REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 32 OF 2010

UTALII TRANSPORT COMPANY LIMITED ……. 1ST PLAINTIFF

VERONICA NDINDI MUSYIMI AND

JUSTUS KIMAU MUSYIMI

AS ADMINISTRATORS OF THE ESTATE OF

STEPHEN MUSYIMI KIMOLO……..…2ND PLAINTIFF

VERONICA MUSYIMI……..…3RD PLAINTIFF

JUSTUC KIMAU MUSYIMI ……...4TH PLAINTIFF

VERSUS

NIC BANK LIMITED ……..……...1ST DEFENDANT

KANINI HARAKA ENTERPRISES LIMITED ……....2ND DEFENDANT

R U L I N G

Order 5 Rule 1(1), (5), (6) and Rule 2(1) and (7) of the Civil Procedure Rules 2010 (hereinafter "the 2010 Rules") provide:-

"1.(1) When a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.

(5) Every summons shall be prepared by the Plaintiff

or his advocate and filed with the plaint to be signed in accordance with Sub rule (2) of this rule.

(6) Every Summons shall be prepared by the Plaintiff or his advocate and filed with the plaint to be signed in accordance with Sub rule (2) of this rule.

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.

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

It is clear from the foregoing that the primary responsibility of preparing a Summons and having it served is that of the Plaintiff. The Plaint must accompany the summons at the time the suit is being commenced and once signed if it is not collected and served within 30 days, the suit automatically abates by operation of law. Further, the life of a Summons is twelve (12) months but the same can be extended on application. Where however, no application is made for a period of twenty four (24) months from the date of the issue of the original summons, the suit may be dismissed by the court suo motto without any notice. The rules however, do not say what happens if the court does not dismiss the suit after the stated period of twenty four (24) months.

It would seem that the purpose of the aforesaid provisions of the Civil Procedure Rules is to ensure that, after filing suit the Plaintiff must take steps to prosecute his suit and must not go to sleep. In those provisions, it would seem that the law has provided effective sanctions in the case of indolent Plaintiffs. Those provisions, in my view, seem to bolster the overriding objective of the Act under Section 1A of ensuring expeditious, proportionate and affordable resolution of civil disputes under the Act. While the provisions regarding the issuance and service of summons are mandatory, those that relate to extension of validity and consequent dismissal in the event of default are permissive.

On 26th January, 2010, the Plaintiffs filed this suit against the Defendants praying for various reliefs.

The Plaintiffs also filed an injunction application which was fully heard and dismissed in a ruling delivered by Hon Kimaru J on 22nd October, 2010.

On 20th April, 2011, the 1st Defendant took out a Notice of Motion expressed to be under Sections 1A and 1B, Order 2 Rule 15 (c) and (d) and Order 5 Rules 1 and 2 of the Civil Procedure Rules seeking the dismissal of the suit on the grounds that the summons expired on 26th January, 2011 and no application for the extension of their validity had been made. Consequent to that application, it would seem that summons dated 28th April, 2011 were issued. This elicited yet another Notice of Motion dated 17th May, 2011 by the 1st Defendant seeking to stay of the filing of any appearance by the 1st Defendant until that application had been heard and that the Summons dated 28th April, 2011 be struck out. These two (2) applications were consolidated and were argued on the basis of written submissions in respect of which this ruling relate.

It was contended on behalf of the 1st Defendant that the Plaintiffs were not keen to proceed with the trial of this suit, that the suit having been filed on 26th January, 2010 the life of the Summons commenced then, that the validity of those summons expired on 26th January, 2011, that no application had been made to extend the validity of those summons, that the Deputy Registrar did not have jurisdiction to issue the summons dated 28th April, 2011 outside the validity period. Mr. Gichuhi, learned Counsel for the 1st Defendant submitted that a Plaint without a valid summons is impotent, he cited the case of **Mae Properties Ltd –vs- Davidson Ngini (2005) E KLR** in support of that contention, that there was no jurisdiction to extend summons that had already expired, **National Bank of Kenya Ltd –vs- Syntax Printers & Others (2006) E KLR,** that the overriding objective does not cure a fundamental procedural defect and relied in the case of **Nilami Doshi –vs- Credit Agricole Ltd & Others HCCC No. 802 of 2002 (UR).** Finally, Mr. Gichuhi submitted that the delay in collecting the summons for service had not been accounted for by the Plaintiffs' Advocates and that the applications were predicated upon matters of jurisdiction and they should therefore be allowed.

The 2nd Defendant did not file any Replying Affidavit but filed submissions in support of the applications. Mr. Kiiru learned counsel for the 2nd Defendant supported Mr. Gichuhi's submissions and further submitted that under Order 5 Rule 6 of the Civil Procedure Rules, it was incumbent upon the Plaintiffs Advocates to ensure that the summons were collected and served within the year. Counsel urged the Court to allow the applications.

