



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 297 OF 2011
MAHESHKUMAR CHHOTABHAI PATEL

ILABEN MAHESHKUMAR CHHOTABHAI PATEL.....PLAINTIFFS

VERSUS

BANK OF INDIA.....1ST DEFENDANT
SAMUEL A. ANGWENYI.....2ND DEFENDANT
ESTHER N. ANGWENYI.....3RD DEFENDANT
M/S SESA INVESTMENTS LIMITED.....4TH DEFENDANT

RULING

1. Before the Court is the 1st Defendant's Notice of Motion dated **5th December 2012**. It is taken out under **Order 5 Rules 1(2) & Rule 6** and Order 40 Rules 6&7 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Application seeks for two main orders as follows:-
 1. *That the Plaintiff's suit which commenced by way of plaint dated 8th July 2011 and followed by Notice of Motion application dated 12th July 2011 be dismissed for having abated on account of failure to obtain and serve summons to enter appearance fifteen months since the Plaint was filed.*
 2. *That the injunction order made in favour of the 1st Plaintiff/Respondent be discharged or set aside due to the fact that from the time the injunction was issued the Plaintiffs have never taken any steps to obtain a summons to enter appearance in support of the Plaint nor have the Plaintiffs taken any other steps to determine the suit although a period of over fifteen months since the Plaint was filed has elapsed.*
 3. *That the costs of this application be borne by the Plaintiffs/Respondents.*
2. The Application is supported by the affidavit of **ROBERT MUGO MUTITU**, the 1st Defendant's Advocate, sworn on **5th December 2012** and is based on the grounds stated on the face thereof.

3. It is deponed by Counsel for the 1st Defendant that the Plaintiff the 1st defendant was duly served with was not accompanied with a summons to enter appearance. He avers that to date no summons to enter appearance has ever been served upon the 1st Defendant although fifteen months have elapsed since the Plaintiff was filed.
4. It is the deponent's contention that the Plaintiffs proceeded with this case on several occasions including applying and being issued with an interlocutory order of injunction dated 14th July 2011 which order restrained the 1st Defendant from exercising its statutory power of sale even before the summons to enter appearance was issued. He further contends that the continued existence of the injunction issued in this suit against the 1st Defendant continues to hinder it from exercising its statutory power of sale as per the legal charge.
5. It is also Counsel's contention that after being issued with an injunction, the Plaintiffs have never seen it fit to obtain a summons to enter appearance nor have they ever taken any other step towards the determination of this case so as to justify the continued existence of the order of injunction and the suit as a whole.
6. It is averred by Counsel that the 1st Defendant is suffering irreparable damages since the Plaintiffs are not servicing the loan whose interest continues to accrue. He contends that the Plaintiffs have demonstrated lack of interest in pursuing their claim and therefore the suit should abate while the injunction issued in their favour should lapse.
7. The Application is opposed vide the Plaintiffs' **Grounds of Opposition** dated **21st January 2013** as well as the Replying Affidavit of **SAMUEL A. ANGWENYI** sworn on behalf of the 2nd to 4th Defendants and dated **17th December 2012**.
8. The Plaintiffs' grounds of opposition are that the 1st Defendant's application does not meet the prerequisites of the provisions of Order 5 Rule 1(2) and Order 40 Rules 6 & 7 of the Civil Procedure Rules. The Plaintiffs also argue that the 1st Defendant is seeking for an order that the Plaintiffs be punished for sins that are not theirs and over which they have no control. It is the Plaintiffs' position that the duty of signing summons belongs to the Court and not the Plaintiff. Therefore it is their case that they cannot bear responsibility for delay to sign the same.
9. As earlier stated, the 2nd to 4th Defendants have opposed the current application vide the 2nd Defendant's Replying Affidavit. It is averred by the 2nd defendant that the Court in its ruling dated 9th July 2012 directed the parties to revert to their pre-agreement position and refund monies which may have changed hands as appropriate. However, it is the 2nd Defendant's averment that the Plaintiffs have not since refunded the said amounts advanced to them under the contract.
10. It is further averred by the 2nd Defendant that the dismissal of this suit would prejudice the 2nd to 4th Defendants' claim against the Plaintiffs since the doctrine of *res judicata* would be in operation. According to him, the taking out and issue of summons would do justice to all parties concerned in the subject suit rather than its dismissal.
11. The 2nd Defendant contends that the dismissal of the suit will occasion irreparable harm and loss to the 2nd to 4th Defendants and he prays that the Court do direct the Plaintiffs to take out fresh summons and serve them to enable them to have their day in Court.
12. The 1st Defendant as well as the 2nd to 4th Defendants filed their submissions in Court on 21st May 2013 and on 30th May 2013 respectively.

ANALYSIS

13. I have considered the pleadings herein, the affidavits on record and the submissions. The main issue for determination is whether the suit herein should abate for want of service of summons to enter appearance and consequently whether the injunction orders issued in favour of the Plaintiff

should be discharged.

14. It is not in dispute that the Plaintiffs herein instituted this suit by way of a Plaint dated 8th July 2011 and followed by Notice of Motion application dated 12th July 2011. Therefore, it is plain that as at the date of the current application the Plaintiff had failed to obtain and serve summons for over 15 months from the date of filing this suit.

