REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 185 OF 2008

SUDI CHEMICAL INDUSTRIES LIMITED .....…1ST PLAINTIFF/RESPONDENT
AUTO CURE LIMITED ……..... 2nd PLAINTIFF/RESPONDENT
KHUSH FURNITURE. ……..... 3RD PLAINTIFF/RESPONDENT

VERSUS

SHAIMA INVESTMENTS LIMITED.....…DEFENDANT/APPLICANT

R U L I N G

Before me is an application by way of Chamber Summons dated 4th June, 2010 filed on behalf of the defendant. The application was filed under Section 3A of the Civil Procedure Act (Cap 21 Laws of Kenya) and Order 5 rule 13© and (d) as well as Order 5 rule 1 (1) and (2) of the Civil Procedure Rules. It seeks the following orders: -

1. ***That this honourable court be pleased to strike out the plaintiff's suit.***

2. ***That costs of this application and the entire suit be borne by the plaintiffs.***

The application has grounds on the face of the Chamber Summons. The grounds are, inter alia, that the plaintiffs' suit was filed on 13th May, 2008 but the plaintiffs failed to take out or file summons to enter appearance within 12 months of filing the plaint. That the plaintiffs took out summons after a delay of 2 years without any application for extension or validity of summons. That the defects were fundamental defects which could not be cured.

The application was filed with a supporting affidavit sworn on by Shailesh Shah described as a director of the defendant. It is deponed in the said affidavit, inter alia, that the deponent has been advised by his advocate P. Munge Murage that the plaintiffs' suit was fatally defective on the following reasons.

(a) The plaintiffs suit had breached mandatory provisions of Order 4 of the Civil Procedure Rules;

(b) No summons were issued in the first instance upon filing the plaint and the plaint is thus fatally defective and incompetent;

(c) The plaintiffs suit consequently breached mandatory provisions of Order 5 rule 1 of the Civil Procedure Rules;

(d) No extension of validity of time was sought by the plaintiffs to warrant issuance of summons to enter appearance after a period of two years or there about.

The counsel for the defendant/applicant also filed written submissions on 4th October 2010. It was contended, inter alia, that the attempt to take out summons was done on 13th May, 2010 which was about two years after filing of the plaint. Therefore, the suit as it stood in the court records without valid summons to enter appearance, was not legitimate.

It was contended that in the absence of summons the plaint remained impotent and all the subsequent steps taken by the parties herein were a nullity in law as summons was required to have been issued within 12 months after filing the suit. Reliance was placed on the case of **Alfred Makhongo & 2 others Versus Zablon Nthamburi & another (2010) EKLR** where the court held that since no summons were signed and issued within 12 months of filing the suit or at all, the same was liable to be dismissed without notice. It was contended that under Order 4 rule 3(1) of the Civil Procedure Rules, it was mandatory that once a suit has been filed summons must issue to the defendants ordering him to appear within the time it is specified therein. It is the plaintiff or his advocate to prepare summons to enter appearance and file them with the plaint. No summons having been signed or issued within 12 months of filing the suit, the suit was liable to be struck out. It was contended further that the attempt by the plaintiff to issue summons and serve them two years after filing of the plaint was a gross abuse of the process of the court.

It was emphasized that summons to enter appearance were not mere pieces of paper. Reliance was placed on the case of **Firenze Investments Ltd Versus Kenya Way Ltd Civil Suit No. 542 of 1999** in which the court stated that the summons was a necessary and vital document governing the time table of pleadings and that the issuance and service thereof must comply with the rules for the pleadings to acquire legitimacy. It was the contention that the Overriding Objective in the Civil Procedure Act, should not be used to defeat rules made, or render the rules irrelevant. This was not a mere irregularity that could be cured under the inherent power of the court provided for in section 3A of the Civil Procedure Act. Reliance was also placed on the case of **Anthony WechuLi Odwisa Versus Alfred Khisa Munyanganyi [2006] eKLR** where the court held that where service of process was required, failure to do so went to the root of proper procedure and litigation.

It was contended that though the plaintiffs tried to explain the delay, they were merely trying to shift the blame to the Deputy Registrar. However, the plaintiffs made no attempt to illustrate that the Deputy Registrar had failed to sign the summons for a period of two years. Reliance was placed on the case of **Erastus Wameya Versus Jotham Wabomba [2008] EKLR** where the court held that although it was the responsibility of the court to issue summons, the plaintiffs could not escape for their failure to prove that they actively pursed the court with a view to having the summons signed and sealed. It was contended that the Deputy Registrar had no basis of issuing a summons after the lapse of two years. Therefore, the summons issued on 13th May 2010 were invalid.

