REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 442 of 2008

KARANDEEP SINGH DHILLON. ..... 1ST PLAINTIFF
SUKHVINDER SINGH DHILLON. ..... 2ND PLAINTIFF
T/A S. S. DHILLON TRANSPORTERS
VERSUS
NTEPPES ENTERPRISES LIMITED. ..... 1ST DEFENDANT
HENRY T NDIEMA. ..... 2ND DEFENDANT

R U L I N G

The application before me is dated 19th March, 2009 and is brought by the defendants. They seek the striking out of the plaint on various grounds shown on the face of the application.

The main grounds stated include

a) that the Amended plaint is not verified by both plaintiffs or dated or signed.

b) that the original plaint is not signed by the plaintiffs

c) that the plaint is scandalous, frivolous and/or vexatious for having been filed without being accompanied with valid summons to Enter Appearance as well as failing to serve the summons for a period prescribed by law.

Two applications which are similar both dated the same day, have been filed by each defendant. They were argued jointly by Mr. Bundotich appearing for them. One application is supported by the sworn affidavit of one Ole Nkanae and the other by Henry Tole Ndiema said to be a Director in the 1st Defendant Company.

The relevant facts behind these applications to the extent the court understands them are as follows. The Plaintiffs are individual transporters who trade under the name of Dhillon Transporters. It is not made clear whether the trading name is a partnership.

The first Defendant is apparently a limited liability company and the 2nd Defendant is said to be a director in the 1st Defendant Company

The plaint from the court file records was filed in court on the 17th September, 2008. It appears to be properly accompanied by a verifying affidavit sworn on 17th September, 2008 by one Karandeep Singh Dhillon, the 1st Plaintiff in this suit. Accompanying the plaint besides the verifying affidavit, are eight copies of the Summons to Enter Appearance. They are properly filled in type. Four copies are directed to Henry T Ndiema and the other four are to Nteppes Enterprises Limited. The summons show in print that service of the pleadings and the summons themselves would be through the Plaintiffs advocates. Clearly however these two sets of the Summons were never signed by the Officer of this court entitled to sign and issue them.

I have made a thorough search of the court file for any other set of such Summons to Enter Appearance which may have been used. I find no other set. Examination and perusal of the Deputy Registrar's or court's minutes on the record of the file on the other hand, do not show that any summons were ever signed and/or issued by the Deputy Registrar at any time since the date of filing of the plaint.

Concerning the court minutes and entries in this court file, only records relating to interlocutory applications and the filing of Appearance and Defences are on the record. To that end the Memorandum of Appearance and both Defendants' defences were filed on 11th February, 2009. The Appearances and Defences are clearly shown and minuted as having been filed under protest.

The plaint appears to have been properly signed by Simani & Associates as the Advocates for the Plaintiffs. The Verifying affidavit was apparently sworn by one S. S. Dhillon on 17th September, 2008. There is also on the record an Amended Plaint properly signed by Simani & Associates and filed in court on 31st October, 2008. The Defendants assertion that the plaint and/or the Amended Plaint were filed while they were unsigned, does not appear to be correct or true. The source of unsigned Plaint or Amended plaint which the defendants claim they have is not apparent and its origin appears unknown. The court will not pay any more attention to the allegation.

It was the Defendants further position that the Amended Plaint was filed outside the prescribed time and that leave of

court to do so was not sought or granted. I have looked at the record. The Amended Plaint, as earlier stated, was filed on 31st October, 2008. By then the Defendants had not filed their appearances or defences as they asserted that they had not been served with the Summons to Enter Appearance and defence.
In accordance with the provisions of Order VIA Rule 1, a party may without leave of the court, amend any pleadings of his once at any time before the pleadings are closed. It appears clear to me accordingly, that the pleadings had not closed in view of the fact that the Defendants Memorandum of Appearance and defences had not been filed by then. Indeed, the latter were not to be filed until several months thereafter, on 11th February, 2009. The conclusion I come to accordingly, is that the Amended plaint was timely and properly filed by the Plaintiffs.
Another issue raised by the Defendants is that the Amended Plaint was not accompanied by a verifying affidavit. Mr. Bundotich did not point to the Civil Procedure Rules which require that an Amended Plaint which is really supposed to be an improved version of the plaint, should also be accompanied by a verifying affidavit if the plaint itself had been properly so accompanied. Nor did he, as required by rules of practice, cite any legal authority to that end. In the circumstances, I hold that their assertion does not have merit especially because I am of the opinion that an amended plaint does not require to be accompanied by a verifying affidavit.
The only other main issue remaining to be resolved is whether or not the failure of the Plaintiffs to take out and serve a Summons to Enter Appearances during the filing of the plaint, is fatal to the suit. The Defendants submission was that the failure invalidates the suit. The Plaintiffs position on the other hand, is that the Summons to Enter Appearance were actually issued and served upon the Defendants. The Plaintiffs alternatively argued that even if the said summons were not taken out and/or served, the failure occasioned no harm since the Defendants, in any case, filed their appearances and defences and have not suffered prejudice.
The relevant provisions of the law on this issue is Orders IV and V of the Civil Procedure Rules, to which I now turn.
Order IV Rule 3 provides: -
"(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 the seal of the court.

