



**REPUBLIC OF KENYA**

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

**Civil Case 57 of 2000**

**TALIB HUSSEIN F. BHAJI & ANOTHER.....PLAINTIFFS**

**VERSUS**

**THE ATTORNEY GENERAL for and on behalf of**

**THE COMMISSIONER OF LANDS.....1<sup>ST</sup> DEFENDANT**

**DOULTON HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

I have before me an application to strike out the summons served upon the 2<sup>nd</sup> defendant (hereinafter “the applicant”) and the suit. The application is expressed to be brought under the provisions of Section 136 (1) of the Government Lands Act, Section 16 of the Government Proceedings Act, Order IV Rule 3 (4) and Order VI Rule 13 (1) (a) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The reasons for the application are as follows:

- (i) That the Summons to Enter Appearance is defective and invalid since it commands appearance to be entered within 10 days after service thereof.**
- (ii) That the plaintiffs have no locus standi in this matter.**
- (iii) That the suit is time-barred.**
- (iv) That the suit discloses no reasonable cause of action against the applicant.**

The application is supported by an affidavit sworn by one Fred Athuok, one of the directors of the applicant. In the affidavit, the said director depones that the applicant was served on 14<sup>th</sup> February 2000 and the summons, which was undated, commanded the applicant to enter appearance within 10 days of service. The applicant then proceeded, through M/S H.A.T. Anjarwalla Advocates, to file appearance and defence on 7<sup>th</sup> April 2000. the said director further depones that he has now been informed, which information he believes to be true, that the said summons is a nullity and void of any legal effect and could not have attracted an appearance or filing of a defence.

The plaintiffs did not file any replying affidavit or Grounds of Opposition. I however, allowed counsel for the plaintiff to respond to the application on points of Law when the application was canvassed before me on 12<sup>th</sup> March 2009.

In his oral submissions before me, counsel for the applicant argued

that under Order IV Rule 3 (4) of the Civil Procedure Rules, summons must give more than 10 days to enter appearance and the summons must also be dated which is not the case with the summons which were served upon the applicant herein. Counsel strongly submitted that the provisions of the said rule are mandatory and it was irrelevant that the applicant had entered appearance and delivered its defence. Counsel made those submissions on the authority of the Court of Appeal decision in **Ceneast Airlines Limited – v – Kenya Shell Limited [C.A. No. 174 of 1999] (UR)**, in which it was observed that summons issued in breach of the said rule makes the summons invalid and of no effect.

Counsel further argued that if the summons are invalid, there is no suit and the plaintiffs' suit should be struck out.

On the issue of limitations, counsel submitted that under the Government Proceedings Act, the plaintiffs' suit was statute barred as against the 1<sup>st</sup> defendant and that the mandatory notice before filing suit had not been given by the plaintiffs which failure further rendered the plaintiffs' suit incompetent. Counsel further took issue with the temporary injunction issued against the 1<sup>st</sup> defendant which, according to counsel, was contrary to the Law.

In her brief submissions before me, counsel for the 1<sup>st</sup> defendant associated herself with the submissions of her colleague, counsel for the 2<sup>nd</sup> applicant. On her part, counsel for the plaintiffs took objection to the supporting affidavit which in her opinion is not allowed under Order VI Rule 13 (1) (a) of the Civil Procedure Rules. Counsel further submitted that on being served with the said summons to enter appearance, the applicant duly entered appearance and delivered its defence in which limitation is not pleaded and cannot therefore be raised at this stage. If summons is determined to have given insufficient time to enter appearance, counsel urged me to save the suit. For that proposition reliance was placed upon a decision of the High Court in **Sultanali Kermally & Another – v – Laila Mohamed Seif Al Busaidiya and others [HCCC No. 156 of 2006] UR**.

I have considered the application, the supporting affidavit, the submissions of counsel and the authorities cited. Having done so, I take the following view of this matter. There is no dispute that the summons issued in this suit required the applicant to enter appearance within 10 days from the date of service of the same. The summons was given on some date in February 2000. The date of issue was not shown. Was that omission fatal to the summons? I think not, because the summons required the applicant to enter appearance within 10 days of service. The 10 days would only commence running from the date of service. The failure to indicate the day of the month on which the summons was issued was therefore not fatal. The period within which appearance was to be entered is however a completely different cup of tea. Rule 3 (4) of Order IV of the Civil Procedure Rules is clear that

**“The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided that the time for appearance shall not be less than 10 days.”**

In **Ceneast Airlines Limited – v – Kenya Shell Limited** (supra) the Court of Appeal held the view that the provisions of Order IV Rule 3 (4) are mandatory and the time for entering appearance cannot be less than 10 days of the service of summons. The court then stated that a summons which required appearance to be entered within 10 days from the date of service was in breach of the said order and sub-rule and was consequently invalid and of no effect.

Following that decision, Mary Kasango J (then Ag. Judge), in **Mapis Investment (K) Limited – v – Kenya Railways Corporation [HCCC No. 335 of 1998] UR** dismissed the plaintiff's suit on the ground,

*inter alia*, that the summons to enter appearance contravened the provisions of Order IV Rule 3 (4) of the Civil Procedure Rules.

