



**REPUBLIC OF KENYA**

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

**Civil Suit 252 of 2001**

**MARTHA BOCHERE MICHOE ..... PLAINTIFF**

**VERSUS**

**WILLIAM MABEYA OMBUTORA ..... DEFENDANT**

**RULING**

The Defendant/Applicant filed this application by way of Summons in Chamber on the 11<sup>th</sup> July, 2006. It was filed under the provisions of Order IX A Rules 10 and 11 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act and seeks, inter alia, the following orders:-

1. That the application herein be certified as urgent and same be heard ex parte.
2. That pending the hearing and determination of the instant application the Honourable Court be pleased to order that the Defendant/Applicant be discharged and/or released from the G.K. Prisons, Eldoret where he is serving one month civil jail.
3. That the Honourable Court be pleased to set aside, quash and/or vary the ex parte judgment herein together with all other consequential orders thereto and the case to proceed for hearing.
4. That the Applicant/Defendant be granted leave to file his statement of defence.
5. That costs of this application be borne by the Plaintiff/Respondent.

The background to the application is that the Plaintiff filed this suit through a Plaint dated 21<sup>st</sup> December, 2001 in which the Plaintiff claimed general and special damages for injuries sustained in a road accident. The Plaintiff claimed that the Defendant motor vehicle knocked her down as she was walking along the Kisii-Migori Road. That she sustained serious injuries as a result.

Interlocutory judgment was entered against the Defendant for failure to enter any appearance. The case then went for formal proof before the Hon. Justice Omondi Tunya and later before the Hon. Justice George Dulu.

The Court awarded general damages in the sum of Kshs. 580,000/= special damages in the sum of Kshs. 62,866/=. Interest at the rate of 14% was also awarded and costs of the suit. The judgment was delivered on 9<sup>th</sup> November, 2004.

The Respondent was arrested and placed in civil jail in execution of the decree hence this application.

The Applicant sets, inter alia, the following grounds for the application:-

- That the Summons to enter appearance, the principal document is unlawful and illegal as it is not dated.
- That no notice of entry of judgment was issued in terms of Order XXI Rule 6 of the Civil Procedure Rules.
- That the Defendant/Applicant has a plausible and triable defence.
- That the ex parte proceedings and judgment herein were irregular, illegal, null and void.

The application is supported by an affidavit sworn by the Applicant on 10<sup>th</sup> July, 2006. In it he stated that he was never served with the Summonses and Plaint on 12<sup>th</sup> January, 2002 at the Kisii D.C's offices as alleged in the affidavit of service of the Server one Thomas Obutu, Advocate.

The Respondent opposed this application, and filed a Replying Affidavit sworn by Morris Indakwa Buluma, the advocate for the Plaintiff/Respondent. In the said Affidavit, the Counsel states that Thomas Obutu Advocate as an officer of the Court was entitled to serve the Process and did in fact serve the Defendant with the Summons and Plaint.

I have considered this application and the rival affidavits. I have considered the facts, evidence and submissions by Counsel.

The first issue I wish to deal with is that of whether the Summons was dated or not, and if not whether the Summons was fatally defective and/or invalid.

The Plaintiff/Respondent in paragraph 11 of her Counsel's Affidavit admits that the Summons which was allegedly served was undated.

I have also perused the Court file and confirm that even the copy in the file is not dated.

I have carefully perused Order IV and V of the Civil Procedure Rules. There is no express provision as to the effect of non-dating of a Summons. However, it is clear from Order V, Rule 1 that a Summons shall be valid for the first instance for twelve months from the beginning of the date of its issue.

In Order V (12) the Court has power to extend the validity of Summons from time to time if the Defendant has not been served and if is satisfied it is just to do so.

This means that the Summons can only be valid initially for a specific period of twelve (12) months. After the twelve months it expires and becomes invalid. It is impossible to compute the period of validity of a summons which is not dated. One does not know when it was issued by the Court and its length of validity cannot be computed.

If twelve (12) months pass without service, it would be impossible to extend such a Summons since its date of commencement of validity or issuance is unknown.

It is my construction of the aforesaid provisions that a Summons must be dated, signed and sealed for it to be a valid Summons. This is a mandatory requirement. Without a date, a Summons is fatally defective.

On this ground alone I do hold that the entire proceedings before the Court was a nullity ab initio. Any service of the Plaint was in effect an improper service. It is the Summons which sets out the period within which appearance was to be entered by the Defendant. The Plaint itself is still valid and on the Court record.

I do hereby grant prayer 3 of the application with costs to the Applicant/Defendant. This follows that the decree and the Warrant of arrest are also set aside.

From the Amended Plaintiff the accident which is the subject-matter of this suit took place along the Kisii-Migori road. The address and place of work of the Defendant is in Kisii. I do not see why the suit was filed in Eldoret.

Since the Plaintiff has to obtain a fresh Summons to serve the Defendant, I do hereby order that the hearing of this suit and any proceedings therein take place at the High Court at Kisii.

I do order that this file be taken to Kisii High Court Registry forthwith for their appropriate action.

**DATED AND DELIVERED AT ELDORET ON THIS 27<sup>TH</sup> DAY OF JANUARY, 2009.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:**

Mr. Nyambegera holding brief for Anyona Mbunde for the Defendant

Mrs. Khayo for the Plaintiff/Applicant