REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE

Civil Suit 80 of 2002

ERASTUS K. WAMEYA

AMILA CHERWA

BARNABAS EJAKAIT

SHADRACK ORONI

GROMWEL W. MANYONGE.....PLAINTIFFS

.

V E R S U S

1. JOTHAM WABOMBA.....1ST DEFENDANT

2. NGOBOLELE FARMERS CO. LTD.....2ND DEFENDANT

R U L I N G

The 2nd defendant wishes to have the suit against it struck out because it has never been served with summons to enter appearance, and as the summons have, in any event, expired.

In the alternative, the 2nd defendant (who shall hereinafter be cited as (“***the applicant”)*** says that the suit should be struck out, on the grounds that it had abated, by reason of the failure to serve summons.

In the further alternative, the applicant says that the plaint should be struck out because it is not dated, as required by law.

The plaint on record was filed in court on 9/10/2002. However, it is not dated.

Since the filing of the plaint, the applicant says that it has never been served with summons to enter appearance. And as more than 24 months had lapsed since the suit was filed, the applicant believes that the summons had expired, and could not therefore be validated.

But the plaintiff contends that the learned deputy registrar never signed the summons to enter appearance, so as to make them valid. Therefore, it is said that the summons could not have expired, as they had never been validated in the first instance.

Those rival contentions give rise to the question as to when a summons to enter appearance becomes valid. Once that issue is determined, it should become evident when the validity of the summons expires, as in the first instance, a summons is supposed to be served within 12 months. That is by virtue of the provisions of Order 5 rule 1 of the Civil Procedure Rules.

Again, once it is determined as to when the validity of a summons commences, the court would be able to establish the date beyond which the said summons cannot be validated.

By virtue of the provisions of Order 4 rule 3 (5) of the Civil Procedure Rules;

" Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule."

There is an unsigned and undated summons filed next to the plaint herein. Also, there is a court receipt which indicates that when the plaint was filed on 9/10/2002, the plaintiff paid for the claim, the verifying affidavit and summons to enter appearance.

To that extent, the plaintiffs did comply with the provisions of Order 4 rule 3 (5), by preparing the summons and presenting the same to the court together with the plaint.

There is no doubt that after the plaintiffs had prepared the summons, filed it in court and paid for it, it was then the responsibility of the court to date, sign and seal the summons.

According to the plaintiffs, the court did not discharge its obligation of dating, signing and sealing the summons. Therefore, the plaintiff believes that the

summons which he had prepared and presented at the court registry was never validated.

But the applicant blames the plaintiffs for the failure to validate the summons even though five years had lapsed since the suit was filed.

Meanwhile, on 6/7/2007 an Amended Plaint was filed in court. The applicant says that that was done without leave of the court, and after the suit had abated due to non-service of summons. Therefore, the said amended plaint could not, in the opinion of the applicant, cure the abatement of the suit and the invalidity of the summons.

However, the plaintiffs point out that once the court had set aside the judgement which had hitherto been entered against the defendants, the pleadings had been re-opened. For the record, it is important to note that the judgement was set aside after the court was satisfied that there was no proof of service of the plaint and summons, on the applicant herein.

The issue that arises is whether the setting aside of the judgement, on 2/3/2007 served to re-open the pleadings.

After the plaintiffs filed an amended plaint, the court issued summons to enter appearance, which were then served upon the applicant. Thereafter, the applicant entered appearance and filed a defence, but as the applicant pointed out, it took those two steps under protest, as the applicant was convinced that the summons were invalid.

In the amended plaint, the original 2nd plaintiff was not a party, as the plaintiffs say that that person had since passed away.

According to the plaintiffs, the pleadings remained open because by the time of the demise of the original 2nd plaintiff, summons had not yet been served on the defendants. Therefore the plaintiffs believed that they had every right to amend the plaint, without first seeking leave of the court to do so.

However, as the applicant herein submitted, the plaintiffs did not provide the court with evidence to show when the original 2nd plaintiff passed away. Consequently, this court is unable to determine whether or not, by the time the plaintiffs filed the amended plaint, the suit by the original 2nd plaintiff had abated.

In that regard I hold that the plaintiffs failed to demonstrate that the demise of the 2nd plaintiff, before service of summons, could or did re-open the pleadings.

