



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 237 of 2008

ELEGANT COLOUR LABS NAIROBI LTD..... PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED. 1ST DEFENDANT

REGISTRAR OF TITLES. 2ND DEFENDANT

DENA INVESTMENTS LIMITED. 3RD DEFENDANT

R U L I N G

The application before the court is dated 17th July, 2009. It is for the striking out of the main suit filed on 18th May, 2008 together with the application under it. The main ground advanced for the application to strike out is that by the time it was filed on 4th August, 2009 which was over one year since the filing of the suit, no Summons for Entering Appearance had been served on the Applicants/Defendants.

The position taken by the Plaintiffs is that the Defendants had been properly served with the summons to enter appearance and accordingly the application for striking out has no basis. The Plaintiffs pointed to the file records where the purportedly proper returns of service of the summons and pleadings, exist.

Turning to the file records and perusal thereof, shows that there is an affidavit of service of the Amended Summons to Enter Appearance filed by the Process-Server named as Casper Khayeka. The affidavit is purported to have been sworn on 7th September, 2009 and it asserts that service was effected on 22nd July, 2009. The said Amended Summons was issued by the Deputy Registrar on 16th July, 2008. They were therefore supposed to be served within a period of one year which would have ended on 15th July, 2009.

If then the said Summons were, (according to the Process-Server) served on 22nd July, 2009, the said service would not be valid since the summons elapsed within a year which ended on 15th July, 2009. On the other hand the said Amended Summons could validly be extended under the relevant Civil Procedure Rules, being Order V Rule 1 (2). The record before me does not show that Plaintiffs have ever applied for the extension of the Summons, nor do the Plaintiff's claim so.

Confusion arose however, when the process-server aforementioned admitted before the court and under oath, that the said Amended Summons to Enter Appearance was served by him not on 22nd July, 2008 but on 11th July, 2008. The said process-server had been summoned to be cross-examined by the Defendant under Order V Rule 16 to establish the truthfulness of the deponements in his affidavit of service in the record.

The said process-server admitted that the deponements that he had served the Amended Chamber Summons with the Summons to

Enter Appearance on 11th July, 2008, were false. He also admitted that he does not really know who he had served nor could he be sure that the papers he served were filed in court by him. He thought that the Summons which had been served upon the Defendants, got lost in the offices of the Plaintiff's advocates and were never filed in this court. This is so despite the fact that the Plaintiff's Advocate, Pramod Patel, had also sworn an affidavit of service claiming that the Amended Chamber Summons carrying the Summons to Enter Appearance were served by the same process served on 11th July, 2008 and yet as a matter of fact the Summons to Enter Appearance aforesaid itself was not signed and issued by the Deputy Registrar until 16th July, 2008. The summons did not exist on 11th July, 2008.

The conclusion this court arrives at concerning service, is that no Summons to Enter Appearance had ever been served upon the Defendants to-date. While it is probable that the Amended Chamber Summons were filed in court on 11th July, 2008 as suggested by the court receiving-stamp, there is no credible evidence that service of the same together with Summons to Enter Appearance was ever effected.

The situation in the courts hands presently is therefore as follows:-

That the plaint was filed on 18th May, 2008. That the Summons to Enter Appearance was issued and signed by the Deputy Registrar on 16th July, 2008. That by 4th August, 2009 when this application to strike out the suit was filed, the said Summons to Enter Appearance had not been served upon the Defendants. That to-date, the same has never been extended by this court as no application to do so has so far been received.

The question that the court must now answer is this: What is the legal consequences of failure:-

(a) to serve the Summons to Enter Appearances within 12 months.

.....(b) to apply for extension of the Summons to Enter Appearance within 12 months of its issue.

Order V Rule 1 provides thus: -

“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.”

Sub rule(2) allows extension of the summons where it is fair and just to do so. Other subrules stress the fact that every reasonable attempt should be made by the Plaintiff to effect service before the application for extension thereof is made or even allowed. Subrule (7) is of greater importance to the issues before the court presently and it provides thus: -

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

It is apparent then, that where the Plaintiff has not applied for the extension of the Summons to Enter Appearance the court is entitled to dismiss the suit but apparently only at the expiry of twenty-four months. It seems to me proper and correct to say that the extension of Summons aforesaid can logically only be made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist. That appears to be the conclusion reached by Kasango, J. in Nairobi, Milimani High Court Civil Suit No. 67 of 2006 – Golden Bell (Oversees) East Africa Vs University of Dar-es-Salaam & Norwegian Agency for Development Co-operation (NORAD). I strongly agree, approve and adopt the conclusion reached therein.

In Udaykumar Chandulal Rajani, Ruxmani W/o Chandulal, J. Rajani Dipak Chindulal Rajani &

Inul Chandulal Rajani T/A Lit Petrol Station Versus Charles Thaithi the Court of Appeal considered the meaning and effect of Order V Rule 1 of the Civil Procedure Act. It stated thus: -

“Order V Rule I provides a comprehensive code for the duration and renewal of summons, and con-compliance with the procedural aspect caused by failure to renew the summons under the rule is such a fundamental defect in the proceedings that the inherent powers of the court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service, he could not in the circumstances re-issue fresh summons after expiry of the aforesaid 24 months period. Neither did the entry of appearance by the defendants revive the summons which had expired.....”

And later in the same ruling the court stated: -

“However, in this case neither the plaintiff nor his advocate did exhaust the provisions of Order V Rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of Summons beyond 24 months, when in fact there was no valid summons in existence.....”

Clearly then, the summons under the said order which have capacity to be extended by the court on application by the Plaintiff, are the summons which are still valid. This means that an application to extend can only be made within the duration of the 12 months provided under Rule 1 forecited or under any other duration allowed in extension of the original summons, provided the total period do not extend beyond the 24 months life-span of the suit under the Order.

One more issue arises from the above still; can this court dismiss a suit on the basis of non-service of the above summons or on failure to extend the summons if the period of 24 months has not expired from the date of original issue thereof? In this case for example the Summons to Enter Appearance were issued only on 16th July, 2008. They without the relevant extension expired on 15th July, 2009. There is duration of another 12 months which will expire on 14th July, 2009, before the period of 12 months expires. How is this?

My understanding of the rule however, and it is my finding, is that that the period of 24 month provided under the rule is the largest period allowed to sustain the suit if and only, there is a valid extension of the original 12 months or there are from time to time similar extensions within the maximum period of 24 months allowed. That is to say, the maximum 24 months period would not matter and indeed would not make any logical sense if the original summons prescribed to last 12 months, and capable of extension is left to lapse by the Plaintiff.

In this case before me, the Plaintiff’s accept that the Summons in question was issued on 16th July, 2008. They do not deny that they failed to comply with Order V Rule 1 (2) to extend the summons by 15th July, 2009 when they expired. They do not argue that the original Summons validly existed at the time when this application was filed to strike out the suit. Even presently there is no valid application to extend the summons although such an application, would in my view, be valid only if it had been filed while the said original summons were still valid on or before 15th July, 2009. In these circumstances this court will have no alternative but to strike out the suit following the Provisions of Order V Rule 1 and the above cited legal authorities.

I hereby strike out this suit with costs to the Defendants. Order accordingly.

Dated and delivered at Nairobi this 9th day of February, 2010.

.....
D A ONYANCHA

JUDGE