15. It is the Applicant's prayer that the Plaintiffs' suit be dismissed for having abated on account of failure to obtain and serve summons to enter appearance fifteen months since the Plaint was filed.

16. The Plaintiffs have opposed the applicant's prayer on the ground, *inter alia*, that the duty of signing summons belongs to the Court and not to them. On the other hand the 2nd to 4th Defendants have opposed the application on several grounds among them that the dismissal of the current suit would prejudice their claim against the Plaintiffs since the doctrine of *res judicata* would be in operation.

17. The doctrine of *res judicata* is clear as elucidated under **section 7** of the **Civil Procedure Act**. The said section states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

18. The subject matter in the current suit is with regard to a Legal charge whereby the Plaintiffs are challenging the 1st Defendant's right to statutory power of sale. That has got nothing to do with the 2nd to 4th Defendants' claim against the Plaintiffs for recovery of monies advanced to the Plaintiffs which is based on a sale agreement. To say the least, it is clear that the doctrine of *res judicata* will not apply if the Defendants were to institute proceedings against the Plaintiffs.

19. Now to the substance of the application. The issuance and service of summons is governed by **Order 5** of the **Civil Procedure Rules**. **Order 5 Rule 1(6)** of the said Rules is categorical that every summons (except where the Court is to effect service) should be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate.

20. Further, **Order 5 Rule 1(2)** of the **Civil Procedure Rules** stipulates that 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 (Emphasis supplied). From the Court records, it is evident that there are several copies of summons to enter appearance which are neither signed nor sealed. It therefore follows that no summons were ever issued in this matter.

21. In the circumstances there was no summons to be collected for service as contemplated under **Order 5 rule 1(6)** of the **Civil Procedure Rules**. The Plaintiffs have argued that the duty of signing summons belongs to the Court and that they cannot bear responsibility for delay to sign the same. While that may be the case, I do not completely agree with the Plaintiffs that they should not bear responsibility for delay in signing the summons.

22. It is rather common ground that it is upon the Plaintiff to move the Court for its rights and keep a case in motion. As is the Practice the filing of a Plaint should be followed by the service of summons which the Plaintiffs did not do. There is no evidence on record that the Plaintiffs pursued the same or even that they tried to remind the Court to seal and sign the said summons. The Courts are run by human beings who are susceptible to forgetfulness. In the current matter it is apparent that the persons tasked with signing and sealing of summons failed to do so.

23. That notwithstanding, the Defendants were aware of the suit filed against them as is evident from

the affidavits filed in opposition of the Plaintiffs' applications. Therefore, whatever anomaly was caused by failure to issue and serve the summons can be cured.

24. Having established that summons to enter appearance were not issued, that is signed and sealed, in this matter, it is only fair that this Court do rectify the same. In that case I order that the summons herein be signed and sealed by the relevant Court officer within 14 days from the date of this Ruling. Thereafter, the Plaintiffs to serve the summons upon the Defendants within 14 days of issue or notification whichever is earlier. Failure to do so the suit herein shall abate and consequently the injunction orders will be discharged.

25. It is also the Applicant's prayer that the injunction order made in favour of the Plaintiffs be discharged or set aside for want of summons to enter appearance and that the Plaintiffs have not taken any other steps to determine the suit. It is well over two years now since the case was instituted and an injunction was granted in the Plaintiffs' favour yet there is no indication that they have taken any steps to set the suit for hearing.

26. I am aware of **Order 40 rule 6** which states thus:-

***“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise (Underlining supplied).*”**

27. The said rule is not absolute as it gives the Court discretion not to discharge an injunction where twelve months has lapsed if there are sufficient reasons to do so.

28. In the current matter, it has been established that summons were not issued and this Court has made an order for the same to be done. Thereafter, the Parties herein should file their respective pleadings and ensure that the suit is set down for hearing in the earliest time possible. As is evident from the Court records, the Defendants have not put in their written statements of Defence. For the foregoing reasons, I will not discharge the injunction orders herein.

29. I am alive to the fact that dismissal of a suit should be the last resort to be exercised by a Court. I am also alive to the fact that the Courts are enjoined to do substantial justice to the parties in line with the overriding objectives under Section 1A and 3A of the Civil Procedure Act as well as Article 159 of the Constitution. For the aforesaid reasons it would be appropriate that the suit herein proceed on its merits and all parties be granted their day in Court.

30. In the upshot, the 1st Defendant's Notice of Motion application dated **5th December 2012** is hereby dismissed with the following orders:-

a. ***That the summons herein be signed and sealed by the relevant Court officer within 14 days from the date of this Ruling. Thereafter, the Plaintiffs to serve the summons upon the Defendants within 14 days of issue or notification, whichever is earlier. Failure to do so the suit herein shall abate and consequently the injunction orders will be discharged.***

b. ***The Plaintiffs shall bear the 1st Defendant's costs for this application within 30 days.***

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 5TH DAY OF DECEMBER 2013.

E. K. O. OGOLA

JUDGE

PRESENT:

Mutito for the Plaintiff

Kethi Kilonzo holding brief for Nyandieka for the Defendant

Teresia – Court clerk