Finally, the plaintiffs submitted that even though both the original plaint and the verifying affidavit were undated, that constituted no more than a curable defect in form. In other words, the plaintiffs' opinion is that the failure to date the plaint and the verifying affidavit does not go to the substance of the suit. The plaintiffs therefore invoked the provisions of Order 6 rule 12 of the Civil Procedure Rules, to urge this court not to take any objection to the plaint based on the technicality of the plaint being undated.

Having given due consideration to the application before me, the submissions made by counsel, the authorities cited, and the applicable law, I now proceed to determine the issues raised.

In the case of ***KENYA INDUSTRIAL ESTATES LIMITED Vs OGANA & ANOTHER [2004] 1 E.A 96*** the Hon. Kasango J. held that the court has no power to extend the validity of summons beyond 24 months. In so holding, the learned judge derived guidance from the decision by the Court of Appeal in ***RAJJANI & OTHERS Vs THAITHI [1996] LLR 443,*** wherein the Court of Appeal said;

" ***Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure."***

But then the plaintiffs herein have submitted that there was never a valid summons, in first instance. Whilst that may be the position, it is significant to note the following words of the Court of Appeal, in the case of ***RAJJANI & OTHERS V THAITHI*** (above-cited);

" ***. . . neither the Plaintiff nor his advocate did exhaust the provisions of Order V rule 1 (5) by making any application for extension of the validity of the original summons and consequently, the court has no power to extend the validity of the summons beyond 24 months, when in fact there was no valid summons in existence."***

In my understanding of that quotation, a summons may only have its validity extended whilst it was still valid. Therefore, if a plaintiff failed to seek the extension of the validity before the summons expired, he could not do so thereafter.

That understanding is shared by the Hon.Okwengu J., as can be seen from her decision in ***STEPHEN KARUOYA MWANGI V JOYCE MUMBI MUGI, NYERI HCCC. NO.77 OF 2002,*** wherein she said;

" ***No order for extension of validity of summons can herefore breathe new life into the summons once its lifetime has expired. . . . That is to say that once a summons expires without its validity being extended, the Civil Procedure Rules do not provide for re-issue of such summons."***

In my considered opinion, that issue is well settled. However, it must be appreciated that all those authorities make reference to the issue of extension of the validity of summons. That must surely presuppose that the summons were valid, in the first instance. It is only then that the validity thereof could be extended.

If, as the plaintiff says, the summons were never signed nor dated, did they possess any validity at all?

By virtue of Order 4 rule 3 (5) of the Civil Procedure Rules, the plaintiffs were obliged to prepare summons, which they were to file with the plaint. That, they did.

Thereafter, by virtue of Order 5 rule 3 (2), the summons were supposed to have been signed by the judge or the officer appointed by the judge. The summons were also supposed to be sealed with the seal of the court. It is only then that the summons which had been prepared by the plaintiff would then assume the character of " ***a judicial document calling a party to submit***

to the jurisdiction of the court ",

as was said by the Hon. Warsame J. in ***MOBILE KITALE SERVICE STATION Vs MOBIL OIL KENYA LIMITED & ANOTHER [2004] 1 KLR 1, at page 8.***

In effect, summons are not valid immediately after the plaintiff prepares it and files it in court alongside the plaint. I believe that that is why Order 5 rule 1 (1) states that;

" ***A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue . . . "***

In my considered view, the summons can only be deemed as issued when it has been signed and sealed.

My understanding of the decision in the case of ***RAJJANI & OTHERS V THAITHI*** is that a summons which is valid, can have its validity extended for upto 24 months from the date of issue.

As the summons prepared by the plaintiffs were never signed nor sealed by the court, the court is deemed not to have issued the summons. Therefore, that which did not have life could not have expired at end of 24 months or at all.

Although it is the responsibility of the court to issue summons, I hold considered view that the plaintiffs cannot be permitted to escape censure, for failing to prove that they actively pursued the court, with a view to having the summons signed and sealed.

When the plaintiff in the case of ***MOBILE KITALE SERVICE STATION V MOBIL OIL KENYA LIMITED & ANOTHER [2004] 1 KLR 1,*** had failed to take out summons for five years, the Hon. Warsame J. did not hesitate to dismiss the suit for want of prosecution.

But in the case before me, there was no application for dismissal of the suit for want of prosecution. Therefore, I am unable to grant that relief.

