



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

Civil Suit 95 of 2005

EZEKIEL ODUK PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR COMPANY LIMITED ... DEFENDANT

RULING

This application by way of chamber summons seeks the following orders:

(a) The purported summons issued and or

reissued in this suit on 13th May 2008 by

the Deputy Registrar be struck out and

their purported service on the defendant

on the 15th July 2008 be declared illegal,

null and void.

(b) This suit be struck out and or be dismissed

with costs to the Defendant.

(c) The costs of this application be borne by

the Respondent/Plaintiff in any event.”

The application was supported by an affidavit sworn by Maurice Omondi Ng'ayu, Acting Legal Services Manager of

the defendant.

The application was premised on grounds that may be summarized as hereunder:

- **Summons to enter appearance are required to be prepared by the plaintiff or his advocate and should be lodged together with the plaint to be signed and sealed by the court and thereafter served on the defendant.**
- **The suit was filed on 14th July, 2005 but the summons to enter appearance were not filed then.**
- **If at all any summons were filed as required, they were not served during their validity and therefore no competent suit was properly instituted.**
- **If at all the summons had been filed and issued on 14th July, 2005, the same were not capable of any extension as at 13th May, 2008.**
- **Both the plaint and the summons are inseparable and without the summons the defendant cannot be called upon to answer the claim in the plaint.**

The defendant filed a replying affidavit and stated,

inter alia, that:

- **Prior to the filing of the suit he had entered into negotiations with the defendant with a view to settling the claim out of court. The negotiations commenced sometimes in June, 2003.**
- **The negotiations had not borne any fruit as at 3rd August, 2005 when the defendant wrote to the plaintiff and requested him to withhold any precipitate action.**
- **To prevent the suit from being caught up by the provisions of the Limitations of Actions Act, the plaintiff lodged the plaint and summons to enter appearance on 14th July, 2005 and paid for the plaint and the summons to enter appearance.**
- **The summons were not signed by the Deputy Registrar and were not available for collection until 13th May, 2008 when they were first issued and so the issue of lapse of the summons and/or re-issue of the same does not arise.**
- **The plaintiff's affidavit in support of the application was sworn by a person who had not been**

authorized under the corporate seal of the defendant to swear the affidavit.

Mr. Odhiambo for the defendant cited **GOLDEN BELL**

(OVERSEAS) EAST AFRICA LIMITED –VS- UNIVERSITY OF DAR-ES-SALAM, Civil Case No. 67 of 2006 at Milimani Commercial Courts, Nairobi (unreported).

In that case, the plaint was filed in 1994 and summons issued. The summons to enter appearance were served about 10 years later, the summons having been re-issued. The court held that by virtue of the provisions of **Order V rule I (1) and (2)**, the validity of the summons had expired and there was nothing to extend on 13th April, 2005 when the Deputy Registrar purported to extend the same. The plaintiff's suit was struck out. A similar holding was made in **NATIONAL BANK OF KENYA LIMITED –VS- SYNTAX PRINTERS LIMITED & OTHERS**, High Court Civil Suit No. 92 of 2003 at Eldoret (unreported).

Mr. Oguttu who held brief for Mr. Oduk for the defendant sought to distinguish the aforesaid authorities by arguing that in this case, no summons had been issued prior to 13th May, 2008. The validity of the summons as at 15th July, 2008 when they were served cannot therefore be questioned.

The defendant entered appearance on 16th July 2008 and filed a statement of defence on 5th August, 2008. There is no dispute that the plaint had been lodged in court on 14th July, 2005 and court filing fees paid together with Kshs. 50/= for summons.

Order IV rule 3 (5) requires the plaintiff or his advocate to prepare summons and file them together with the plaint so that the summons can be signed by a judge or an officer appointed by a judge, in this case, the Deputy Registrar.

As per **Order V rule 1 (1)** summons (other than concurrent summons) are valid in the first instance for 12 months from the date of their issue.

The summons dated and signed on 13th May, 2008 were the only one that were issued and they were served together with the plaint upon the defendant on 15th July, 2008. It is therefore clear that the summons had not expired. If any summons had been signed and issued on 14th July, 2005 when the plaint was filed they would have been invalid three years later. This is the distinguishing aspect between the authorities cited by the plaintiff's counsel and this case. If the plaint had been served in July, 2005 without the summons which were served in July 2008 there would have been nothing to warrant entry of any appearance by the defendant but that was not the case.

But one may wonder whether there was any valid suit between the time when the plaint was filed and the time when summons were issued. The **Civil Procedure Act** defines a “suit” to mean “**all civil proceedings commenced in any manner prescribed.**”

Order IV rule 1 states that:

“**Every suit shall be instituted by
presenting a plaint to court, or in such
other manner as may be prescribed.**”

The plaint should be paid for (**Order IV rule 2 (2)**) and **rule 3 (I)** is explicit that:

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”

For purposes of this application, upon filing of the plaint a valid suit was commenced and the fact that summons to enter appearance were signed, issued and served three years after the date of commencement of the suit did not *per se* invalidate the suit.

For the aforesaid reasons, I dismiss this application with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF NOVEMBER, 2009.

D. MSUINGA

JUDGE.

19/11/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Ongige HB for Mr. Oduk for the plaintiff

Mr. Bana HB for Mr. Okengo for the Defendant

Court: Ruling delivered in open court.

D. MUSINGA

JUDGE.