



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Civil Appeal 49 of 2008

IBRAHIM RAMBEKA APPELLANT

VERSUS

JOB KWARE AKUNGA RESPONDENT

**(Appeal from Ruling of the Senior Resident Magistrate at Ogembo Senior Resident
Magistrate's Court Civil Case No.37 of 2008 by Jacinta Kwena – S.R.M)**

JUDGMENT

This judgment is in respect of a ruling delivered on 30th April, 2008 by the learned trial magistrate pursuant to a preliminary objection that was raised by the appellant's advocate, Mr. Anyona. He argued that the appellant (defendant) was never served with any summons to enter appearance. He was only served with a plaint, chamber summons and a certificate of urgency. Counsel submitted that there was therefore no valid suit before the trial court. He cited the provisions of Order IV rule 3(5) which states as follows:

“(5) 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.”

In his response, Mr. Nyamwange for the respondent (plaintiff) admitted that he had not prepared the summons for the court's signature and sealing. However, he contented that the summons could be issued anytime within twelve months from the date of filing the suit. In any event, he added, the appellant had already entered appearance.

The learned trial magistrate agreed that the summons had not been presented to court and therefore none had been issued. The magistrate went on to state that the respondent's advocate had paid Kshs.50/= for the summons but the clerk who was serving the respondent's advocate was the one who did not issue them upon payment. She dismissed the Preliminary objection and added that the mistake was on the part of the court and could be rectified by issuing the summons.

The appellant was aggrieved by that ruling and filed an appeal to this court. He stated that the learned trial magistrate erred in law and fact by holding that the suit before the court was proper even when the plaintiff had been filed without summons. He added that the learned trial magistrate was not right in stating that it was the court that was to be blamed for not issuing the summons, which was clearly the duty of the plaintiff's advocate.

Order IV rule 3(5), which was cited earlier, stipulates that the summons are prepared by the plaintiff or his advocate. It is not the court that prepares the summons. The learned trial magistrate was plainly in error. Payment of

Kshs.50/- by a plaintiff for summons does not absolve a plaintiff from the responsibility of preparing summons and presenting them with the plaint for signing and sealing. See JACQUILINE ATIENO OCHIDO VS JONE BROOKS CONSULTANTS LTD & ANOTHER HCCC.NO.2 of 2005 at Kisumu (unreported).

In the suit that was filed by the respondent (plaintiff), no summons have been prepared and presented to court to date. What is the validity of such a suit?

In PRAFULLA ENTERPRISES LTD VS NORLAKE INVESTMENTS LTD, HCCC NO.463 of 2001 at Kisumu (unreported), Gacheche J held that Order IV rule 3(5) makes it mandatory that every summons shall be filed with the plaint and that the two must accompany each other and therefore a plaint served without summons to enter appearance renders the suit incurably defective. Tanui J. held the same in CHRISTOPHER OCHIENG VS SAVINGS & LOAN (K) LTD & OTHERS, HCCC NO.327 of 1999 at Kisumu (unreported).

The respondent's advocate did not give any reason for his failure to prepare summons and present them to court. The plaint was filed on 11th April, 2008 and more than two months thereafter, the plaintiff's advocate is yet to comply with the mandatory provisions of Order IV rule 3(5) of the Civil Procedure Rules. He cannot simply say that since the defendant has already entered appearance, there is no need of serving the summons to enter appearance. Strictly speaking, the memorandum of appearance should not have been filed until service of summons had been effected. The plaintiff's continued breach of order IV rule 3(5) is an abuse of the court process that cannot be countenanced. I hold that there is no valid suit before the trial court. I allow the appeal and strike out the plaint and all the interim orders issued by the trial court. The appellant shall have the costs of this appeal as well as the costs in the subordinate court.

DATED, SIGNED and DELIVERED at KISII this 25th day of June, 2008.

D. MUSINGA

JUDGE

Delivered in open court in the presence of:

Mr. Anyona for the appellant

N/A for the Respondent

D. MUSINGA

JUDGE