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

4) .....

5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule."

My understanding of Order IV Rule 3(1) – (5) above, is that the Summons to Enter Appearance is effectively a part and parcel of the plaintiff's pleadings at the time of filing a suit. The mandatory requirement is that the summons must accompany the plaint and be filed together or at the same time. The reason for filing the two documents together is borne out by subrule (1). It is so that the judge or the officer signing on his behalf, may issue the summons out immediately together with a copy of the plaint, to be served upon the defendants.
The Summons are therefore to become the instrument that alone activates the plaintiffs claim as contained in the plaint. The Summons orders the Defendant to respond to the claim in the plaint within the prescribed time therein contained. It also warns the Plaintiff that failure to file an appearance and thereafter defence will lead to the entering of a judgment in the suit against the defendant. Like any other pleading, therefore, a summons to Enter Appearance is one of basic importance in the suit and its issuance or extension where relevant, cannot be understated.
Order V Rule I (1) and (2) provide the duration and extension of the relevant Summons. It states: -
1) A summons ..... shall be valid in the first instance for twelve months beginning with the date of its issue.....

2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.
3) – 6) .....

7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."

In responding to this application to strike out the plaint, the 2nd Plaintiff merely state that their advocate has advised them that the Plaintiffs complied with the requirements of the Civil Procedure Rules. He accordingly terms this application frivolous and mischievous. The Plaintiffs advocate further states that he lodged the summons in court as required and believes the same were served together with other suit papers.
As already hereinabove found by this court, however, the summons together with the plaint which were filed in court were never at any stage served. Indeed the eight copies of the summons intended to be served on the two defendants, were never signed. They still lie there below the filed plaint.

The plaintiffs' counsel half-hearted claim, in his written submissions, that the summons to enter appearance was filed and served together with other suit papers, is therefore, not only hollow, but also dishonest, coming from an officer of this court. If there was any truth in the Plaintiffs' advocate's claim of service, he would without doubt have filed in this matter, an affidavit of service stating or indicating which process-server served the summons and pleadings, in what manner, and on what date(s). In case of dispute he might even avail the process-server to be cross-examined. However, this, the advocate did not do and could not attempt since he knew that service was at any stage, attempted.
It is my view and I so hold that it was the Plaintiffs' or their advocate's obligation to ensure that the summons to enter appearance were issued and served. They failed to discharge that obligation. The failure has legal consequences, and I now turn to examine them.
Careful perusal of Order IV rule 3(1) and 3(5) do in my view, show that it is mandatory for the Plaintiff to file his plaint simultaneously or together with the summons to enter appearance. It seems to me clear also that it is the mandatory the duty of the judge or of the officer who signs on his behalf, to sign and issue out for service, the filed summons accompanied by copy of the plaint. That is why, to assist the judge to comply with that duty without delay, the plaint and the summons are required to be filed together by the Plaintiff. It is apparent then that the Rules Committee did not invisage a situation where the Plaintiff would file a plaint without the summons to enter appearance or where the Judge or Deputy Registrar on his behalf, would fail to sign and issue out the summons immediately or without delay, as happens in practice.
Indeed I am of the view that Rule 1(i) of Order V takes into account the provision of Order IV Rules 3(1) & (5) to invisage that the date of issue of the summons is supposed to be one immediately after the plaint accompanied by the summons, is filed. The twelve months given by the subrule as the lifespan of the summons, should in my view start immediately the plaint and the summons are filed together. Subject only to human volatility. i.e. where the Deputy Registrar is too occupied to sign and issue it out on the same day or next day after filing, or where the plaintiff files only the plaint without the summons due to inadvertence and has to run back to prepare it and file it the same or the next day.
It therefore remains clear, that Order IV and V have laid down a fundamental procedure as to how to start and activate litigation. Unless the procedure is strictly complied with by the parties participating in it, such litigation would be still-born. Failure to comply with the rules would not accordingly be a mere irregularity but breach of a fundamental principle which would go to the root of the process of court.
While in this case before the court the issue is failure to issue a summons to enter appearance, the issue in the case of **Udaykumar Chandulal Rajani Ruxmani w/o Chandulal J. Rajan Dipak Chandulal Rajani Inuj Chandulal Rajani T/A LitPetrol Station**, **Versus Charles Thaithi**, Civil Appeal No. 85 of 1996, was one of extension of such a summons. The court stressed the comprehensiveness of the code underlying the issuance, duration and renewal of the summons thus: -

