



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Appeal 127 of 2007**

**MARK NJOROGE NGUTHI..... APPELLANT**

**VERSUS**

**JAMES MUTHEMBUA..... RESPONDENT**

**JUDGMENT**

The appellant was the plaintiff in the suit that he initiated against the respondent who was then the defendant that has culminated in this appeal. In the suit the appellant had claimed as against the respondent a sum of Kshs.161,600.00, general damages and costs of the suit. The suit was informed by the fact on or about 17<sup>th</sup> December, 2003 the respondent without any lawful authority by himself, his servants or agents damaged 4 tractor wheels and two trailer wheels belonging to the appellant at Naromoru forest where he was a forester.

When the plaint was allegedly served on the respondent, he failed to enter appearance nor file a defence. Accordingly on 14<sup>th</sup> October, 2004 upon request by the appellant judgment in default of appearance was entered. Thereafter the suit was set down for formal proof. The suit was eventually heard by way of formal proof and judgment delivered on 8<sup>th</sup> September, 2006. The appellant thereafter commenced execution by way of Notice to show cause. By an application dated 21<sup>st</sup> September, 2007 and filed in court under certification of urgency pursuant to the provisions of orders IXA rule 10, VI rule 13 of the Civil Procedure Rules and section 3A, the respondent sought that the proceedings, judgment, consequential decree and all other orders be set aside, that the memorandum of appearance and defence annexed to the application be deemed as duly filed and r,,,,,,ed, that having granted the prayer above, the court be pleased to strike out the suit for being statute barred and finally that the appellant be condemned in costs of the application.

In support of the application, the respondent advanced the argument that he was never served with summons to enter appearance nor a copy of the plaint, that he had a strong defence that raised triable issues, the suit contravened section 12 of Government proceedings act and finally that he was being sued in connection with performance of his duties as a civil servant as such he had no capacity to be sued on behalf of the government. He elaborated and expounded on this ground in an affidavit he swore in support of the application save to add that he was a civil servant working as a conservator of forests and that at the time alleged in the affidavit of service as to when and where he was served with summons to enter appearance (Nyahururu bus terminus in Nyeri) he was at his new work station in Londiani.

In response, the appellant swore a replying affidavit to the effect that the respondent was properly served with the summons to enter appearance. Indeed he was the one who pointed out the respondent to the advocates for purposes of service of summons. The acts complained of were in the nature of criminal activity in the nature of malicious damage to property and therefore the respondent cannot claim that he did so in the cause of his official duties. That the applicant had been sued in his personal capacity and not as an officer the government. Finally he deponed that the respondent had always been aware of the case and in fact at one time requested the appellant's

advocate to consider reducing the amount to enable him pay.

The application came for interpartes hearing before Mr. M.K.K. Serem, the then Resident Magistrate on 1<sup>st</sup> October, 2007 Mr. Mayoha, learned state counsel orally submitted on behalf of the respondent whereas Mr. Nganga learned counsel for the appellant responded. Having carefully listened to the rival oral arguments with regard to the application, the learned Resident magistrate reserved his ruling on 21<sup>st</sup> November, 2007. When the ruling was delivered as aforesaid the learned magistrate allowed the application in its entirety holding thus, “..... All the same summons to enter appearance were defective for offending order 5 rule 7 civil procedure rules aforementioned. That alone is enough to dispose off this application. But for avoidance of doubt, I shall also dwell on the second issue on a point of law..... the defendant is a civil servant being sued in connection with performance of his duties as such, yet he has no capacity to be sued on behalf of government..... having found that defendant was a government agent and was at the time engaged in the employer of the government, the defendant could not have been sued in his personal capacity..... The plaintiff therefore has clearly breached the mandatory provisions of section 12(1) and section 13A (1) of Cap 40 ..... The defendant suit is therefore bound to fail on the second limb of the issues for determination .....

In nutshell the application was allowed on the grounds that the summons were not sealed and secondly that appellant’s suit was bad in law.

