IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 234 of 2004

KENYA BRIDGE ASSOCIATION & 2 OTHERS……..…PLAINTIFFS

VERSUS

SAMINA ESMAIL & 4 OTHERS……....……....…..DEFENDANTS

R U L I N G

The Notice of Motion, filed on 15/8/06, under Order 16 rule 6; Order 4 rule 3 (1) & 5 of the Civil Procedure Rules and Section 3A Cap. 21, Laws of Kenya, seeks dismissal of the Plaintiff's suit for want of prosecution; and that the suit be struck out or dismissed for being incompetent. Then costs.

At the commencement of the hearing of the application, learned counsel for the Plaintiff/Respondent raised three Preliminary Points of law as under:

(a) That the application, as filed, is premature because under Order 16 rule 6 of the Civil Procedure Rules, the application can only be dismissed at the expiration or lapse of three years. Here, the suit was filed in court on 12/3/04, and clearly between that date and 15/8/06 when the current application was filed, three years have not lapsed.

(b) The Supporting Affidavit by the Learned Counsel for the Defendant/Applicant is defective to the extent that the same does not state the source of the deponent's information, as required by the law.

(c) The Supporting Affidavit is not correct and is untrue because the matter came into court on 23/3/04 and went on till 4/5/04 when counsel for the applicant got into argument with the Judge and the matter could not proceed because of the hostility of the counsel.

In opposition, learned counsel for the Applicant averred that the applicant could not come under Order 16 rule 5 of the Civil Procedure rules because summons have never been issued and served on the Defendant/Applicant as required by order 4 rule 3(1) of the Civil Procedure Rules. Since the Respondent has failed to serve the Applicant with summons, the pleadings will never close, and only when the pleadings have closed can the provisions of Order 16 rule 5 come into play. Hence no other provision is applicable other than Order 16 rule 6.

The applicant's counsel submitted that failure to serve the summons upon the Defendant/applicant for 2½ year constitutes inordinate delay and the suit is incompetent.

On the Supporting Affidavit, learned counsel submitted that Preliminary Objections should be, and are, on matters of law, not fact, and that he is the advocate on record and therefore aware of what is in the file.

Lastly, it is the contention of the counsel for the applicant that the court is given power, by order 18 rule 7 of the Civil procedure Rules, to accept the Affidavit as it is.

Having closely studied the pleadings herein, and considered the submissions by learned counsel for both sides, I have reached the following findings and conclusions, with respect to the Preliminary Objections, raised by counsel for the Plaintiff/Respondent.

It is trite learning that preliminary objections must be on points of law, and have the potential of disposing off the entire suit/appeal for want of prosecution or for incompetence. Any preliminary objection which does not satisfy the above tenets is a mere delaying tactic aimed at nothing more than delaying the hearing and final determination of whatever matter that is before the court and in which the preliminary objection is raised.

In the present application, counsel for the Respondent contends that the same is pre-mature, according to the provisions under which the application is brought, that is Order 16 Rule 6 of the Civil Procedure Rules which state as under:

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed, and in such case the Plaintiff may, subject to the law of limitation, bring a fresh suit."

Simple arithmetical count clearly shows that between 12/3/04 when the suit was filed and 15/8/06, when the current application for dismissal was filed, three years have not lapsed. It is on the basis of the above provisions that counsel for the Plaintiff/Respondent contends that the application herein is premature.

On the face of it, the argument is sound, but only if it is read in isolation of other relevant provisions of the law and facts in the suit. And this is what brings the applicant's contentions into sharp focus. The applicant's case is that since the plaint/suit was filed on 12/3/04 up to the filing of the application herein, which is a period of more than two years, the Plaintiff/Respondent has deliberately failed/ignored to serve summons upon the Defendant. The legal effects of this are that the provisions of Order 16 rule 5 of the Civil Procedure Rules will never come into operation. That is to say that the pleadings will never close, and before that happens all the provisions of rule 5 of Order 16 cannot be invoked.

To appreciate the force behind the Applicant's case, it is imperative to reproduce the relevant legal provisions, starting with the service of summons, before considering Order 16 rules 5 and 6 of the Civil Procedure Rules.

As per Order 4 rule 1 of the Civil Procedure Rules "**every suit shall be instituted by presenting a plaint to the court…."**

"**When a suit has been filed a summons SHALL issue to the defendant ordering him to appear within the time specified therein."** Rule 3(1).

Rule 3(3) provides:

"**Every summons shall be accompanied by a copy of the Plaint"**

Pausing at this juncture, it is important to underline the provisions of Rule 3(1) above, as that is the gist of the Defendant's case in this application. While the suit shall be instituted by presenting the plaint to the court, it is required that once the suit has been filed a summons SHALL issue to the Defendant; and the summons SHALL be accompanied by a copy of the plaint.

In the present case, it is a common ground that no summons has issued to the Defendant. Learned Counsel for the Plaintiff admitted as much, by attaching to his Replying affidavit, filed on 8/12/06, a copy of a letter from Rautta & Co. [previous counsel to Plaintiff, to Sharad Rao] dated 7/12/06. That letter

clearly shows that whereas the suit [plaint] was filed on 12/3/04, no summons ever issued to the Defendant, and none has issued up to the date of filing the application for dismissal herein.

