadings filed herein, together with the submissions made by the Plaintiff and 1st Defendant. The issue for determination is whether the suit should be declared to have abated or be dismissed for failure to serve summons pursuant to Order 5 Rule 1(6) of the Civil Procedure Rules. The 1st Defendant argued in this regard that despite the suit being filed on 9th December 2011, summons to enter appearance were served upon him on 4th July 2013 after the present application had been filed.

The Plaintiff attributed the failure to serve summons on the 1st Defendant to the inadvertence on the part of the judiciary. He argued that summons were prepared and accompanied the Plaintiff at the time of filing but were never signed and sealed. As regards the applicable law, Order 5 Rule 1 of the said Civil Procedure Rules provides for the issue and service of summons as follows:

- 1. (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) 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.
- (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.**

Order 5 Rule 2 of the Civil Procedure Rules on the other hand provides for the period of validity and extension of summons once issued in the following terms:

- 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 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 satisfied it is just to do so.**
- (3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.**
- (4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been**

served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

This court therefore has to determine the effect of the issue of summons after one year of filing of suit, which delay in the issue of summons is not disputed. I note that the only effect provided for in Order 5 Rules 1 (6) of the Civil Procedure Rules is that a suit will be abate if the summons are not collected within 30 days of their issue or notification thereof. Under Order 5 Rule 1 of the Civil Procedure Rules summons cannot be issued unless signed and sealed by the court. Such issue therefore occurred on 4th July 2013, when they were signed and sealed by the Deputy Registrar of this Court and were served on the 1st Defendant on 8th July 2013. This suit therefore cannot have abated as the summons were served within 30 days of their issue, albeit the delay in the said issue.

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 delay in the issue and service of summons 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] e KLR, where summons to enter appearance though filed together with the Plaint 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.

This Court is also granted discretion to extend time fixed for doing any act under section 95 of the Civil Procedure Act as follows:

“ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

Order 50 Rule 6 of the Civil Procedure Rules also has similar provisions 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 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:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise. “

It is my view that these provisions give the court discretion to extend time *suo moto* or upon application and upon such terms as the justice of the case may require. In this regard I note that the Deputy Registrar of this Court exercised discretion to enlarge time for issuance of summons pursuant to Order 49 Rule 7(i) (b) (iii) and Order 50 Rule 6 of the Civil Procedure Rules. No appeal has been lodged against those orders as envisaged by Order 49 Rule 7(i) and therefore, the summons to enter appearance issued on 4th July 2013 were properly issued. More fundamentally, this Court is now obliged by Article 159 (2) (d) of the Constitution to administer substantive justice without undue regard to procedural technicalities, and this

suit thus deserves to be heard on its merit.

The 1st Defendant's Notice of Motion dated 16th April 2013 is thus not only overtaken by events but is also hereby denied for the foregoing reasons. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this _____26th_____ day of _____June_____, 2014.

P. NYAMWEYA

JUDGE