



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

NAIROBI

CIVIL SUIT NO. 685 OF 2007

**MESHACK OKOTH OBURA practicing as MESHAK OKOTH OBURA & CO.
ADVOCATES.....PLAINTIFF**

VERSUS

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION.....DEFENDANT**

RULING

The Plaintiff filed this suit on 28th September, 2007 and along with the Plaint, the summons were filed to be signed by the authorized officer of the court as per Order IV Rule 3 of the repealed Civil Procedure Rules. The Plaintiff also filed an application dated 27th September, 2007 under Order XXXIX Rule 1, 2 and 3 of the said Civil Procedure Rules seeking for temporary injunction from further proceedings of the proclamation dated 14th September 2007.

At the initial ex-parte hearing of the said application a temporary interim order was granted on condition that the Plaintiff deposits Kshs.250,000/- within 10 days as is evident from the order of 28th September, 2007. I do not have any proof of such deposit.

The matter was thereafter adjourned to afford possibility of settlement.

However, on 21st November, 2007, the court gave an interparte hearing date for the said application as no settlement had been reached.

Thereafter, on 24th January, 2008, the court granted the interim injunction on hand after hearing the

application ex-parte, the Defendant being not represented.

Since 24th January, 2008, the Plaintiff with the interim injunction stayed on the suit, apparently not asking for issuance of summons filed along the Plaintiff.

The Defendant thereupon filed an application dated 17th September, 2010 seeking the dismissal of the suit for want of prosecution.

Thereupon, the Plaintiff filed the application dated 24th November, 2010, which is the application to be determined seeking the prayer that the summons herein do issue on such terms and conditions as are just. The application is supported on the grounds set forth on its face and the supporting affidavit of the Plaintiff sworn on 24th November, 2010.

The main grounds on which the application is based is that there was an assurance of the settlement as per the discussions. In paragraph 3 of his affidavit, it is averred:-

“I recall discussing this matter with Mr. M.C. Mulwa Advocate and my advocate on record during one of the court sessions when it was mutually agreed that this matter would best be resolved through negotiations.”

Thus the failure to obtain summons was on account of the misconception that the settlement could be reached.

The application is strenuously opposed by the Defendant and its Company Secretary Grace Mudala Magunga has sworn a detailed replying affidavit on 4th May, 2011.

It reiterates the background of the matter culminating to the interim injunction, which I have already specified.

Obviously, from those facts which are indisputable, the Plaintiff with the interim order obtained ex-part order after which he did not take any action. His averments of any further discussions as regards settlement are denied by the Defendant and also not substantiated.

I am aware that the application was filed just before the promulgation of Civil Procedure Rules 2010. Even looking at the repealed Civil Procedure Rules, Order IV Rule 3 (1) stipulates that the summons shall issue when a suit has been filed, which should have been accompanied by a copy of the Plaintiff. The present Plaintiff did accompany the summons but the Plaintiff has not obtained its issuance as stipulated in the said provisions. I further note that there is no time limit prescribed for issuance of the summons, but I would emphasize that in absence of any stipulation of the time limit, the act in question must be done within reasonable time. The lack of issuance from September, 2007 is, under no standard of fairness or even logic, reasonable time.

I am also not persuaded to believe the averments made by the Plaintiff that he was assured of the settlement. The facts of this case are self evident and I reject the stipulation to that effect by the Plaintiff. I say so because as at 21st, November, 2007, the court recorded that there is no settlement and on fixing the interparte hearing the court further remarked; ***“If by then no settlement will have been reached and the parties unwilling to talk further”***.

The Plaintiff, on 24th January, 2008 by proceeding ex-parte with the application, showed that there was no settlement and parties were unwilling to talk.

The averments to the contrary made by Plaintiff now are not creditworthy and are, in my view, dishonest.

Order 54 Rule (2) of Civil Procedure Rules 2010 stipulates the provisions of Civil Procedure Rules 2010 shall be applicable to all proceedings even if filed earlier before the effective date.

Moreover, as per Sec. 1A of the Civil Procedure Act, the courts are enjoined to exercise its discretion to facilitate just, expedient, proportionate and affordable resolution of the civil dispute. The constitution also echoes the said sentiments.

In the premises, I do find that the application dated 24th November, 2010 lacks merit and I dismiss the same with costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of **May, 2011**

K. H. RAWAL

JUDGE

13.05.2011