Meanwhile, as regards abatement due to non-service of summons, I hold the view that that could only have happened if more than 24 months had lapsed from the date the summons were issued. But as the court did not issue summons herein, abatement did not arise owing to non-service of the summons.

It is, of course, not challenged by the applicant that the original 2nd plaintiff is deceased. However, as the applicant says, it is not aware of when exactly the said party passed on. Therefore, at this stage of the case, and on the basis of the information currently available, I cannot say whether or not the suit by the original 2nd plaintiff had abated, following his demise.

As regards the amendment of the plaint, it is noted that the Amended Plaint was filed in court on 6/7/2007. It is on that same date that the applicant also filed its application herein.

In the said application, there is no reference to the Amended Plaint. Indeed, the emphasis is only on the failure by the plaintiffs to serve summons, which summons are said to have expired after the lapse of 24 months from the date of issuance.

The applicant could not have been making reference to the Amended Plaint, because in respect

thereof, summons were issued on 6/7/2007, and the said summons were thereafter served upon the applicant. The applicant has even entered an appearance and filed a defence, albeit conditionally.

In so far as the applicant has reserved its right to challenge the validity of the summons which were served upon it, with the Amended Plaint, I hold the view that it would be premature for me to adjudicate on the validity or otherwise of the said summons. It is only if the application raised the issue that it would be appropriate for the court to delve into the validity or otherwise of the Amended Plaint.

For now, all I wish to say is that it does appear that the applicant had not filed a defence to the original plaint. If that be the position, and by virtue of Order 6 rule 11 of the Civil Procedure Rules, pleadings would not have closed.

Again, if that be the position, then pursuant to Order 6A rule 1 (1), the plaintiffs would have been entitled to amend the plaint without leave of the court.

I will say no more on that issue, for now, as the substantive application before the court, currently, does not ask me to strike out the Amended Plaint. The application does not also allege that the Plaint should be struck out on the grounds that it had been amended without leave of the court.

Another issue raised before me, is in relation to the failure by the plaintiffs' to date both the Plaint and the verifying affidavit.

Does that omission render the Plaint and verifying affidavit fatally defective, as asserted by the applicant? Or, is the said omission a curable defect, as submitted by the plaintiffs?

As far as the plaintiffs are concerned, the failure to date the Plaint and the verifying affidavit constitutes nothing more than a technical defect. The omission is said to be a matter of form, rather than substance.

The question that I ask myself is the role of dates in plaints and verifying affidavits.

Prior to 1975, if an affidavit had been sworn prior to the filing of a suit, such an affidavit would be rejected. However, since the amendment of Order 18 rule 9 of the Civil Procedure Rules, an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.

In the circumstances, I hold that the requirement for dating an affidavit is directory.

As regards the Plaint, I hold that the dating thereof is equally directory. I say so because by virtue of the provisions of Order 4 rule 2 (2) of the Civil Procedure Rules, the date – stamp affixed to the Plaint, at the court registry, when the plaintiff will have paid the requisite fee, is the date of filing suit. It would matter little that the plaintiff had dated the plaint earlier than the date of filing, if, for instance, the issue arose regarding whether the suit had been brought within or outside the period prescribed by law.

In the result, I do accept as correct, the plaintiffs' submissions, to the effect that the failure to date the plaint and the verifying affidavit did not go to the substance of the said documents. The defects are thus not fatal.

In the case of ***MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER, MILIMANI HCCC. NO.810 OF 2001,*** the Hon. Ringera J. (as then was) said;

" ***Deviations from or lapses in form and procedure which do not go to jurisdiction of the court or prejudice the dverse party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.In those instances the court should rise to its higher calling to do justice by saving the proceedings in issue. "***

That is precisely what I have decided to do herein, as the failure to date either the plaint or the verifying affidavit does not go to jurisdiction, nor does it prejudice the applicant herein.

The verifying affidavit is hereby struck out, but the plaintiffs are granted leave to file a compliant verifying affidavit within the next ***FOURTEEN (14) DAYS.***

Meanwhile, the Plaint too is incomplete, without a date. Instead of striking it out, I direct that it be deemed to have been dated 9/10/2002, which is the date when it was filed in court.

In the final analysis, the applicant is partly successful in its pursuit. I therefore award it 50% of the costs of the application dated 2/7/2007.

It is so ordered.

Dated and Delivered at Kitale, this 22nd day of January, 2008.

FRED A. OCHIENG

JUDGE