Counsel emphasized that the rules were intended to regulate the practice in court. The ends of justice would be better served if the plaint herein was struck out because the summons issued were invalid.

On the hearing date Mr. Munge for the defendant made submissions highlighting the written submissions. Counsel emphasized that summons could not be extended after the expiry of duration of existing summons.

The application is opposed. A replying affidavit sworn by Hemanshu Roy Pattni was filed on 17th August, 2010. The deponent described himself as a Managing Director of the 1st plaintiff. It was deponed in the said affidavit that he was advised by the advocate for the plaintiffs that the plaint was filed together with the summons to enter appearance which was to be signed by the Deputy Registrar of the court. That due to the urgency of the matter then, the plaintiffs could not wait for summons to be signed by the Deputy Registrar and, therefore, served a plaint and a Chamber Summons application under certificate of urgency, with a view to collecting the summons to enter appearance and serve the same at a later stage

after it was signed by the Deputy Registrar.

It was deponed also that the application under certificate of urgency proceeded in court on many occasions from 13th May 2008 up to 16th May 2009 when a ruling was finally delivered and a notice of appeal was filed against the said ruling. It was deponed that the learned Judge had stated that the matter be referred to the Business Premises Rent Tribunal.

That on 6th of April, 2010 the defendant/applicant advocates unilaterally commenced proceedings in the Business Premises Rent Tribunal. The plaintiffs then instructed their advocates to proceed with this suit while they continue with the appeal because, it appeared that the defendant did not intend to bring this suit to a closure. It was deponed that the counsel for the plaintiffs had advised the deponent that the summons to enter appearance were not signed by the Deputy Registrar due to the initial urgency of the matter and subsequent prolonged proceedings. Therefore, the said advocate prepared a fresh set of summons to enter appearance which were signed by the Deputy Registrar on 13th May, 2010 and subsequently served to the defendant's advocates. It was deponed also that there was nothing to be extended as no summons had been signed and issued in the first place.

The plaintiffs counsel filed written submissions on 5th October, 2010. It was contended that the present application is frivolous because it was based upon deliberate misinterpretation of the law as one could not seek extension of validity of summons which were never issued. It was argued that Order 5 rule 1 of the Civil Procedure Rules states that a summons shall be valid in the first instance for 12 months from the date from which it was issued. It was contended that the date of issuance of a summons is the date when the Registrar signs such a summon. Reliance was placed on the case of **Erastus Wameya Versus Jotham Wabomba** (supra), cited by the defendant herein. There were no previous summons that were issued by the Deputy Registrar. Therefore, there was no issue of extension of summons. Counsel contended that the delay in issuing the summons and serving the same had been explained in the replying affidavit. There was no provision in the Civil Procedure Rules which restricts the issuance of summons in the first instance to only 12 months, therefore, this application is misconceived and should be dismissed.

It was contended that Order 6 rule 13 (c) and (d) of the Civil Procedure Rules related to anormalies on the face of pleadings such as the plaint and defence, and did not cover complaints relating to issuance and service of summons to enter appearance. It was also contended that the defendant had invoked irrelevant provisions of Order 5 rules 1 and 2 of the Civil Procedure Rules. It was contended that though the said rules related to the issuance and validation of summons, at the time that this application was filed, summons to enter appearance had already been issued and served. Therefore, there was no question of non issuance of such summons. It was also contended that the defendants had no legal basis for challenging the Deputy Registrar's legal authority to sign summons.

Counsel contended that all the cases cited and relied upon by the defendant were cases where summons had not been issued at all. Counsel stated that in the case of **Erastus Wameya** (supra), the Judge refused to dismiss the suit because summons to enter appearance had already been signed, issued and served.

At the hearing Mr. Kitonga for the plaintiffs orally highlighted the written submissions.

I have considered the application, documents filed and submissions both written and oral on both sides. I have also considered the authorities cited and the law.

This application was brought under Order 5 and 6 of the Civil Procedure Rules. However, the relevant legal provisions are under Order 4 rule 3, which provide: -

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

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with a seal of the court.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than ten days.

