



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA
Civil Suit 156 of 2006

SULTANALI KERMALLY

ALI KERMALLYPLAINTIFFS

VERSUS

LAILA MOHAMED SEIF AL BUSAIDIYA.....1ST DEFENDANT

WAKF COMMISSIONER OF KENYA.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

RULING

By a plaint dated 3rd April 2000, Sultanali Kermally and Ali Kermally (1st and 2nd Plaintiffs) sued Laila Mohamed Seif Ali Busaidiya, the Wakf Commissioner of Kenya and the Attorney General (1st, 2nd and 3rd defendants) over the ownership of 18 parcels of land comprised in Mombasa/Block XX and Mombasa/Block XXI. The plaint and the accompanying summonses were served upon all the defendants. The 2nd defendant filed its appearance and defence on 12th April 2000 and on 27th April 2000 respectively. The 1st defendant followed by filing his appearance and defence on 3rd May 2000. The 3rd defendant was the last to file his appearance on 31st July 2000. The 3rd defendants defence was filed on 15.11.2000. The record shows that the suit has been very active. The parties involved have even done discoveries and exchanged documents in readiness for the hearing of the suit.

By a motion dated 19th April 2007, the 1st and 2nd defendants prayed for interalia the summons to enter appearance issued in this suit and all pleadings following the plaint to be struck out. They also asked for an order to set aside all applications and proceedings. It would appear when this motion was served, the plaintiff was provoked to take out the summons dated 2nd May 2007, the subject matter of this ruling. Basically in the summons the plaintiff seeks to cure the defect pointed out in the aforesaid motion. The outcome of the summons will obviously affect the status of the motion. If the summons succeeds it means the motion automatically fails as having been overtaken by events. If the summons fails it will mean that the motion must be decided on its merits.

In the summons, Mr. Kasmani learned advocate for the plaintiff has urged this court to grant the plaintiff leave to amend the summons to the extent that the period provided of ten (10) days is deleted and substituted with 15 days. The learned advocate has also urged this court to direct that the amendment

be deemed to have effect from the date of service of the summons served upon the defendants. It is the submission of Mr. Kasmani that the defect is a mere irregularity and hence can be corrected by an amendment. Mr. Kasmani argued that the defendants waived their rights to raise the objection when they entered appearance. It is further submitted that the error did not cause any prejudice to the defendants.

In fact is the argument of the plaintiff that if the amendment is not allowed it will cause serious prejudice on the parties in that they will be required to file fresh pleadings thus procrastinating the matter further.

Mr. Pandya, learned advocate for the 1st and 2nd defendants opposed the summons. He was of the view that the summons was intended to take away the 1st and 2nd defendants' rights expressed in the motion dated 19th April 2007. this court was urged to find that the summons was null and void hence cannot be salvaged by way of an amendment. It is also the submission of Mr. Pandya that the summons is not a pleading as envisaged under the Civil Procedure Act.

I have considered the powerful submissions made by learned counsels. I have also perused the pleadings placed before this court. What is clear from the onset is that the summons to enter appearance issued on 3rd April 2000 gave the defendants ten (10) days within which to enter appearance. The law is very clear on this aspect. Under order IV rule 3(4) of the Civil Procedure rules, the defendant should have been given not less than days to enter appearance. Consequently the summons issued on 3rd April 2000 contravened the provisions of order IV rule 3(4). From the summons and the subsequent submissions, the following issues arose for my determination:

First, whether or not a summons to enter appearance is a pleading?

Two, whether or not the defect pointed out is a mere irregularity or a nullity?

Three, whether or not the defect is curable by an amendment?

On the first issue, it is clear that the learned advocates took different positions in the matter. Mr. Kasmani is of the view that the summons to enter appearance is a pleading whereas Mr. Pandya is of the opposite view that it is not a pleading. What is a pleading? The answer to this question is given in section 2 of the Civil Procedure Act which reads as follows:-

“ “Pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and the defence of any defendant thereto, and the reply of the plaintiff to any defence or counterclaim of a defendant”

In my understanding I am convinced that a summons to enter appearance is a pleading hence the same is capable of being amended depending on the circumstances and facts of each case. However even if I was found to be wrong on the issue, still I am of the strong view that a summons to enter appearance is a document capable of being amended under the provisions of order VI A rule 5 of the Civil Procedure rules.