Maraga J (then Ag. Judge), in **Borka Ahmed Salim & Another – v – Stephen C. Ngala (Mombasa C.A. No. 58 of 1998) (UR)** held that proceedings and actions based on summons which do not comply with the said provisions are a nullity. The Learned Judge maintained the same position in **Lualenyi Ranching Company Limited – v – William Mlegwa Wakise [CA No. 188 of 2003] UR**. Mutungi J, in **Geom Holdings (K) Limited & 2 others – v – Cooperative Merchant Bank Limited and 2 others [HCCC No. 85 of 2004] (UR)** struck out a plaint on the ground, *inter alia*, that the summons required the defendant to enter appearance within 10 days of service which contravened the provisions of Order IV Rule 3 (4) of the Civil Procedure Rules.

Mwera J, in **Equatorial Commercial Bank – v – Mohansons (K) Limited [HCCC No. 524 of 1998] (UR)** felt bound by the decision of the Court of Appeal in the **Ceneast Airlines** case and allowed an application to set aside a judgment and strike out a memorandum of appearance and defence filed pursuant to summons that required the defendant to enter appearance within 10 days of service.

Judge Sergon appears to have advanced a slightly different view in **Sultanali Karmally & Another – v – Laila Mohamed Seif Al Busaidiya & two others [HCCC No. 156 of 2006]**. In that case, the Learned Judge found that the summons to enter appearance gave the defendants less than 10 days within which to enter appearance. The summons therefore contravened the provisions of Order IV Rule 3 (4) of the Civil Procedure Rules and was a nullity. The divergent view was with respect to the effect of such a finding on the suit itself. The Learned Judge held that the suit itself cannot be said to be fatally defective and proceeded to order the issue of a fresh summons to enter appearance. The position taken by Sergon J was not without authority. The Learned Judge cited the case of **Shah – vs – Investment and Mortgages Bank Limited [2001] Vol. I E.A. 274 (C.A.K)** in which it was held that a defect in the summons to enter appearance has got nothing to do with the validity of the suit in which the summons is issued. The court indeed considered the decision in the **Ceneast Airlines** case and observed that although service was held to be invalid the defendant was granted unconditional leave to defend which could not have occurred if the suit had, itself, been invalid.

It would appear that **Shah – v – Investment & Mortgages Banks (supra)** case was not brought to the attention of Kasango J when the Learned Judge decided the case of **Mapis Investment (K) Limited – v – Kenya Railways Corporation (supra)** case. There is also no evidence that the said case was cited to Maraga J when the Learned Judge considered **Borka Ahmed Salim and Another – v – Stephen C. Ngala (supra)** and **Lualenyi Ranching Company Limited – v – William Ndegwa Wakise (supra)**. Mutungi J, does not also appear to have had the benefit of the decision in **Shah – v – Investment \* Mortgages Bank** case when the Learned Judge considered **Geom Holdings (K) Limited & Others – v – Cooperative Merchant Bank Limited and Others (supra)**.

It is also doubtful whether Mwera J was alerted of the decision of the said Court of Appeal when the Learned Judge considered **Equatorial Commercial Bank – v – Mohansons (K) Limited (supra)**.

My analysis of the above decisions leads to the conclusion that the summons to enter appearance served upon the applicant herein was defective and therefore null and void as the same was in clear breach of Order IV Rule 3 (4) of the Civil Procedure Rules. In the language of the **Ceneast Airlines** case, the said summons was “invalid and of no effect.” That finding however cannot attract the sanction of striking out the suit. Indeed in the **Ceneast Airlines** case, the Court of Appeal allowed the appellant to enter appearance and file a defence. If the suit was also invalid, that order would not have been made. In **Shah – v – Investment and Mortgages Bank** case the Court of Appeal agreed with Mbaluto J, as he then was, who had found that summonses which had been served on the defendants were invalid because they provided for entry of appearance within 10 days of service and ordered fresh summonses to issue.

In the premises, there is no basis for striking out the suit. Since the suit remains valid, in exercise of the inherent power of the court, and in the interests of justice, I order that fresh summons be issued within the next 10 days from the date hereof upon payment of the requisite court fees.

What happens to the applications made subsequent to the invalid summons? In my view the same cannot survive and are struck out with costs.

Before penning off, I will briefly comment on the applicant's complaints based on the Government Lands Act and the Government Proceedings Act. The relevant provisions of the said Acts are invoked in the heading of the application. However, the body of the application and the supporting affidavit do not demonstrate how the said Acts have been offended. The form of the application would not in my view accord the plaintiffs a fair opportunity to respond to those complaints. Those complaints therefore do not deserve my decision thereon.

On her part counsel for the plaintiffs took objection to the supporting affidavit. In her view the same was for striking out because the applicant had, *inter alia*, invoked Order VI Rule 13 (1) (a) which expressly prohibits reliance upon evidence. The objection in my view is without merit as the applicant has invoked other provisions of the Law and was entitled to rely upon evidence.

In the end the application is allowed in terms of prayer 1 thereof and the undated summons is struck out. Fresh summons should issue within the next 10 days from the date hereof upon payment of the requisite court fees if any. Applications made subsequent to the invalid summons are also struck out with costs.

The applicant shall have the costs of this application against the plaintiffs.

**DATED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF APRIL 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

Oyatta/Njoroge for the applicants.

**F. AZANGALALA**

**JUDGE**

**23<sup>RD</sup> APRIL 2009**