The Plaintiff filed a Replying Affidavit by Stephen Kimau Musyimi sworn on 20th June, 2011 and written submissions in opposition to the applications. Mr. Musyimi swore that the Plaint was filed together with the summons as required by law on 26th January, 2010, that a ruling on the injunction application was delivered on 22nd October, 2010, that the Deputy Registrar of this court had not signed and sealed the summons prior to 14th April, 2011, that the Plaintiffs Advocates were advised in April, 2011 to deliver fresh summons for sealing as the oversight was that of the court, that fresh summons were sealed and issued on 28th April, 2011 and duly served upon the Defendant's Advocates. The Plaintiff contended that the validity of summons start running from the date of issue not the date of filing, that under the previous Order IV rule 3 of the Civil Procedure Rules the obligation and duty to seal and issue summons is on the court, that since the summons in this case were issued on 28th April, 2011, their expiry date would have been 28th April, 2012, that the delay in issuing the summons is attributable to the court. In Mr. Musyimi's view, the application by the 1st Defendant was meant to conceal its fraudulent activities

and not the dismissal of the suit for want of prosecution, that the Plaintiff is are ready to set down the suit for trial once all pre-trials are concluded.

Mr. Issa learned counsel for the Plaintiffs submitted that the provisions of law relating to summons prior to December, 2010 were different from the current Order 5, that in the previous Order IV of the Civil Procedure Rules there was no time limit for the court to issue summons, that failure by the court to issue summons timeously cannot be visited upon the Plaintiff's. Counsel relied on the case of **Erastus K. Wameyo & 4 Others –vs- Jotham Wabomba & Another.** He submitted that the summons issued on 28th April, 2011 were valid, that the same had not abated. Mr. Issa distinguished the authorities relied on by the 1st Defendant and urged the court to dismiss the applications with costs to the Plaintiff.

I have considered the Affidavits on record, the submissions of counsel and the authorities cited.

In my view , the issues that turn on the 1st Defendant's applications under consideration are, firstly whether it is the provisions of the repealed Civil Procedure Rules or the 2010 rules that are applicable to the Plaintiff's suit as concerns Summons to enter appearance, secondly, when does the validity of a summons commence and finally who is to blame for the delay in the issuance of the summons in this case?

Order 54(2) of the Civil Procedure Rules 2010 provide that:-

"2. In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done.

Provided that …….

(a) If, and in so far as it is impracticable in any such proceedings to apply the provisions of these Rules, the practice an procedure therefore obtaining shall be followed"

From this provision, it is clear that even the suits that were pending at the time the 2010 Rules came into force must comply with those rules unless it is shown that it is not practicable for them to apply. It has not been shown that it was impractical for the 2010 rules to apply to the Plaintiffs suit.

However, Section 23(3) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya provide as follows:-

"(3). Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall not:-

(a) revive anything not in force or existing at the time at which the repeal takes effect or;

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) <u>affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or</u>

(d) affect the a penalty, forfeiture or punishment incurred in respect of an offence committed against a written law so repealed;

(e) affect an investigation, legal proceedings or remedy in respect of a right, privilege, obligation, liability, forfeiture or punishment, as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made."

Further, Section 27(1) of the same Act provides that:

"27 (1) All subsidiary legislation shall, unless it is otherwise expressly provided in a written law, be published in the Gazette, and shall come into operation on the day of publication, or, if it is enacted either in the subsidiary legislation or in some other written law that the subsidiary legislation shall come into operation on some other day, on that day, subject to annulment where applicable"

The effect of these provisions is that the Civil Procedure Rules 2010 became applicable after they were enacted, that is 17th December, 2010. Before then, the old rules applied. To that extent therefore, since this suit was filed on 26th January, 2010 the repealed Civil Procedure Rules applied to this suit until December, 2010. To that extent I agree with Mr. Issa Counsel for the Plaintiffs that the applicable provisions were the then Orders IV and V which provided for ***'Institution of Suit and Issue of Summons'*** and ***'Service of Summons'.***

The repealed Order IV Rule 3 required, inter alia, that the Summons be prepared by the Plaintiff and be filed together with the Plaint, that the same be signed by the judge or an officer appointed by the judge and be sealed with the seal of the court. Order V on its part provided that the validity of the summons shall be for a period of twenty four (24) months from the date of issue. It is not disputed that the Plaintiffs complied fully with the provisions of the said former Order IV of the Civil Procedure Rules. They filed the summons together with the Plaint and it was left for the judge or an officer appointed by the judge to sign them. To this extent I am persuaded by and fully agree with the dicta of Hon. Ochieng J in ***ERASTUS K. WAMEYA & 4 OTHERS –VS- JOTHAM WABOMBA & ANOTHER(2008) e KLR*** at page 5 wherein he stated:

"By virtue of Order 4 Rule 3 (5) of the Civil Procedure Rules, the Plaintiffs were obliged to prepare summons, which they were to file with the Plaint. That they did.

