



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 532 of 2010

EPHANTUS WACHIRA NGOCHI PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LIMITEDDEFENDANT

R U L I N G

1. By a Plaintiff dated 4th December, 2009, the Plaintiff made several claims against the Defendant. Although that Plaintiff was filed on the same day, 4th December, 2009, no summons were issued and on 26th April, 2012, the Defendant made an application under Order IV Rule 3, V Rule 1 & 2 of the Civil Procedure Rules praying that the suit be dismissed with costs for having abated on account of want of service of valid summons to enter appearance.
2. The Grounds upon which the application was made were that the summons to enter appearance would have in the first instance been valid for a period of twelve (12) months from December, 2009 to December, 2010 or upon extension for a period of not more than 24 months. That upon the effluxion of the 24 months from the date of filing suit in December, 2009 and there being no evidence of any valid application having been filed to extend the validity of the summons, the suit must have abated for want of service of summons. Mr. Kuyo learned Counsel for the Defendant submitted that there was no evidence to show that any summons had been issued and that no difficulty had been explained in the service of the summons upon the Defendant.
3. On being served with the Defendant's said application, the Plaintiff filed an application on 6th June, 2012 under Order 5 Rules 1, 2 and 4 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act seeking an order that fresh summons to enter appearance be issued. By virtue of the Grounds of Opposition dated 6th June, 2012, the Plaintiff sought to rely on the said application in opposition to the Defendant's said application.
4. The Plaintiff contended that because the Plaintiff in this suit was filed together with an application under a Certificate of Urgency, that application was proceeded with and there has never been any summons issued in respect of the main suit, he contended that due to the transfer of the suit from the High Court Central Division to the Commercial and Admiralty Division the court file could not be traced and there was delay in applying for summons. The Plaintiff further contended that summons could not have abated since the summons had not been issued in the first instance.

5. Mr. Koceyo, learned Counsel for the Plaintiff submitted that since there is a consent entered on 3/5/2012 and prayer (e) of the Plaint had been allowed the Defendants had submitted to the jurisdiction of this court. That the new Advocates had taken over in July, 2012 and were willing and had demonstrated that they intended to prosecute the Plaintiff's suit. Counsel urged that the Defendant's application be dismissed and the Plaintiff's application be allowed as prayed.

6. I have read and considered the applications on record and the submissions of Counsel. I propose to consider the Plaintiff's application dated 6th June, 2012 first since if allowed, there will be no need to consider the Defendant's application.

7. The Plaintiff has sought the exercise of this court's discretion to issue fresh summons to enter appearance. This suit was filed on 4th December, 2009. The rules applicable then were our former Civil Procedure Rules. However, with the coming into effect of the 2010 Civil Procedure Rules, the new Rules started to operate. Order 54 thereof provides:-

"1. The Civil Procedure Rules are revoked.

2. In all Civil Proceedings 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."

The proviso to the said subrule provided that it is only where it was impracticable to apply the new rules that the old rules were to be resorted into. To my mind, the Plaintiff has not demonstrated that there is any impracticability to apply the new rules. I therefore hold that the rules applicable to the applications before me are the Civil Procedure Rules 2010.

8. The issuance and service of summons is governed by Order 5 of the 2010 Civil Procedure Rules. Under Order 5 Rule 1 it is mandatory that summons should be issued and sealed at the very least within 30 days of the date of filing suit. Order 5 Rules 1(2) and (6) are very relevant to this application. Rule 1(2) and (b) provide:-

"(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.

(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."

9. I should point out here that I have carefully perused the record and I have not seen any summons accompanying the Plaint or issued by the court at any time. This is so because none were prepared and filed by the Plaintiff at the time of commencing these proceedings. That being the case, my view is that as at 4th December, 2010, twelve months were over and were the Plaintiff willing, he should have either had issued or extended any summons to enter appearance if he had any. It is obvious that he did not have any summons capable of being extended upon expiry of 12 months after the filing of the suit.

10. The 2010 Civil Procedure Rules came into force on 17th December, 2010. Under those rules, Summons to Enter Appearance are supposed to have been collected for service as at 17th January, 2012 failure to which they were to abate. That presupposes a situation where the filing of the suit is pushed from the 4th December, 2009 to 17th December, 2010. Now that no summons were filed or were served within 30 days of the 17th December, 2012, I am of the view that the suit abated in or about 18th February, 2011.

11. As that was not enough, twelve months later, 18th January, 2012, no summons had been issued and in my view the suit had long abated.

12. I am not in agreement with Mr. Koceyo that a suit can only abate when summons have been issued and not served. My view is that, the requirement to ensure that the summons are served within 30 days of issuance of notification, is to buttress the overriding objective of the Civil Procedure Act, that disputes be dealt with and be resolved with expedition and proportionately. The Plaintiff is expected to have filed his Complaint with the summons, he failed to do so. He now makes an application praying for the issuance of fresh summons saying that:-

“Court now that I did not prepare and file the summons to enter appearance with my complaint, I need the court to order that summons be issued to enable me prosecute the suit.”

My view is that that won't do. No reasons whatsoever have been advanced why the Plaintiff did not file any summons with the Complaint or thereafter for a period of over 2 years and seven (7) months to wake up now and apply to have the summons issued. My view is that, the suit was brought for the purposes of vexing the Defendant and that is why after filing the suit the Plaintiff was consumed with the interlocutory application until it was awakened by the Defendant through the latter's application made on 26th January, 2012.

13. Accordingly, I find that there are no good grounds or reasons or any reasonable grounds that have been advanced to enable the Court exercise its discretion in favour of the Plaintiff. I do not agree with Mr. Koceyo that a suit can only abate if a summons has been issued and not before. I say so because, the overriding objective of the Civil Procedure Act is that disputes be resolved expeditiously. Therefore, the law put it upon the shoulders of the Plaintiff to prepare and file summons for the court to issue the same and notify the Plaintiff of such issuance. Now that the Plaintiff failed to prepare the summons for well over 24 months, I am of the view that the suit has already abated.

14. The Plaintiff submitted that prayer No. (e) of the Complaint had been allowed by consent and that therefore the Defendant had submitted to the jurisdiction of the court. That may be so, but that does not cure the defect that no summons have ever been issued to summon the Defendant to appear and defend the suit in order to validate the proceedings.

15. Accordingly, I decline to grant the Plaintiff's application dated 6th June, 2012. It follows therefore that the Defendant's application dated 25th January, 2010 has no otherwise but to succeed.

16. In the end, I dismiss the Plaintiff's application dated 6th June, 2012 and allow the Defendant's application dated 25th January, 2012 with costs of both the applications to the Defendant.

DATED and DELIVERED at Nairobi this 26th day of September, 2012.

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A. MABEYA
JUDGE