



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL CASE NO. 19 'A' OF 2008

HATIM HAMZA ALI PLAINTIFF

VERSUS

SIMONE MANCINI 1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

This is an application made by way of Chamber Summons under Order VI Rule 13 1 (b), (c) and (d) Civil Procedure Rules seeking that the Plaintiff's suit against the 1st Defendant be struck out and/or dismissed. It is based on grounds that:-

- (a) The summons in this suit have not been served on the 1st Defendant to date.
- (b) The summons on record against the 1st Defendant is invalid.
- (c) The summons is over twelve months since they were issued by the Court.
- (d) The Plaintiff has failed to take any steps to ensure the matter proceeds to hearing since March 2009, since the first Defendant filed his defence.

The application is supported by the affidavit sworn by Mr Mouko advocate for the applicant who states that initially, the Plaintiff had obtained a default judgement against the 1st Defendant. However this was successfully set aside upon application by the Defendant.

Since setting aside of the ex-parte judgement, Plaintiff has not served the Defendant or defence counsel with any summons, the summons which were issued with the plaint were not extended or renewed and it is apparent Plaintiff has no interest in pursuing the matter. It is on account of this that Mr Mouko urges for striking out of the entire suit.

The application is opposed, and in a replying affidavit sworn by the Plaintiff who objects to the admission of the supporting affidavit which is sworn by Mr Mouko (defence counsel) and who is not a party to the suit. The Plaintiff further avers that 1st defendant was served with summons by a process server as per the affidavit of service marked HHA1. It is denied that Plaintiff has lost interest in this matter, rather the slow pace in matters stemmed from a desire to accommodate the defendant's participation in this matter.

On 13/9/10, both counsel had agreed to dispose of this matter by way of written submissions. The matter was mentioned on 12/10/10 but neither counsel has filed written submissions. It was again mentioned on 10/11/10 for purposes of filing submissions but none had been filed. The court then directed that counsel

do file written submissions within 7 (seven) days for that date but as the time of writing this ruling, no submissions had been filed by either counsel. I therefore write this ruling on the strength of what is contained in the affidavits.

The first issue to address is whether the court should pay regard to the affidavit sworn by Mr Mouko who is an advocate for the defendant, and who is not a party in this suit. The application is by the Defendant whose reasons for seeking to strike out the entire suit are (a) Not being served with summons (b) the current summons expired(c) the pendency of this suit is raising anxiety to the defendant.

Of course the state of defendant`s mind (that is anxiety) is something which perhaps would have been better stated by the defendant and not his counsel. Courts have been reluctant to accept affidavits sworn by litigant`s counsel because it actually amounts to counsel giving evidence on behalf of his client and may also place counsel in an awkward and embarrassing situation, should the adverse party then elect to cross-examine him on the contents of the affidavit. The position was examined in a decision by Hon Justice A.Ringera(as then was) in the case of **Kisya Investment and Another V Kenya Finance Corporation Limited and Others, HCCC No.3504/93**, the learned Judge stated;-

“It is not competent for party`s advocates to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the advocate courts an adversarial invitation to step from the privileged position at the bar into the witness box, he is liable to be cross-examined on his dispositions. It is impossible and unseemly for an advocate to discharge his duty to this court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same cause”

This almost sounds like indictment against advocates who swear affidavit supporting this client`s cause. Hon Justice D.Onyancha in the case of **Oduor v Afro Freight (2002) KLR pg 652** had a more accommodating approach – that the supporting affidavit sworn by the Plaintiff`s advocate did not state that counsel had authority and the affidavit was deemed to be improperly sworn by Counsel.

For me, I think citing authority to swear an evidentiary matters is simply cushioning what is already a flamed approach. An affidavit contains issues how the status of applicant is affected evidence which must be from the person stating those facts.

Be that as it may, I am keenly aware of the “Oxygen Principle” under section 1B of the Civil Procedure Act which places a duty on this court to consider what is the overriding objective – of course the overriding objective is what is the best in the ends of justice, and whether any prejudice be caused to the adverse party. I therefore consider the substantive issue here, which is simply whether submissions have been served on the 1st defendant, and if so, whether the same are still valid.

It is the Defendant`s contention that the reason why the earlier judgement was set aside, in the first place, was because summons had not been served. He also confirms that summons were issued with the plaint but were not extended or renewed and the 12 months lapsed long time ago- which means the life of the summons was spent. The Plaintiff however insisted that there had been service of summons as supported by the affidavit of service sworn by Boniface Musyoki. Yet when the judgement was set aside Mr Mouko alluded to the fact that the reason was the issue of non-service, and I did not hear even a whimper to protest that. So that as matters stand, summons were issued on 17th April 2008 and were not served. The life came to an end twelve months later. The same have not been renewed and remain unserved. Should this be a reason to then strike out the plaint under Order VI Rule 13 1 (b) (c) and (d)?

“13 (1) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that;-

(b) It is scandalous, frivolous and vexatious; - or

(c) It may cause prejudice, embarrassment or delay the fair trial of the action

(e) *It is otherwise an abuse of the court process*

The purposes for summons is so as to notify the defendant that he is required to enter appearance within a specified period. In this instance the 1st defendant has actually filed his statement of defence. I fail to comprehend how failure to serve summons on a party who has already filed his statement of defence causes prejudice or delay of this matter – the fact of the matter is that both parties are aware there is a dispute in court and both have filed their pleadings. I think under the circumstances, the service of summons will purely be a technical formality which would not impact either way, in the just determination of the proceedings or the efficient disposal of this suit. It would be unfair and completely defeat the interest of justice were the application to be sustained because the service of the summons will simply be a technical side show. I therefore decline to strike out the suit. Instead I direct that the Plaintiff do serve the summons on 1st defendant within 7 (seven) days from today. Each party will bear its own costs in this application.

Delivered and dated this 23rd day of February 2011

**H A OMONDI
JUDGE**