

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 445 of 2001

HUSSEIN MOHAMED AWADH PLAINTIFF

VERSUS

FIRST AMERICAN BANK OF KENYA LTD.DEFENDANT

R U L I N G

The subject matter of this ruling is a notice of Preliminary Objection dated 27th April 2006 filed by the defendant which read as follows:

“The defendant herein do hereby give notice to the honourable court and the plaintiff herein of its intention to raise a Preliminary Objection at the hearing of this suit on the grounds that this suit is a nullity as is based on defective summons to enter appearance contrary to Order IV rule 3(4) of the Civil Procedure Rules.”

It is the argument of Mr. Abubakar advocate for defendant that the summons served gave it less than 10 days to enter appearance in contravention of the provisions of Order IV rule 3(4) of the Civil Procedure Rules. This court was urged to set aside the summons and to direct that fresh summons be served. The defendant’s learned advocate cited the *Per incuriam* decision of the court of Appeal in **Erneast Airlines Ltd. =vs= Kenya Shell Ltd. [2002] 2E.A. 357 (C.A.K)**. The learned advocate also cited the decision of Justice Mwera in **Equatorial Commercial Bank =vs= Mohansons (K) Ltd.** The sum total in the above 2 decisions is that the summons which requires a defendant to enter appearance within 10 days is in breach of Order IV rule 3(4) of the Civil Procedure Rules. It was also stated that the summons must state that a defendant should enter an appearance on the 10th day of service or any day thereafter as may be specified in the summons.

Mr. Tindika advocate for the plaintiff was of a different view in the matter. The learned advocate was of the view that the defect is a mere irregularity which is cured and waived upon entry of appearance by the defendant. Mr. Tindika further argued that the defendant suffered not prejudice. The plaintiff’s counsel cited the case of **Nanjibhai Prabhudas & Co. =vs= standard Bank Ltd. [1968] E.A. P.670**. In this case the defendant was irregularly served with summons but nevertheless the defendant entered appearance. An objection was raised against the entire suit on the basis of defective service. This court came to the conclusion **inter alia** that even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity. It was held that the defendant waived the irregularity when it entered an unconditional appearance.

The background of this dispute can easily be traced from the pleadings filed before this court. On the 5th day of September 2001 the plaintiff filed a plaint against the defendant in which he claimed both special and general damages from the defendant arising out of loss of employment and malicious prosecutions. The summons accompanying the plaint was served. The same indicated that the defendant was requested to enter appearance within 10 days. This is admitted by the plaintiff that the summons contravened Order IV rule 3(4) of the Civil Procedure Rules. The defendant entered an unconditional appearance on the 17th day of March 2001. A defence was filed on 2nd October 2001.

The question which must be answered now is what is the effect of such summons? The consequential effect of such summons is that they are invalid. If the summons are invalid then the summons must be set

aside. However this court must look at the purpose of fixing time to enter appearance in the summons. This is to enable the defendant sufficient time to enter appearance. If the time specified in the summons is below that specified in the rules, lapses and an interlocutory judgment is entered in default of appearance, the court is bound to set aside such summons and the resultant exparte judgment. But where the defendant enters appearance within or outside the period specified in the summons before judgment, then it makes no sense to set aside the summons and then direct for re-issue and service. I am of the view that where the defendant has not suffered any prejudice the summons should not be set aside. The defect in such a case should be excused and treated as a mere irregularity which irregularity is waived when a defendant enters an unconditional appearance. The two decisions cited by the defendant are in respect of situations where judgment in default of appearance had been entered. This is different from the position obtaining in this matter where no default judgment is in place. The crux of the matter is that the defect in the summons will be regarded as fatal when there is an exparte judgment in default of appearance hanging over the defendant's head.

The end result is that the Preliminary Objection is ordered dismissed and the defect in the summons is treated as an irregularity already waived by the defendant upon entry of an unconditional appearance. Costs shall abide the outcome of this suit.

Dated and delivered at Mombasa this 31st day of May 2006.

J.K. SERGON

JUDGE

In open court in the presence of Abubakar for the applicant. No Appearance for Mr. Tindika for the Respondent