



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 555 of 2008**

**MEDISEL (KENYA) LIMITED ..... PLAINTIFF  
VERSUS  
PHARMACY & POISON BOARD ..... DEFENDANT**

**RULING**

This application is brought by chamber summons dated 13<sup>th</sup> November, 2009, and taken out under **Section 3 A** of the **Civil Procedure Act; Order V Rule 1 (1) and (7); and Order VI Rule 13 (1) (d)** of the **Civil Procedure Rules**. By the application, the 2<sup>nd</sup> Defendant applies for an order that this honourable Court do strike out the plaint dated 19<sup>th</sup> September, 2008, and filed in Court on 24<sup>th</sup> September, 2008. The Applicant also prays that the cost of this suit and of this application be borne by the Plaintiff.

The application is supported by the annexed affidavit sworn by Nitin Mehrotra, the 2<sup>nd</sup> Defendant's Country Manager, East Africa, and is based on the grounds that –

- (a) *There is no jurisdiction to entertain the suit herein.*
- (b) *There is no suit before the honourable Court as no summons to enter appearance have been extracted and/or served upon the 2<sup>nd</sup> Defendant/Applicant in contravention of provisions of Sections 19 and 20 of the Civil Procedure Act and Order IV Rule 3 (1), (2) and (3) of the Civil Procedure Rules.*
- (c) *The plaint dated 19<sup>th</sup> September, 2008 and filed in Court on 24<sup>th</sup> September, 2008 is a nullity for want of summons.*
- (d) *The 2<sup>nd</sup> Defendant has not been served with summons to enter appearance for well over 13 months and the plaint filed on 24<sup>th</sup> September, 2008 is therefore an abuse of the Court process.*
- (e) *The suit has abated as a result of the failure to serve summon for more than 13 months.*
- (f) *The Plaintiff has not made any efforts to serve, extend or otherwise validate the summons to enter appearance in this suit.*
- (g) *It is fair and just that the orders sought by the Applicant be granted.*

In spite of having been served, none of the parties herein filed any response whether by way of grounds of opposition or a replying affidavit. When the matter came for hearing, Mr. Nyanga holding brief for Mr. Waliaula for the Plaintiff/Respondent applied for an adjournment on the ground that Mr. Waliaula was indisposed. He also applied for leave to put in a replying affidavit. In response on behalf of the Respondents, Ms. Ogula said that the Respondents were served on 23<sup>rd</sup> November, 2009, and there had been no replying affidavit since that time. He therefore opposed the application for adjournment. Mr. Nyanga then stated that his instructions had been confined to applying for adjournment and leave to file a replying affidavit. The Court observed that having been served about six months ago, the Respondents had sufficient time to file a replying affidavit but did not do so. No reason was given for that omission. Secondly, the Court was told that Mr. Waliaula was indisposed which was only a statement from the bar unaccompanied by any evidence. For these reasons, the Court declined to grant the adjournment.

Ms. Ogula for the Applicant referred to the application and emphasized that no summons had been served for well over 13 months. She referred the Court to the case of **UDAYKUMAR CHANDULAL RAJANAI & ORS T/A LIT PETROL STATION v. CHARLES THAITHI, CA NO. 85 OF 1996** and **ANTONY WECHULI ODWISA v. ALFRED KHISA MUNYANGANYI, HCCC (BUSIA) NO. 47 OF 2004**, and urged the Court to reach the same decision and strike out the plaint herein with costs. \_

Having considered the pleadings and the submissions of Counsel for the Applicant, I take the view that the only issue for determination is whether this suit ought to be struck out on the ground that the Applicant was not served with summons to enter appearance. According to the record, by a chamber summons dated 26<sup>th</sup> November, 2008, the 2<sup>nd</sup> Defendant/Applicant applied to be enjoined in this suit as the 2<sup>nd</sup> Defendant. The main ground for that application was that some injunctive interim orders had been issued against the Applicant while it was not a party to the suit. It was therefore necessary for the Applicant to be made a party to the suit in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

By a ruling delivered on 6<sup>th</sup> February, 2009, the Applicant was duly enjoined as the 2<sup>nd</sup> Defendant as prayed. In the same ruling, the Court directed each party to amend its pleadings to reflect that the Applicant was henceforth the 2<sup>nd</sup> Defendant in the matter. The 2<sup>nd</sup> Defendant was further directed to make a formal application for review or setting aside of the orders of 25<sup>th</sup> September, 2008, which had prompted the 2<sup>nd</sup> Defendant/Applicant to apply to be enjoined as a party to the suit.