The worst part of that letter is that Rautta Advocate did not, and does not, consider the summons necessary. To crown it all, Rautta Advocate states:

"Once the Defendant appeared in court and having been duly informed about the case, their rights to have summons served on them must be deemed to have been waived, and the need therefore overtaken by events."

I take grave exceptions to the above contentions, which are in my view, based on total misapprehension of the law.

To begin with, no party or parties have the power to waive the law. Were that the position there would be no knowing what the law is if role-occupants and litigants can change the law at will. Not even the court can change or waive the law. Only the Legislature has such power.

Secondly, the role and place of the summons in the litigation process cannot be overstressed. It is to the summons that the Plaint must be attached; and it is the summons that orders the Defendant to enter appearance and file defence to the claims stated or alleged in the attached plaint, within the time prescribed in that summons.

Accordingly to allege or aver that the Defendant had been duly informed is a legal fallacy. There is no other legally acknowledged way of informing a Defendant about the plaint and when he/she should enter appearance and defence.

Thirdly, it is the entering of the defence by the Defendant that sets the process of closing of the pleadings, and thus the operations of Order 16 rule 5 of the Civil Procedure Rules. That rule provides as under:

5 If, within three months after:

a) the close of the pleadings, or

b) the removal of the suit from the hearing list or

c) the adjournment of the suit generally….the defendant may either set down the suit for hearing or apply for its dismissal."

To recapitulate, considering all the above provisions and the facts in this case, it is my considered view that the Preliminary Objection that the application for dismissal is pre-mature is an abuse of the court process in that by their own conduct and admission the pleadings will never close since up to now, more than two years since the filing of the suit, summons have never issued to or been served upon the Defendant.

Under order V rules 1 (1) (2) (5) a summons's validity is only 12 months beginning with the date it was issued. After that period, the summons's validity expires and can only be re-issued upon an application for extension of its validity by the court.

Here, the provisions of the law have been rendered impotent by the deliberate conduct of the Plaintiff. There was never any summons issued, hence the issue of extension of its validity does not arise. As found and held herein earlier, more than two years after filing the suit, there is no intention to issue a summons to the Defendant, as per the Plaintiff's admission, may be because the Plaintiff obtained and has been enjoying, some interim orders.

I have no doubt in my mind that had the court known or had the fact that there was no intention to ever

issue a summons to the Defendant, such interim orders would not have been granted by the court.

Order 5 rule 1(7) of the Civil Procedure Rules provides as follows:-

"where no application has been made under sub-rule (2) the court may, without notice, dismiss the suit at the expiry of twenty four (24) months from the issue of the original summons."

The sub-rule (2) referred to above provides that "where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so."

It is superfluous to observe that where there is no summons issued in the first instance, the question of its being served does not arise. A non-existent summons cannot be served. Here there never was, and there never will be, a summons to be served. Similarly, if there never was, and never will be, a summons, after 24 months sub-rule (2) – the question of extension of its validity does not arise.

Accordingly, while granting that the Plaintiff has 12 months in which to issue and serve a summons to a Defendant, where no such summons existed, much less being issued either within the 12 months or the extended validity, at the expiry of 24 months, this court has the power to dismiss the suit.

That I do, both under the provisions of Order 5 rule 1(7) of the Civil Procedure Rules, and Section 3A of Cap. 21, Laws of Kenya, in the interest of justice and to prevent abuse of the process of this court.

The foregoing is sufficient to reject the Preliminary Objections and grant the Notice of Motion herein. Accordingly I grant the application herein, dismiss the suit for want of prosecution and incompetence in that despite the filing of the suit – plaint more than 24 months after the suit was filed, no summons have issued to the Defendant and there is no intention to ever issue such summons to the Defendant as required by law.

Before concluding this Ruling, the competence of the Supporting Affidavit was challenged by Learned Counsel for the Plaintiff on the basis that it is sworn by the applicant's counsel, without disclosing the source of his authority or information. Though Mr. Sherad Rao did not state so, it is clear that he was alluding to the provisions of order 18 rule 3(1) of the Civil Procedure Rules.

I do not consider it necessary to dwell on that point because Mr. Sharad Rao's Replying Affidavit suffers from the same legal deficiencies. To be in conduct of a matter does not, in my humble view, mean that the counsel is authorized to depone on contentious factual matters, especially, as in this case, when the counsel was not on record for the Plaintiff when the alleged hostility between counsel for the Defendant and the court purportedly developed. As a matter of record, that submission, by counsel for the Plaintiff, is not in his Replying Affidavit. Hence, it is a statement from the bar, which is not acceptable in interlocutory applications as inn this case, and I reject the same.

All in all, and for avoidance of any doubts, the Preliminary Objection is not upheld, but rejected. The application for dismissal or striking out of the suit for want of prosecution, and incompetence, is granted, with costs to the Defendant/Applicant and against the Plaintiff/Respondent.

I further order that the Plaintiff/Respondent do pay costs of both this application and suit herein.

DATED and issued in Nairobi this 28th Day of February, 2007.

O.K. MUTUNGI

JUDGE