(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."

There is no dispute that when the plaint herein was filed summons was not served on the defendant. The plaint was however, served with an application. The defendant contends that such summons was not prepared by either the plaintiff or by their advocate and filed with the plaint as required under Order 4 rule 3 (5) above. The plaintiffs claim that such summons was prepared and filed with the plaint but was not served with the plaint because the summons had to await the signature of the Deputy Registrar, while there was an urgent application to be dealt with. It is not disputed that it took about two years for a summons to be signed and served.

Indeed, under rule 3 (5) above, the plaintiffs or their advocate were required to file a summons together with the plaint. They appear to have taken unduly long, a period of around 2 years to actually get the summons signed. No document was filed by any court official in this application to indicate whether or not the said summons was filed with the plaint.

Having considered the facts placed before me, I am of the view that summons were not filed together with the plaint. I so find.

Does that mean that these proceedings brought by way of plaint should fail or be dismissed? Several cases have been referred to by the defendant/applicant with respect to the issuance and service of summons, as well as extensions of summons.

The argument by the defendant that summons cannot be issued or signed after 12 months is not sustainable. The relevant rule only refers to extension of summons that has already lapsed. There is no time limit for the Registrar to sign and issue the initial summons. Therefore, the period of 12 months does not apply to the initial summons.

The cases cited, including the case of **Alfred Makhongo** (supra), except the case of **Erastus Wameya Versus Jotham Wabomba** (supra) related to situations where summons were not issued at all. In the present case, as in the case of **Wameya** (supra) summons have been issued and served. In the case of **Wameya,** Ochieng J, though appreciating the failure or delay of the plaintiff in pursuing the issuance of summons, refused to strike out the suit where summons had already been issued and served. The judge observed as follows: -

"Meanwhile, the plaint too is incomplete, without a date. Instead of striking out I direct that it be deemed to have been dated 9th October 2002 which is the date when it was filed in court".

It is obvious that in the above case, there were more defaults by the plaintiff than merely the delay in issuing the summons. The plaint was also not dated. However, the court exercised its inherent jurisdiction to do justice to the parties, and allowed the suit to stand.

That decision was made in 2008 before the Overriding Objective in the Civil Procedure Act was enacted under Act No. 6 of 2009. The Overriding Objective in the civil cases is contained in Section 1A and 1B of the Civil Procedure Act (Cap 21 Laws of Kenya). It requires that courts provide justice for the purposes of attaining:

a) The just determination of the proceedings;

b)The efficient disposal of the business of the court;

c) The efficient use of available judicial and administrative resources;

d)The timely disposal of the proceedings, and all other proceedings of the court at a cost, affordable by the respective party;

e) The use of suitable technology.

In my view, the above requirements call upon courts to administer substantive justice speedily, and at affordable costs. Indeed, rules of procedure have to be respected. But where parties have not suffered any identifiable prejudice due to technical defaults, then all parties should be given a chance to ventilate their case substantively, expeditiously and at an affordable cost. In my view, the delay in issuing the summons per se herein has not occasioned the defendant any prejudice. If anything, now they have been served with the summons, which is not denied. The forum is open for the parties to ventilate their case substantively.

In addition to the Overriding Objective in the Civil Procedure Act, our Constitution which was promulgated in August, 2010 under Article 159 (2) (d), enjoins courts to do justice without undue regard to procedural technicalities. This fortifies my view that, there being no substantive complaint of prejudice or about the contents of the plaint which has been filed, the delay in serving the summons cannot alone be a good reason to strike out the entire suit. It may be compensated in costs. In the present situation, I do not even find the need for costs because it is not disputed that there was an application in these same proceedings in which all parties participated. There were also other proceedings filed in the Business Premises Rent Tribunal on the same subject matter after this suit was filed. The issues raised herein in my view, required substantive hearing and decisions in order to meet the ends of justice.

In view of the above reasons, I find that the delay in issuing and serving the summons to enter appearance is curable and I so decide. I find and hold that the application lacks merit and I have to dismiss the same.

Consequently, the application is dismissed. Costs will follow the decisions to be made in the main suit.

Dated and delivered at Nairobi this 8th day of June 2011.

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GEORGE DULU
JUDGE

In the presence of
Mr. Nzamba Kitonga for plaintiff/respondent
None appearance for defendant/applicant.
C Muendo – court clerk