The second issue is as to whether the defect pointed out is a mere irregularity or a nullity. Again the learned advocates took divergent positions in the matter. It is the submission of the plaintiff that when the defendants entered an unconditional appearance, they waived their right to raise the objection. Let me deal with the last submission. It is a cardinal principle of law that a point of law can be raised at any time before judgment. The issue touching on the validity of the summons to enter appearance raised in the motion dated 19th April 2007 is a legal issue which cannot be waived merely by a party entering an unconditional appearance. Though the motion was filed in the late stage of the proceedings the court has no option but to determine it as a legal point. It can even be raised at the stage of submissions but before judgment. The remaining issue is whether the error on the summons to enter appearance is a mere irregularity or a nullity. I am convinced that the defect on the summons issued on 3rd April 2000 is a nullity. It cannot be said to be a mere irregularity. In the circumstances and in exercise of my inherent

jurisdiction ex-debito justitiae I hereby set aside the same. The service of the summons therefore was defective. This means that the summons to enter appearance of 3rd April 2000 having been declared a nullity cannot be cured by an amendment. One cannot amend anything which is void from the beginning. Consequently, the Chamber Summons dated 2/5/2007 must fail.

The remaining question is what will happen to the suit now that the summons to enter appearance have been set aside. In my opinion, the suit cannot be said to be fatally defective itself. This being a court of justice I will exercise my discretion to direct the plaintiff to cause to be issued fresh summonses within 10 days from the date of this ruling. The court of Appeal had the occasion to consider the effect of the defective summons in the case of **Shah =vs= Investment and Mortgages Bank Ltd [2001] Vol.1 E.A. 274 (C.A.K.)** At page 281 the revered court expressed itself as follows:

“Before we leave the matter, there is one other issue which we must deal with. It was being contended by the appellants before Mbaluto J that the summonses which had been issued in the case and served on all the appellants and Nakumatt had all been invalid because they provided for entry of appearance within ten days instead of giving them at least ten days to enter appearance. The learned judge found that the summonses had been defective in that respect and ordered fresh summonses to issue. Apparently the learned judge was being urged to hold that since the summonses were defective, it followed that the suit itself was defective and for that proposition the case of **Ceneast Airlines Ltd. =vs= Kenya Shell Ltd [1999] LLR 1038 (C.A.K)** relied on. Nothing could have been further from the truth. That case did not and could not have decided that when summons to enter appearance and file a defence is defective, the suit itself is defective. What the case decided was that if the summons is defective the service of the same upon the other party must itself be defective. The defect in the service, however, has got nothing to do with the validity of the suit in which the summons is issued. It is to be noted that in the Ceneast Airlines case, the service was held to be invalid and the defendant was granted unconditional leave to defend. If the suit had itself been invalid, there would be no occasion for granting leave to defend as there would be nothing to defend. The learned judge, rightly in our view, set aside the defective service and ordered fresh summonses to issue. He was entitled to do so.”

I am bound by the decision of Court of Appeal which I entirely agree with and I apply the same principles in this matter. Who should be awarded costs in this matter? I am afraid to say that none of the parties should get costs. It took about seven (7) years for the 1st & 2nd defendants to raise the complaint expressed in their motion of 19.4.2007. After the complaint was raised, the plaintiff immediately woke up and purported to correct the error via the Chamber summons dated 2/5/2007. The conduct of both parties in the matter over the issue at hand makes me deny any of them costs. My final decision in the matter is to dismiss the Chamber summons dated 2/5/2007 with no order as to costs. I ex debito justitiae direct the plaintiff to cause to be issued fresh summonses in the matter within 10 days from the date of this order. It would appear this decision which is made suo moto would render the motion dated 19.4.2007 superfluous having been overtaken by events. The same in my view ought to be treated as abandoned with no order as to costs. The parties if need be may still agitate the same.

Dated and delivered at Mombasa this 15th day of May 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Kasmani for plaintiff

Mr. Pandya for 1st and 2nd Defendant and Mr. Okello for the 3rd defend cvxant.