



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1791 of 2007

MARGARET NYUTHO-KIARIE.....PLAINTIFF/RESPONDENT

VERSUS DOMINIC KIBIGO KARANJA..... 1ST DEFENDANT/APPLICANT

MAURICE KAWIRA KIBIGO..... 2ND DEFENDANT/APPLICANT

**JOSEPH KIARIE..... 3RD
DEFENDANT**

RULING

By notice of motion dated 19.02.08 stated to be brought under Order IV rule 3 (1) and (5) and Order L rule 1 of the Civil Procedure Rules, the 1st and 2nd defendants/applicants applied for the following orders:-

1. That the suit herein be struck out for being incompetent and fatally defective.
2. That the plaintiff do pay the costs of the suit and this application.

The grounds upon which the application is based are:-

- a) That no summons to enter appearance has been filed together with the plaint as required by law.
- b) That the suit herein is wrongly filed and is incompetent and fatally defective in law.
- c) That no summons to enter appearance has been issued to the 1st and 2nd defendants as required by law.

The application is supported by the affidavit of the 1st defendant/applicant sworn on 19.02.08 by him on his own behalf and on behalf of the 2nd defendant/applicant whom the 1st defendant/applicant describes as his wife. Vide paragraph 2 of the supporting affidavit, the 1st defendant/applicant depones:

‘2. THAT to the best of my knowledge the 2nd co-defendant and I have not been served with any summons to enter appearance in this suit since inception and to my best of knowledge, no summons have apparently been filed simultaneously or accompanying the plaint on record.’

On account of the foregoing grounds, the 1st and 2nd defendants/applicants applied for the striking out of the suit, with costs.

At the hearing of the application, the 1st and 2nd defendants/applicants were represented by learned counsel, Mr P.N. Nyagah while the plaintiff/respondent was represented by learned counsel, Mr K. Mbugua. The 3rd defendant, who is not a party to the present application, was represented by learned counsel, Mr P.W. Gachuhi.

Plaintiff's/respondent's counsel said that the suit was filed simultaneously with a certificate of urgency and that thereafter summons was extracted and served on all parties. He submitted that striking out of the plaint would be grossly unjust as it will defeat the cause of justice. He also added that he had filed grounds of opposition to the present notice of motion on 13.06.08. Ground of opposition No.3 states:

'3. The plaintiff has shown triable issues that the court needs to address (and) in the interest of justice these are:

- (a) She has set out a *prima facie* case with a probability of success.
- (b) She will suffer irreparable loss and damage which cannot be adequately compensated by an award of damages.
- (c) She has shown that the balance of convenience lies in her favour.'

On account of the foregoing, plaintiff's/respondent's counsel submitted that the best way forward is to take a date for hearing of the main suit.

I have given due consideration to the application and opposition thereto.

Rule 3 (1) and (5) of Order IV under which the present application was brought are in the following terms:

'3. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(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.'

Subrule (2) requires every summon to be signed by the Judge or an officer appointed by the Judge and to be sealed with the seal of the court.

It is clear from Order IV rule 3 (5) that every summons shall be filed with the plaint in question. All the plaintiff/respondent said in response to the complaint that no summons was filed with the plaint is that the suit was filed with a certificate of urgency. The initial plaint in the court file is dated 14.02.06. It does not, however, bear a court date stamp showing its date of filing. There is, however, in the court file a chamber summons application also dated 14.02.06 bearing a court date stamp of 21.02.06. It may well be that the plaint was filed on 21.02.06 as the chamber summons but there is no concrete evidence of the date of filing of the plaint. Plaintiff's/respondent's counsel told this court from the Bar that after the certificate of urgency was filed with the plaint, summons was thereafter extracted and served on all parties but he did not say when the summons was extracted and served on the 1st and 2nd defendants, neither was any evidence of service tendered before this court.

Rule 3 (5) is couched in mandatory terms. Plaintiff/respondent has not furnished adequate explanation why no summons to enter appearance was filed with the plaint. All she said through her counsel was that she filed the plaint simultaneously with a chamber summons application for interim restraining orders under certificate of urgency. There are in the court file copies of summons to enter appearance dated 14.05.08 addressed to the 1st and 2nd defendants/applicants but there is no evidence of service thereof upon the said defendants/applicants some 2 years and 9 months since the initial plaint was apparently filed in February, 2006. This long delay is inconsistent with the mandatory provisions of Order IV rule 3 (1) and (5). It is inexplicable and calls for sanctions against the plaintiff/respondent to remind her of the mandatory provisions of the law requiring timely filing and service of summons to enter appearance. The plaintiff's/respondent's approach to the issue seems to have been casual. That won't do and, as already intimated, a reminder to the plaintiff/respondent appears to be necessary as a reminder to her to take more seriously the issue of filing, with the plaint, summons to enter appearance as stipulated by Order IV rule 3 (5).

Plaintiff's/respondent's counsel pointed out that the plaint raises triable issues. That may be so but at the same time the civil procedure rules require the issues to be raised in accordance with the set procedures. This has not been done and no satisfactory explanation was given by the plaintiff/respondent. I am of the view that the requisite procedural rules ought to be upheld in this case.

In view of the foregoing, the notice of motion application dated 19.02.08 succeeds and the same is granted. The suit herein is declared incompetent and struck out as against the 1st and 2nd defendants/applicants. The plaintiff/respondent shall bear the 1st and 2nd defendant's/applicant's costs of the suit and the present application.

Orders accordingly.

Delivered at Nairobi this 4th day of November, 2008.

B.P. KUBO

JUDGE