



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

Civil Appeal 636 of 2006

JAMES MUNIU MUCHERE.....APPELLANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

*(Appeal from the order of the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts
(Githua) dated 18th September, 2006 in CMCC No.1307 of 2002)*

J U D G M E N T

1. This is an appeal arising from an order which was made in the Chief Magistrate's Court at Nairobi in CMCC No.1307 of 2002. The appellant who was the defendant in the case is aggrieved by the order made by the Principal Magistrate on the 18th September, 2006, in which she dismissed an application seeking to strike out the plaint filed in the suit, contending that the plaint was an abuse of the court process as the appellant was served with summons to enter appearance, after the original summons to enter appearance had expired.

2. In his memorandum of appeal the appellant has raised 4 grounds as follows:

- (i) The learned magistrate erred in law in failing to consider the effect of expiry of original summons to enter appearance on the validity of a suit.
- (ii) The learned magistrate erred in law in failing to appreciate that the failure to comply with the provisions of Order V of the Civil Procedure Rules is fundamental defect that cannot be cured.
- (iii) The learned magistrate erred in law in failing to appreciate that orders made in an impotent suit are a nullity.
- (iv) The learned magistrate erred in law in disregarding the expiry of the original summons and thus finding that the suit is valid.

3. During the hearing of the appeal, there was no appearance for the respondent and hearing therefore proceeded ex-parte. Ms. Ngetich who appeared for the appellant submitted that the original summons to enter appearance issued in respect to the respondents plaint became invalid on 22nd February, 2003, and that the order for extension of summons to enter appearance which was given on 9th May, 2005 should have been effective from 22nd February, 2003. Ms Ngetich further argued that under Order V Rule 1 of the Civil Procedure Rules, summons to enter appearance is valid for 12 months from the date of issue. Ms Ngetich therefore maintained that the trial magistrate erred in

dismissing the appellant's application to strike out the plaint. Relying on *Civil Appeal No.85 of 1996 UdayKumar Chandulal Rayani & others t/a Lit Petrol Station vs Charles Thaithi*, Ms Ngetich argued that the summons to enter appearance were null and void at the time the application for extension of the summons to enter appearance was made.

4. I have carefully perused the proceedings in the lower court, and the application subject of the order appealed against. I have also given due consideration to the submissions which were made before the trial magistrate and before me. It is evident that the original summons to enter appearance was issued on 22nd February, 2002. In accordance with Order V Rule 1(1) of the Civil Procedure Rules the summons to enter appearance was valid for 12 months from the date of issue. It is not disputed that the original summons to enter appearance was not served within the 12 months period.

5. Under Order V Rule 1(2) of the Civil Procedure Rules, the court has powers to extend the validity of the summons to enter appearance from time to time, if it is satisfied that it is just to do so. In this case, no application was made to the court for extension of the validity of the original summons to enter appearance. Instead, by an application dated 18th March, 2004, the respondent sought to have the summons to enter appearance re-issued for another 12 months. That application was granted on 9th May, 2005, and summons to enter appearance re-issued on the 19th May, 2005. Consequently, the appellant was served with the re-issued summons to enter appearance.

6. The appellant did not challenge the order of the trial magistrate re-issuing the summons to enter appearance. The appellant has in fact proceeded under the wrong premise that the summons to enter appearance served upon him was the original summons to enter appearance which was wrongly extended. In my view, there is a clear distinction between extension of the original summons to enter appearance, and re-issue of summons to enter appearance. In the case of extension, it is the validity of the original summons to enter appearance which is extended from the date of expiry, thereby giving new life to the original summons to enter appearance. What is actually served on the defendant is the original summons to enter appearance whose validity has been extended. On the other hand, re-issue of summons to enter appearance implies that the original summons to enter appearance has been overtaken or substituted by the new re-issued summons to enter appearance. Therefore, the defendant is served with the new re-issued summons to enter appearance. This may apply for instance, where the original summons to enter appearance is no longer valid or is misplaced or destroyed or is for some other reason no longer available and the suit has not been dismissed under Order V Rule 1(7) of the Civil Procedure Rules.

7. I do note that under Order V of the Civil Procedure Rules, there is a provision for extension of the validity of the original summons to enter appearance, but there is no provision for re-issue of fresh summons to enter appearance. In my considered view, that does not inhibit the court from re-issuing fresh summons to enter appearance. Since the court has powers under Order IV Rule 3 of the Civil Procedure Rules, to issue summons to enter appearance, that power extends to re-issue of summons to enter appearance where this is necessary for the ends of justice to be met. Re-issue simply means to issue the summons to enter appearance again. This is precisely what was done on the 19th May, 2005, by which date no order had been made for dismissal of the suit under Order V Rule 1(7) of the Civil Procedure Rules.

8. I find that the trial magistrate had no reason to strike out the plaint dated 22nd February, 2002, as fresh summons to enter appearance had already been re-issued and served on the appellant. Further, the plaint dated 22nd February, 2002, which was sought to be struck out was no longer in existence, the same having been superseded by an amended plaint filed on 24th May, 2006. Accordingly, I find no merit in this appeal and do therefore dismiss the appeal and order that the original lower court file shall be referred back to the court for the hearing of the suit to proceed. In view of the fact that the respondent did not attend court for the hearing of the appeal, I make no orders as to costs.

Dated and delivered this 28th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Mogaka H/B for Ngetich for the appellant

Advocate for the respondent absent

Eric - Court clerk