



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 100 OF 2012

PETER OWUOR OTULA.....PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....1ST DEFENDANT

PENGUIN ENGINEERING LIMITED.....2ND DEFENDANT

AMOS OTULA.....3RD DEFENDANT

VALLEY AUCTIONEERS.....4TH DEFENDANT

RULING

1. This is a consolidated ruling in respect of 1st and 4th Defendant's Notice of Motion application dated 20th May 2014 and filed on 21st May 2014 and the Plaintiff's Notice of Motion application dated 16th June 2014 and filed on 18th June 2014.
2. The 1st and 4th Defendants' Notice of Motion was brought pursuant to the provisions of Order 2 Rule 15(1)(d), Order 5 Rule 2 and 40 and 7 (sic) of the Civil Procedure Rules, 2010, Section 1A of the Civil Procedure Act and the inherent jurisdiction of the honourable court. It sought the following orders:-
 1. **THAT the Plaint dated 17th February 2012 be struck out and the suit against the 1st and 4th Defendants be dismissed with costs.**
 2. **THAT the costs of this Application be borne by the Plaintiff.**
 3. **THAT this Honourable Court be pleased to make such order or further orders as it may deem just and fit in the circumstances of the case.**
3. The Plaintiff's Notice of Motion application was brought pursuant to the provisions of Order 50 Rule 6, Order 51 Rule 10(2), Order 2 Rule 14 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (1) and (2) were spent. He sought the following remaining orders:-

1. Spent.
 2. Spent.
 3. **THAT the 1st and 4th Defendant's Notice of Motion of application dated 20th May 2014 and 28th January 2014 (sic) be stayed, dismissed and or (sic) struck out with costs.**
 4. **THAT the plaintiff be granted leave to extract summons and serve upon the Defendant's out of time.**
 5. **THAT the costs of this application be provided for.**
4. On 26th June 2014, both the Plaintiff and the 1st and 4th Defendants agreed that each of the affidavits in support of their respective applications would be a response to the others application. The 1st and 4th Defendant did not therefore file any Replying Affidavit in response to the Plaintiff's Notice of Motion application.
 5. The court will deal with the two (2) issues of extension of Summons to Enter Appearance and Striking out under separate headswith a view to addressing both applications.

THE PLAINTIFF'S CASE

6. The Plaintiff instructed the firm of Duncan Anzala t/aM/S WaiganjoWachira& Co Advocates to file suit but the said advocates neglected to collectthe Summons to Enter Appearance and/or serve the same upon the 1st and 4th Defendant. The said advocates did not seek leave of the court to extract the said summons despite having been reminded by the advocates for the 1st and 4th Defendants to do so.
7. The Plaintiff only became aware of his advocates' mistake when the said advocates filed an application to cease acting for him. He stated that the 1st and 4th Defendants would not suffer any prejudice if the orders he had sought were granted as parties had been negotiating an amicable settlement and argued that a mistake of an advocate should not be visited on a party. He submitted that the application had been filed without delay and was in good faith.
8. His Supporting Affidavit and Replying Affidavit in response to the 1st and 4th Defendants' Notice of Motion application were sworn on 11th June 2014 and 26th May 2014 respectively. His written submissions were dated and filed on 26th June 2014.

THE 1ST AND 4TH DEFENDANTS' CASE

9. Their case was basically that save for the application that the Plaintiff had filed seeking injunctive orders, he did not take out Summons to Enter Appearance and/or served them with the same within the time stipulated by the law and that since twenty (20) months had lapsed from the date suit was filed on 17th February 2012, the Plaint herein was invalid.

LEGAL ANALYSIS

EXTENSION OF SUMMONS TO ENTER APPEARANCE

- 10.The Plaintiff placed reliance on the cases of **Invesco Assurance Co. Ltd v Cyrus Ng'ang'a Njuru & 2 Others (2006) eKLR** and **Bamanya vs Zaver (2002) EA 325** where it was held that an innocent litigant should not be punished for the conduct of his advocate.
- 11.He also referred the court to Order 50 Rule 6 of the Civil Procedure Rules that empowers the court to extend time for doing any act or taking any action upon such terms as justice may be required irrespective of whether time for doing that act or taking such action had expired.
- 12.He also relied on the case of **Utalii Transport Company Limited & 3 Others v NIC Bank Limited & Another [2014] eKLR** in which a delay of one and half (1 ½) years was found not to have been inordinate and the case of **CMC Holdings Limited v Nzioki [2004] 1 KLR 173** where it was held that the court's discretion should be exercised judiciously and only after a careful examination of the circumstances and the merits of the case as may warrant for such exercise of its discretion.

