



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Appeal 99 of 2003**

**JIMMY M. MAUTA.....APPELLANT**

**VERSUS**

**WILFRED GITONGA.....RESPONDENT**

**JUDGMENT**

This is an appeal from the ruling of the Principal Magistrate given on the 20<sup>th</sup> June 2003 in Mombasa SRMCC No. 1456 of 2002. It raises one simple issue: The validity and effect of the summons to enter appearance issued in that case on the 20<sup>th</sup> April 2002.

The Respondent in this appeal filed the above mentioned case in person. The summons to enter appearance issued in that case required the Appellant to enter appearance within 10 days. It was served upon the Appellant who entered appearance in protest within that period. He, however, did not file a defence and judgment in default of defence was entered against him.

The Appellant's application to set aside that judgment was dismissed provoking this appeal. In execution of the decree in that case the Appellant's house without land was sold.

Mr. Ouma, counsel for the Appellant, submitted that the impugned summons to enter appearance which, contrary to the express and mandatory provisions of Order 4 Rule 3(4), required the Appellant to enter appearance within 10 days, is a nullity and of no effect and so are all the proceedings orders, judgments and actions based on it. He cited the Court of Appeal decision in **Ceneast Airlines Limited – Vs – Kenya Shell Limited, Civil Appeal No. 174 of 1999**, and urged me to so declare it by allowing this appeal. Counsel also contended that the Appellant's letter on page 065 of the record of appeal was written without his authority. That the Appellant's conduct may have been wanting, he said, does not change the provisions of law.

Mr. Mwakisha, counsel for the Respondent, did not share in that view. He submitted that the summons was duly served upon the Appellant. He entered appearance but ignored to file any defence. Judgment in default of defense was entered and in execution of the ensuing decree the Appellant's house without land was sold. The Appellant has demanded the proceeds of sale in excess of the decretal sum. In the circumstances and taking into account the interests of the auction purchaser of the house this appeal should be dismissed. If the appeal is allowed, given his conduct in the matter, the Appellant should be condemned to pay all the costs.

These rival submissions bring to focus the provisions of Order 4 Rule 3(4) of the Civil Procedure Rules. The relevant parts that Order reads:

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

(2) .....

(3) .....

**(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear. Provided the time for appearance shall not be less than 10 days.”**

This provision is mandatory and the Court of Appeal so held in the **Ceneast Airlines Limited case (supra)**. In the words of that Court

**“This mandatory provision means that the time for entering appearance cannot be less than 10 days or within 10 days of service of summons. It must at least be on the 10<sup>th</sup> day of service or any day thereafter as may be specified.”**

The Court of Appeal then proceeded to hold the summons to enter appearance in that case which, as in this case, required the defendant to enter appearance within 10 days, was invalid and of no effect.

Though obiter that authority, coming from the Court of Appeal, is very persuasive. I am sure if the issue of the summons to enter appearance was a live one the Court of Appeal could have been even more emphatic in its decision. I followed it in **Lualenyi Ranching Company Limited – Vs – William Mlenga Wasike Mombasa HCCC No. 188 of 2003** and so did Mwera J in **Equitorial Commercial Bank – Vs – Mahansons (K) Limited, Mombasa HCCC No. 524 of 1998** and Ringera J (as he then was) in **Abraham Kiptanui – Vs – The Delphis Ban Limited and Another, Nairobi Milimani Commercial Courts HCCC No. 1864 of 1999**. The summon to enter appearance in this matter is therefore a nullity and so are all the proceedings, decree and or orders based on it.

In the circumstances I allow this appeal, set aside the learned Principal Magistrate’s ruling of 20<sup>th</sup> June 2003 and substitute therefor an order allowing the Appellant’s application in that case with no order as to costs. Due to the Appellant’s indolence and the fact that it is the Respondent who set the ball rolling by an illegal summons to enter appearance I order that each party bears its own costs of this appeal as well.

DATED and delivered this 26<sup>th</sup> day of May 2006.

**D. K. MARAGA**

**JUDGE**