"Order V rule 1 provides a comprehensive code for duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this 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".

It in my view follows, that failure to have summons issued and served is as bad, if not worse, as failure to extend the same. A plaint filed in court, on its own, carries no power to summon a Defendant to court. The plaint will lie there impotently. It will alone have no power to bring the parties before the court for its adjudication.
On observing that the plaint filed by the Plaintiff was lying in court without summons having been issued, Kasango, J in **Mae Properties Limited Vs Davidson Ngini**, (Civil Suit No. 313 of 2004, Nairobi) found no reason to allow the suit to continue subsisting on record. She struck it out, after making a finding that the summons which were on the record and which had been actually served upon the Defendants, had expired in terms of Order 5 Rule 1. They had been issued on 17th June, 2004 but were served a year and a day afterwards on 17th June, 2005.
In Busia HCCC NO. 47 OF 2004 – **Anthony Wechuli Odwisa Vs Alfred Khisa Munyanganyi** – Ombija, J found that the Plaintiff had filed the suit but failed to have a summons issued or served. Although under O. XXXVI Rule 3D, under which it was brought, it is the court that gives directions as on whom and in what manner the summons should be served, it was established as a fact, that no summons had issued for directions to be taken. The Honourable Judge found the failure to take out and serve the summons to be a fundamental irregularity. He stated this, in striking out, *Suo moto*: -

"The applicant admits that the summons was neither issued nor served. The matter is compounded by the respondent having entered appearance before the service of the summons. In my view, the entering of appearance is a nullity in law."

In this case before me, the Plaintiffs filed their plaint on 17th September, 2008. They neither took out nor served the summons to enter appearance, until this application was filed on 23rd March, 2008, a period of about 18 months. The summons were under order IV rule 3(5) supposed to issue immediately or without delay after the filing of the suit on the 17th September, 2008. It is apparent to me and I so hold, that the plaint and the whole suit herein never at any stage assumed any life as no such life was ever breathed into it by service of the summons upon the defendants.
I further hold that the meaning and implication of Order V rule I (i) of the Civil Procedure Rules is that a valid summons is incapable of being issued for the first time outside a duration of 12 months after a suit to which it relates, was filed.
It is my further view, from the reading and Consideration of Order IV, Rule 3 and Order V Rule I, that a court has no jurisdiction to deal with a filed plaint until a summons which alone will activate it, has been issued and served. If this

proposition is correct, as I think it is, it would follow that a plaint and suit would be liable for striking out at any stage before the summons is so issued out.

Before I make orders for the striking out however, I will consider Plaintiffs' other argument, that the filing of the Memorandum of Appearance and defences by the Defendants changed the legal consequences of the failure to take out and serve the summons. In my view however, the Defendant's defences were filed notwithstanding the failure of service of the summons. Indeed, the appearances and defences were clearly filed under protest for non-service. That is to say, the processes were filed without prejudice. The Plaintiffs being at fault for failure to serve, they cannot purport to take advantage of their fault. Furthermore, examination of the defences filed clearly show that they were filed merely to protect or secure the right or time to file defence. They are mere denials, clearly lacking specifics of proper defences, presumably because the Defendants did not have specifics of the plaint.

The factor of the amended defence filed in this case, needs to be mentioned also. It is my view and finding that where a plaint is liable for striking out on a fundamental cause as in this case, where it is invalid for lack of being activated, such a plaint would lack power, substance or even shape to be amended. It has no life inside it that can be agitated or improved by amendment. In my opinion the amended plaint herein for that reason, had no life of its own.

Upon the facts and legal propositions discussed herein above. I hold that the plaint in this suit has no validity as it presently exists. It should not be allowed to continue lying idly and impotently in the Registry. It is hereby struck out with costs to the Defendants. Orders accordingly.

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

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D A ONYANCHA
JUDGE