From the above holdings, the appellant preferred this appeal. He advanced 5 grounds of appeal in his memorandum of appeal to wit;

- “1. That the learned magistrate erred in law for allowing the application dated the 21<sup>st</sup> September, 2007 and proceeding to strike out the plaintiff’s suit without allowing the plaintiff his day in court. A miscarriage of justice was therefore occasioned.
2. The learned magistrate erred in law for proceeding to entertain the application dated the 21<sup>st</sup> September, 2007 whereas the same had been filed by a stranger to the proceedings.
3. The learned magistrate erred in law and fact for ruling as he did that the respondent was a government official at the time the cause of action arose whereas in fact he had been on suspension.
4. The learned magistrate erred in law and fact in completely disregarding the appellant’s submissions and continuing to allow the application as prayed. A miscarriage of justice was therefore occasioned
5. The proceedings and the ruling are irregular and unlawful.”

When the appeal came up for hearing on 21<sup>st</sup> September, 2009 counsels agreed to canvass it by way of written submissions. Respective written submissions were subsequently filed and exchanged. I have carefully read and considered them together with the cited authorities.

As already stated, the application was allowed on two grounds aforesaid. The suit found as a fact that the summons were not sealed. Accordingly they were not in conformity with order V rule 2 of the civil procedure rules. Indeed the provisions of order 5 rule 6(a) are mandatory. The summons to enter appearance having been defective for offending the said provision of law, there were no proper summons capable of being served. To that extent I agree with the learned magistrate. However, whose duty is it seal summons he enter appearance before they released to a litigant. It is the duty of the issuing court to do so. It appears in the circumstances of this case that the court failed to do so. To my mind the omission of the court cannot be visited upon an innocent litigant.

Further if the summons served were defective as correctly held then there was no suit that the respondent was capable of defendant. The defendant is only made aware of the existence of a suit by summons to enter appearance which are ordinarily accompanied by a plaint. Now if the summons to enter appearance were held to be defective, then everything accompanying them was defective. One cannot serve the summons to enter appearance from the annexures and or attachments. They go as a whole. In my view therefore the learned magistrate erred when after holding that the summons to enter appearance were defective, proceeded to strike out the appellant’s suit for want of competence. Assuming however that the learned magistrate treated the defective summon to enter appearance separately from the accompanying plaint, was he right to consider it alongside the draft defence filed with the application? I do not think so. Why? Because in the respondent’s application, he had sought in one of the prayers that the memorandum of appearance and defence annexed be deemed as duly filed the body of the ruling that the learned magistrate has addressed that prayer. He only says at the conclusion of his ruling that,

“..... The upshot of my ruling that the applicant’s application dated 2<sup>nd</sup> September is and is hereby allowed in terms of prayer No. 3, 4, and 5. I do not think that this is sufficient. The learned magistrate proceeded to consider and act on the defence which was not formally on record. Further, even if the learned magistrate was right in considering the defence, he could not on the material before him have struck out the suit for want of competence. After all, did the respondent himself say in the grounds in support of the application that he had, “a strong defence that raises many triable issues .....”

The application too was omnibus. Omnibus application should as much as possible be discouraged as they tend to confuse issues as happened herein. It is undesirable to have in one application several prayers founded on different issues and circumstances. In the instant application, there were prayers for setting aside the judgment, draft memorandum of appearance be deemed as filed and served and then the striking out of the entire suit. The basis for the last prayer was distinct from the grounds in support of the other issues. I do not think in application to set aside an *ex parte* judgment, the applicant can in the same breathe seek to strike out of the suit. What comes first? To my mind, all that the learned magistrate should have done was to set aside the judgment on the basis of summons to enter appearance being invalid and leave it that. He could then have directed that fresh but valid summons do issue.

In the result and for the foregoing reasons, I would allow the appeal and set aside the order and ruling of the learned magistrate dated 21<sup>st</sup> November, 2007. In substitution thereof I direct fresh but sealed summons do issue to the appellant for service upon the respondent. Thereafter the suit should proceed for hearing in the normal manner: As the mistake or omission which necessitated this appeal was occasioned by the court, I make no orders as to costs.

*Dated at Nyeri this 22<sup>nd</sup> day of March 2010.*

**M.S.A. MAKHANDIA**  
**JUDGE**

*Delivered on 22nd day of March, 2010,*  
*By:*

**J.K. SERGON**  
**JUDGE**