13. It was the 1st and 4th Defendants' submissions that there would be no competent suit where a Plaintiff had taken out Summons to Enter Appearance and failed to serve the same within the stipulated time as per Order 5 Rule 2(1) of the Civil Procedure Rules or failed to collect the same once they were issued. They referred the court to the case of **Lee Mwathi Kimani v National Social Security Fund & Another [2014] eKLR** amongst several other cases to buttress its arguments.

14. As was rightly submitted by counsel for the 1st and 4th Defendants, the court could only exercise its discretion and power to extend the time of service for summons while the original summons were still valid. The provisions of Order 5 Rule 1 of the Civil Procedure Rule, 2010 provides as follows:-

“ A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of 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.”

15. Whereas the court has power under Order 50 Rule 1 of the Civil Procedure Rules to enlarge time within which to do something, the provisions of Order 5 Rule 2 (1) of the Civil Procedure Rules cannot be any clearer on the mandatory nature of the same.

16. Under the provisions of Order 5 Rule 1(5) as read together with sub-rule (6), the summons shall be prepared and filed together with the Plaint and shall be collected for service within thirty (30) days of issue or notification, whichever is later, failing which the suit shall abate.

17. A perusal of the Summons to Enter Appearance in the court file shows that the same were issued on 6th November 2012. They ought to have been collected within thirty (30) days from that date. Indeed, the Plaintiff was expected to act reasonably to check on the summons if he had not been notified of the issuance of summons more so as he filed his application seeking injunctive orders under a certificate of urgency.

18. However, that does not in any way suggest they had to be served within the said period as many intervening factors could have led to them not being served. If for good reason the same were not served within the time they were alive, the remedy would have been for the Plaintiff to seek extension of the same before 5th November 2013.

19. The Summons to Enter Appearance herein could not be extended for the simple reason that they were dead; they were non-existent meaning that there was nothing to extend. Consequently, as the Summons to Enter Appearance were not or renewed within the life time of the original summons, the suit herein stood abated.

20. Notably, this very court made a similar finding and holding in the case of **Barclays Bank of Kenya vs Patrick Njuguna Kubai [2014] eKLR** when it dismissed an application for extension of summons to enter appearance for the reason that the application seeking extension of the summons was filed after the summons therein had expired.

21. The court therefore had no hesitation in agreeing with the holding of Rawal J (as she then was) in **Julius Njoroge Muira v Harrison Kiambuthi Mburu [2011] eKLR** in which she stated as follows:-

“...I shall thus without hesitation find that the original summons is not in existence and all the efforts to revive the same by reissuance were null and void. The original summons that has lost its life cannot be resurrected.”

22. In any event, this was a position that has since been settled by the Court of Appeal, which binds this court, in the case of **Udaykumar Chandulal Rajani & 4 Others v Charles Thaithi [1997] eKLR** where it held that:-

“...the court had no power to extend the validity of summons beyond twenty four months, when in fact there were no valid summons in existence...” and which ruling was applied with approval in the case of **John Mwangi Kigotho v Moses Wafula Waswa [2009] eKLR**.

23. It is unfortunate that the firm of advocates the Plaintiff had instructed to act for him failed to

obtain summons and serve the same upon the Defendants as stipulated under the provisions of the Civil Procedure Rules which were mandatory in nature.

24. For the foregoing reasons, the court found and held that the failure by the Plaintiff's advocate to collect and serve the Summons to Enter Appearance was not a mistake that could be excused making it impossible for the Plaintiff's suit against the 1st and 4th Defendant to be sustained. It was immaterial that the Plaintiff had filed its application to extend the said summons timeously, which in fact this court did not find to have been so, or that the 1st and 4th Defendants would suffer no prejudice if the orders he had sought were granted as prayed. The court has no option but to reject the Plaintiff's submissions in this regard and accept those that had been advanced by the Defendant.

STRIKING OUT OF THE PLAINTIFF'S SUIT

25. The aforesaid finding by the court therefore rendered the 1st and 4th Defendants' Notice of Motion application moot. The court found no need to analyse the submissions and case law that were relied upon by the parties to support their respective arguments regarding the striking out of the Plaintiff's suit against the 1st and 4th Defendants. The same would add no value to the ruling hereinfor the reason that the 1st and 4th Defendant's application would automatically succeed.

DISPOSITION

26. Accordingly, having considered the pleadings by the parties, the affidavit evidence, the written submissions and the case law in support of the respective parties' case, the court came to the conclusion that the Plaintiff's Notice of Motion dated 16th June 2014 and filed on 18th June 2014 was not merited and the same is hereby dismissed with costs to the 1st and 4th Defendants.

27. The upshot of this court's ruling therefore was that the 1st and 4th Defendants application dated 20th May 2014 and filed on 21st May 2014 was merited and the same is hereby allowed in terms of Prayer Nos (1) and (2) of the said application.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 18TH day of DECEMBER, 2014

J. KAMAU

JUDGE