



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 212 of 2005**

**PETER KAMAU IKIGU..... APPELLANT**

**VERSUS**

**PETERSON OGINO ONGARO..... RESPONDENT**

**JUDGMENT**

The appeal herein, filed on 8/4/05, challenges the Subordinate Court's judgment, in CMCC 6880 of 2004, at Milimani Commercial Courts, delivered on 17/3/05, on the following grounds of appeal:

1. The Learned Magistrate misdirected herself in holding that the summons were properly served on a Sunday.
2. The Subordinate Court erred in law and in fact in ignoring the decision of the High Court cited by the Counsel for the appellant.
3. The lower court erred in law and in fact in holding that the Draft Defence did not raise any triable issues.
4. The Subordinate Court erred in law and in fact in placing reliance on a defective Replying Affidavit, sworn by an Advocate.
5. The decision of the Subordinate court went against the weight of evidence.
6. The lower court misdirected itself in denying the appellant leave to defend.

Wherefore, the appellant prays that: the Ruling of the learned magistrate be set aside; appellant be granted unconditional leave to defend the suit, and costs of the appeal be granted to the appellant.

From the Record of Appeal and the submissions of both learned counsels, there are common grounds whose early disposal clears the way, for the more complex issues raised in some of the grounds of appeal.

It is common ground that the summons to enter an appearance and defence was served on 8/8/04, which was a Sunday. The question is simply whether such service is legally valid.

Order 49 Rule 8 (2) of the Civil Procedure Rules provides as under:

**“Service shall normally be effected on a weekday other than Saturday and before the hour of five in the afternoon”**

Then follows sub-rule (3) which provides that:

**“For the purposes of computing any period of time subsequent to service outside the times specified in sub-rule(2) – service effected after five in the afternoon on a week-day other than Friday or Saturday is deemed to have been effected on the following day; and service effected after five in the afternoon on Friday is deemed to have been effected on the following Monday.”**

It is the appellant’s case that the service of summons in this case was improper, the same having been effected on Sunday, and accordingly, the appellant was not served with the Summons and plaint to enable him enter appearance and file his defence. In any case, according to the pleadings in the Record of appeal, the appellant was not in at the time he is alleged to have been served. This bolsters the appellant’s case that there was no service of the summons, as required by law, and that the purported affidavit of service is a mere fabrication.

I agree with the appellant’s contention and the submissions by the learned counsel for the appellant.

The above holding disposes of ground of appeal No. 1 in the Memorandum of appeal, and in favour of the appellant.

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The next challenge – ground No. 2 – avers that the lower court ignored a binding authority and admitted an affidavit by an Advocate – in violation of Order 18 rule 3 of the Civil Procedure Rules.

Order 18 Rule 3(1) of the Civil Procedure Rules provides as under:

**“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Provided that in interlocutory proceedings, or by leave of the court, an Affidavit may contain statements of information and belief showing the sources and grounds thereof.”**

Before delving into the analysis of this ground of appeal, I wish to reiterate the effects and import of ground of appeal No. 1 on non-service of summons onto the Appellant. Once it is held, as I have, that the summons to enter appearance and defence was either not served or was improperly served upon the defendant, the legal and equitable effects are that the Defendant has no idea that he has been sued, what is being claimed from him by the Plaintiff [because the plaint is attached to the summons, and it is the Plaint that contains the Plaintiff’s claim], and how and against what to defend himself. Put differently, it is the summons that actually set rolling the process of prosecution in a civil suit.

There is therefore the fundamental question. In the absence of [effective service] of summons, is there a suit?

In the appeal before me the summons is purported to have been served upon the Appellant on a Sunday. That clearly violates the provisions of Order 39 rule 8(2) of the Civil Procedure Rules, and the effect is that there was no service of summons, and that cannot legally be done on a Sunday.

The Lower Court, in its Ruling; queries where the appellant was if he was not at home on the Sunday.

Clearly, the lower court erred in law on this point. There is no onus on the Defendant to show where he was, if it is shown that the service could not validly have been effected on a Sunday. Even if the appellant were at home, that would not cure or validate the summons.

In my view, lack of valid service of the summons upon the appellant is sufficient ground to sustain the

appeal before me. However, there are other grounds on which the appeal is premised.

Ground No. 2, above, raises two basic points. The validity of an Affidavit by an Advocate when the matters deponed on are on factual and contentious issues. Clearly, and looking at the Replying affidavit by learned counsel for the Respondent, that Affidavit is in violation of the provisions of Order 18 rule 3 of the Civil Procedure Rules, and should have been ignored or expunged from the record. That done, then the application was unopposed and should have been granted. Failure to do so occasioned an error in law.

Still on the above point, it was submitted by counsel for the Appellant that the lower court ignored a binding authority of the High Court.

It is important to observe that whether an authority is binding on a court is not only on the superiority of the court that delivered the decision, **vis-à-vis** the court alleged to have ignored the decision, but also the relevance and importance of the authority under the circumstances before the deciding court. Such factors include the similarities of the facts in the two cases. But in my humble view, where the statutory law- in this case the provisions of Order 18 rule 3(1) – are so clear the decided case takes a secondary place. So long as the statutory provision is followed, the decided case may be ignored, without any effects on the decision. Here, both were ignored by the Learned Magistrate, and that was an error in law.

Ground of appeal No. 3 raises the issue as to whether or not the draft defence raises any triable issues. The law on this point is that even if the Defence raises one, not more, triable issue, that is sufficient to entitle the Defendant to a full hearing.

Here, I have looked at the Draft Defence, and without pre-empting or prejudging the substantive suit, I am convinced that there are triable issues, which call for a full trial at which evidence can be adduced and witnesses cross-examined, for justice to be done. Such issues include such questions as to whether the Defendant was ever a tenant of the Plaintiff /Respondent; whose property is it over which the tenancy is underpinned.

Accordingly, I find and hold that there are triable issues over which the Appellant should have been given an opportunity to ventilate in his defence. The learned magistrate erred in holding otherwise, under the circumstances and the materials before me.

Grounds of appeal Nos. 4 through 6 are all subsumed in what I have found and held under ground of appeal No. 3 above. I need not repeat myself on those same or similar issues.

All in all therefore, and for reasons given above, the appeal herein succeeds; and I:

- (a) Set aside the ruling of the learned Magistrate, dated 17/3/05.**
- (b) Allow the appellant unconditional leave to defend the suit.**
- (c) Costs of both this appeal and the application at the court below, to be borne by the Respondent.**

DATED and delivered in Nairobi this 30<sup>th</sup> Day of January, 2007.

**O.K. MUTUNGI**

**JUDGE**