Thereafter, by virtue of Order 5 Rule 3 (2), the summons were supposed to have been signed by the judge or the officer appointed by the judge. The summons were also supposed to be sealed with the seal of the court. It is only then that the summons which had been prepared by the Plaintiff would then assume the character of 'a judicial document calling a party to submit to the jurisdiction of the court", as was said by the Hon. Warsame J. in MOBILE KITALE SERVICES STATION Vs MOBIL OIL KENYA LIMITED & ANOTHER (2004) 1 KLR 1, at page 8.

In effect, summonses are not valid immediately after the Plaintiff prepares it and files it in court alongside the Plaint. I believe that this is why Order 5 Rule 1(1) states that:-

'A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue. ….'

In my considered view, the summons can only be deemed as issued when it has been signed and sealed.

My understanding of the decision in the case of RAJJANI & OTHERS Vs THAITHI is that a summons which is valid, can have its validity extended for up to 24 months from the date of issue.

As the summons prepared by the Plaintiffs were never signed nor sealed by the court, the court is deemed not to have issued the summons. Therefore, that which did not have life could not have

expired at the end of 24 months or at all."

Looking at a summons in terms of the Forms set out in the Schedule to the Civil Procedure Act, one will note that the penultimate paragraph and/or sentence reads ***'Given and issued under my hand and Seal of the Court this . . day of …. '.*** To this end therefore, one cannot but agree with Hon. Ochieng J in ***THE ERASTUS CASE (supra)*** that the validity of summons begin on the date they are signed and sealed. This is so because undated and unsigned summons cannot be Summons capable of summoning the Defendant to enter appearance in any proceedings. They remain just pieces of papers. In my view therefore, the summons which the Plaintiffs filed and left them to be signed but remained unsigned did not acquire any validity of a summons until they were signed.

From the foregoing, I am satisfied and hold that under the repealed Order IV of the Civil Procedure Rules, the Plaintiffs had done all they were required to do under the law. It was the court that was enjoined to ensure that the summons were signed and sealed. That the court did not do and the Plaintiffs cannot be blamed for the same. I have also taken into consideration that a ruling on an injunction application that had been reserved for delivery on 19th March, 2010 was only delivered on 22nd October, 2010. Of course the summons could not be signed when the file was with the Judge awaiting delivery of that ruling. To that extent the Plaintiffs would be blameless for the delay in the issuance of those summons.

However, the foregoing was the position until 17th December, 2010 when the 2010 Rules came into force. As I have already pointed out, under Order 54 of those rules, all suits henceforth were supposed to be subject to those rules as far as it was practicable. Applying the provisions of the new Order 5, those summons should have been signed and sealed within 30 days of 17th December, 2010. That is up to 10th February, 2011 having excluded the period from21st December, 2010 through 13th January, the following year when time is excluded. They were not. It would seem that it is only on 19th April, 2011 that the Plaintiffs woke up from their slumber to notice that the summons had been dated 14th April, 2011 but had not been sealed. Of course having not been sealed by the court they were invalid for being in breach of Order 5 rule 1(2) of the Civil Procedure Rules. The Plaintiffs made a follow up on 19th April, 2011 whereby the summons were signed sealed and issued on 28th April, 2011.

From the foregoing, the Plaintiffs can only be faulted for waiting between 17th December, 2010 and April, 2011 before reminding the court that their summons had not been issued. That fault in my view is not fatal. Under Rule 6 of Order 5, the suit only abates if the summons remain uncollected and unserved for 30 days of the date of issue or notification of the issuance.

Having already found that the date of validity of summons commences on the date of issuance and not the filing of the suit, the summons in this case remained pieces of papers in the court file until they were acted on 28th April, 2011. It follows therefore that the summons issued on 28th April, 2011 were validly issued and their service upon the Defendant's or their Advocates if so done within 30 days of the 28th April, 2011 was valid. In my view therefore, the issue of extension of the validity of summons could not arise in this case in view of what I have already said. Accordingly, although correct in their exposition of the law in instances of extension of validity of summons, the authorities relied on by the 1st Defendant are not applicable in the circumstances of this case.

Accordingly, for the foregoing reasons I am satisfied that the applications by the 1st Defendant are not meritorious and are hereby dismissed.

For the reason that the Plaintiffs took no action after 17th December, 2010 until April, 2011, I will make no orders as to costs. The Defendants should now proceed to enter appearance within 10 days of today and file their respective Defences within 14 days of entering appearance. Whereafter the parties can undertake pre-trials.

DATED and **DELIVERED** at Nairobi this 21st day of May, 2012.

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A. MABEYA

JUDGE