REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 1184 of 2005

TRENTON (K) LTD…….…….. PLAINTIFF

VERSUS

NAIROBI HOUSE LTD & ANOTHER…….DEFENDANTS

RULING

I have an application dated 13th November, 2007 filed by the interested party herein and the other dated 29th November, 2007, filed by 1st Defendant. Both these applications were agreed to be heard together as they raised the similar issues and asked for similar prayers.

They are premised under Order IV Rule 3, Order XVI Rule 5(d) and Order L Rule 1 of Civil Procedure Rules as well as section 3A of the Civil Procedure Act and all enabling provisions of law.

They seek the prayer of dismissal of the suit.

The grounds in support of the applications are also similarly worded. The main ground is the failure of the plaintiff to take out summons to enter appearance for a period of over 26 months since filing of the plaint.

The counsel for the applicants relied on the aforesaid ground as well as the provisions of Order IV Rule 3 which requires the issuance of the summons to appear to the Defendant on the filing of the plaint.

As per sub – rule(5) Rule 3 of the said Order it is upon the plaintiff to prepare and file the summons to be signed by either a Judge or an officer appointed by the Judge.

It is contended that no summons is applied for or filed by the plaintiff in this suit.

In the replying affidavit sworn by a Director of the 1st plaintiff, an amended plaint filed on 9th June, 2006 and a summons dated 27th June, 2005 have been annexed to show that the summons was filed along with the plaint and was signed. But the court cannot overlook the fact that the plaint was dated and filed on 29th September, 2005 and obviously the summons cannot be issued on a prior date to its filing and that the said summons cannot be a valid summons.

It is also indisputable in this case that the 1st Defendant who was originally sued was not served with summons, even if there was any valid summons, which is not the fact in this matter and its counsel only filed a Notice of Appointment in response to an interlocutory application.

Reliance was placed on the case of **Mobile Kitale Service Station -Vs- Mobile Oil Kenya Ltd** and another. **(2004) KLR VOL. 1 Page 1.**

The High Court held in that case that the duty to issue and serve summons is on the plaintiff and the life span of a summons is 24 months as per order V Rule 1(7) of the Civil Procedure Rules.

Moreover, it is apparent that vide the amended plaint mentioned hereinbefore, the plaintiffs are seeking reliefs only against the 2nd Defendant who has filed an appearance. Thus, it was urged that, it cannot be denied that the plaintiffs have abandoned the plaint against the 1st Defendant in any event. Even if I grant the plaintiffs a benefit of an amendment in future, the plaintiffs cannot come out from the glaring fact of non – issuance and non – service of the summons to the 1st Defendant as per under IV Rule 3 and order V Rule (1) of Civil Procedure Rules.

Valiant efforts were made to discredit the application of dismissal of the suit by Mr. Havi, the learned counsel for the plaintiffs. He contended that the affidavit in support is not competent as the Annexure No. PN 1 has not been marked and produced as per the requirements of the Oaths and Statutory Declaration Act. Now I note that the said Annexure is a copy of the plaint which is a part of the record of this case. Even if the same is struck out from the affidavit the reality will not change. Thus, I am not satisfied that the said omission cannot be cured by the provisions of order XVIII Rule 7 of Civil Procedure Rules. I thus reject that contention.

Similarly, I also reject the submissions that the insertion of order XVI Rule 5(b) in the provisions relied upon in the application is fatal and renders the applications incompetent. The applications can be heard and determined on the other grounds and provisions relied upon. In any event, the applicants have not even submitted on the said provision.

It was further stressed that the date in the summons issued is a typographical error and the amended plaint having been filed on 9th June, 2006, the summons is still valid. The case of **Shah and another V. Investment and Mortgages Bank Ltd and 2 other (2001) KLR. Page 190** was relied upon to support this contention.

It is true that the Court of Appeal found that a defect in summons has nothing to do with the validity of the plaint. However, in my opinion, the facts before the court of appeal in Shah's case (supra) were totally different. The defect in summons was on the face thereof namely, "**at least 10 days to appear".** In this case there is a date which definitely does not correspond to the date of plaint. It is indisputable that the date of summons cannot be prior to the date of the plaint. If that is so, I fail to understand the contention that the said summons can be valid due to filing of an amended plaint. In my opinion, the original plaint did not have summons, as I cannot accept any justification to the same being typographical error.

Even if, I agree to the contention that it was a typographical error, and that the summons is presumed to be issued on 29th September, 2005, the date of the filing of the original plaint, its initial validity expired after twelve months from its presumed date of issuance, as I am not shown that the plaintiffs applied for extension, and thus the summons is dead and not in existence. The dead summons cannot now be resurrected.

The Court of Appeal considered the provisions of validity of summons in the case of **Uday Kamar Chandulal Patel and others –-vs- Charles Thaithi (C.A. No. 55 of 1996** (unreported).

It held:

"**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 the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A cannot cure. The first summons having expired, the Deputy Registrar**

having held that there was no proper service, he could not in the circumstances re – issue fresh summons after the expiry of 24 months period. Neither did the entry of appearance by the Defendant revive the summons which had expired."

In the case of **mobile** (***supra***) it was held:

‘’ **We ought to respect rules of engagement as they are promulgated to achieve justice to rival parties. Summons is a judicial document calling a party to submit to the jurisdiction of the court."**

In the case of **Kiptalum Runo –vs- Agricultural Finance Corporation** (**H.C.C.S 2348 of 1998 (unreported**), Waki J, as then he was, held:

"**Orders 5 in my view is tailored for those vigilant plaintiffs who obtain summons to enter appearance when they ought to under order IV and have made unsuccessful attempts to serve it over a period of 12 months**."

With the facts and law enumerated by me, it is clear that the summons on record, even if I accept as a valid one, is not alive at the time of filing of these applications. It is dead and cannot be revived.

If so, nothing can stand on the document which is dead or a nullity, and I do order so.

As 2nd Defendant has not asked for any remedy, I may not grant the same prayers to her at present.

However, I would allow the application by both the 1st Defendant and the interested party as, in my view, there is no suit pending in law.

The orders accordingly, with costs to the applicants.

Dated and signed at Nairobi this 4th day of March, 2008.

K.H.RAWAL

JUDGE.

4.03.08