The 2<sup>nd</sup> Defendant/Applicant accordingly applied by a notice of motion dated 13<sup>th</sup> February, 2009 for the orders made on 25<sup>th</sup> September, 2008, to be set aside. The application was supported by an affidavit sworn by Wilson D'Souza, the Applicant's Country Manager, East Africa, and was based on the grounds, *inter alia*, that the orders sought to be set aside were issued against the 2<sup>nd</sup> Defendant at a time when it was not a party to the suit, and that the same had seriously and significantly curtailed the 2<sup>nd</sup> Defendant's operations in the country consequent whereupon it continued to suffer massive financial losses as it could not import and distribute its products. On 19<sup>th</sup> February, 2009, the orders made on 25<sup>th</sup> September, 2008, were duly set aside and/or discharged. Against that background the Plaintiff now moves this Court to strike out the plaint in this case on the grounds set out at the beginning of this application.

To say the least, I find this application very strange. The Applicant was enjoined as the 2<sup>nd</sup> Defendant at its own instance and on its own application. Its main ground for seeking to be enjoined was that some prejudicial injunctive orders had been made against it when it was not a party to the suit. After being duly enjoined and successfully applying for those orders to be set aside, the Applicant now comes asking for the plaint in this suit to be struck out on the ground that the Applicant was not served with summons to enter appearance.

I find it contradictory that the Applicant sought to be joined as a party to a suit which it now claims to be a nullity for want of the issue of summons to enter appearance. It is significant that one of its grounds of application is that it has not been served with summons to enter appearance for well over 13 months, and that the plaint filed on 24<sup>th</sup> of September, 2008 was therefore an abuse of the Court process. The Applicant became a 2<sup>nd</sup> Defendant in this suit on 6<sup>th</sup> February, 2009 on the strength of an order of the Court of that date. It was not open for the Applicant to allege in its application that well over 13 months had elapsed from the date of the filing of the suit, and that it was yet to be served with summons to enter appearance.

More importantly, the Applicant was made a party at its own instance. After being enjoined as a party, it applied within a week for some orders allegedly made against it to be set aside and they were duly set aside. If the Applicant was not properly before the Court on account of its not having been served with summons to enter appearance, then what is the probative value of the orders obtained thereby? In my view, the Applicant became a Defendant in this suit upon an order of the Court made upon its own application. The order did not state that any summons to enter appearance were to be served on the Applicant for the simple reason that the Applicant itself did not pray, in its application to be enjoined as a Defendant, for service of summons to enter appearance. The purpose and import of summons to enter appearance is to notify a person that such a person is a party to a suit in Court. Having been made a party to the suit, there was nothing else for the 2<sup>nd</sup> Defendant to be informed. As observed earlier hereinabove, the Applicant sought to be made a 2<sup>nd</sup> Defendant in order to enable the Court effectually and completely adjudicate and settle all questions involved in this suit. The need for the Court to effectually and completely adjudicate upon and settle all questions involved in the suit is as much alive today as it was at the time of the making of the application for the 2<sup>nd</sup> Defendant to be enjoined as a party. The 2<sup>nd</sup> Defendant will not be prejudiced in any way by continuing to be a party unless its sole objective in seeking to be enjoined as a party was to set aside the injunctive order which it managed to have set aside.

I read some mischief in this application and it borders on an abuse of the process of the Court. As it was alive to the fact that it had not been served with summons to enter appearance, the Applicant ought to have requested for such service before embarking on the making of other applications. By participating in the proceedings and obtaining orders without making a request for service immediately it was enjoined as a party, I find that the Applicant waived its right to such service. I accordingly decline to grant the orders prayed for and instead I hereby dismiss the application with no order as to costs.

Orders accordingly.

**Dated and delivered at Nairobi** this 1<sup>st</sup> day of July, 2010.

**L. NJAGI**  
**JUDGE**