



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 476 OF 2009

**FRANCIS NGIRA BATWARE.....
.....PLAINTIFF**

- VERSUS -

**ASHIMOSI SHATANBASI T/A ASHIMOSI SHATANBASI & ASSOCIATE ADVOCATES....1ST
DEFENDANT**

**MUGANGA WASULWA T/A KEYSIAN AUCTIONEERS.....2ND
DEFENDANT**

**ADAN MAALIM.....3RD
DEFENDANT**

RULING

1. The 2nd Defendant wants the suit against it struck out. The primary reason for that quest was that the plaintiff had failed to take out summons for the last five (5) years.
2. A perusal of the record of the proceedings shows that the Plaint was filed in court on 3rd July 2009.
3. Therefore, by the time when the 2nd Defendant’s application came up for hearing on 8th October 2014, the suit was more than 5 years old. However, the applicant had never been served with summons since the inception of the suit.
4. On 30th March 2013, Kimondo J. delivered a Ruling on an application which had been lodged by the 1st Defendant. In that Ruling, the learned Judge dealt, *inter alia*, with the consequences of the plaintiff’s failure to serve summons. This is what the Learned Judge said;

“I then proceed to the third ground: that summons have never been served. Faced with that accusation, it behoved the plaintiff to show the converse. All that the plaintiff states is that the 1st defendant has entered an appearance. In view of the interlocutory proceedings, the mere fact that the 1st defendant had filed an appearance does not answer the question. The High Court is court of record. I have seen 4 original sets of unexecuted summons to enter appearance dating back to the year 2009, the year of the suit. There is no affidavit of service of summons to enter appearance upon the 1st defendant. That contravenes Order 5 rules 1 (6) and 2 (7) of the Civil Procedure Rules 2010. Where no summons are collected within 30 days, the suit abates. Where the summons

are not renewed in 24 months their validity expires”.

5. In respect to the applicant (who is the 2nd defendant) the situation is similar to that of the 1st Defendant.
6. There is no proof of service of summons to enter appearance, upon the applicant.
7. Secondly, the un-executed summons are already more than five (5) years old. They cannot therefore be revived.
8. In the Ruling in respect to the application by the 1st defendant, Kimondo J. proceeded to express himself thus;

“Without the summons there is no suit to proceed with. The nexus is obvious. It is the summons and their service that activate the suit: they bring the proposed defendants to defend the action by entering appearance and defence within the prescribed time”.
9. In the final result, the suit against the 1st defendant was dismissed.
10. In respect to the 2nd defendant’s application, the plaintiff did not put up any fight. Perhaps that was because of the manner in which Kimondo J. had make clear findings on similar issues.
11. I am aware that the plaintiff filed an application to set aside the orders of Kimondo J. However, that fact alone cannot stand in the face of the 2nd defendant’s uncontested application.
12. Accordingly, because the plaintiff has failed to serve summons upon the 2nd defendant for over 5 years the suit cannot be sustained. I therefore strike out the suit against the 2nd defendant.
13. The plaintiff will pay to the 2nd defendant the costs of the application dated 26th August 2014. The plaintiff will also pay to the 2nd defendant the costs of suit.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

Collins Odhiambo – Court clerk.