



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

Civil Suit 313 of 2004

MAE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

DAVIDSON NGINI.....DEFENDANT

R U L I N G

The defendant by his chamber summons dated 18th October 2005, seeks an order for striking out the suit. The application is brought under Order 5 Rule 1 (1) Order 6 Rules 13 (1) (d) and 16 of The Civil Procedure Rules.

The application is based on the grounds that, no valid summons to enter an appearance have been served on the defendant; and in the alternative, that the summons to enter an appearance which were served upon the defendant have expired in terms of Order 5 Rule 1 (1) of the Civil Procedure Rules.

The parties are in agreement that the summons to enter appearance were issued on 17th June 2004 and were served on 17th June 2005.

Defence learned counsel Mr Ohaga submitted that the summons served on the defendant were invalid, and were incapable of calling the defendant to submit to the jurisdiction of the court and to defendant the suit.

Defence counsels stated that the appearance filed, herein, on behalf of the defendant was filed under protest.

Defence counsel submitted that under Order 5 Rule 1 (1) the summons expired on 16th June 2005, so by the day they were served, 17th June 2005, they were expired and invalid. That order 5 Rule 1 (1) provided that summons were valid in the first instance for twelve months beginning with the date of issue. Counsel referred to Cap 2, The Interpretation and General Provision Act, to its definition of month. The definition of that “month” means calendar month.” Counsel also referred to the definition of “calendar month in Stroud Judicial dictionary which provides:

“Calendar month is a legal and technical term and in computing time by calendar month, the time must be reckoned by looking at the calendar and not by counting days Therefore, e.g. “one calendar month’s imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month, less one.”

Defence counsel stated that it was clear the summons had expired by the date of service and that the effect of such expiry was to dismiss the suit. Defence relied on the cases **RAJANI & OTHERS – VERSUS – THAITHI [1996] LLR 443**, where the court of appeal found that:

“Non compliance with the procedural aspects of Order V, which provides a comprehensive code for the duration and renewal of summons, in a fundamental defect that cannot be cured under section 3A Civil Procedure Act,” the court of appeal proceeded to dismiss the suit.

The other case defence relied on was **HCCC No. 3320 of 1991 RAJU INVESTMENTS LTD – VERSUS VIPIN CHANDULAL RAJANI & ANOTHER**, where the Hon Justice Visram followed the finding of the court of appeal in the Rajani case (Supra).”

Learned counsel Mr Gachuhi, on behalf of the plaintiff opposed the application. He said that Order 5 Rule 1 (1) does not provide for computation of time, of the validity of summons. That all it states is the date of issue. He said that it was Order 49 Rule 7, which provides computation, and since Order 5 Rule (1) does not provide a method of computation, Order 49 Rule 7 would apply.

Plaintiff counsel further submitted, in opposition that section 57 of The Interpretation and General Provisions Act (Cap 2) would apply in computing time of the validity of summons.

Plaintiff’s counsel argued that in computing time of the validity of summons, Order 49 Rule 7 and Section 57 Cap 2, provide that the date of issuance of summons would not be taken in consideration.

Plaintiff’s counsel relied on the case **KERMULI – VERSUS – NGACHI [1988] KLR 273**. This case related to consent issued by the Land Control Board, and the issue was whether the consent had been given within the three months period stipulated in the Land Control Act (Cap 302). The application for consent was received by the Land Control Board on 6th May and in calculating the 3 months period the court of Appeal, per Nyarangi J A stated: -

“The month of May would be overlooked because the period of time from 6th May to end of May is not a calendar month.”

Per Gachuhi J.A., stated: -

“The application having been made on 6th May, 1980, three months by ordinary computation of time would commence on 7th May 1980 and expire on 6th August 1980.”

Per Plat J. A. he stated: -

“If the sixth May is taken as the day on which the period commenced, the last day would be the 5th August, supposing that the day of the application is excluded, the period would start on 7th May and end on 6th August. Hence if consent was given on 7th August it is one day too late.”

It is clear that the majority of the Judges of the Court of Appeal, held in favour of the definition of calendar month, as found in Stroud’s Judicial Dictionary, that is the calendar month is to be calculated from day of the happening of a thing, to the day numerically corresponding to that day in the following month, less one. The plaintiff in opposing the defendant’s application argued that in computing the twelve months, of the validity of summons, as provided in Order 5, Section 57 of Cap 2 would apply. That section provides: -

“In computing time for the purposes of a written law, unless the contrary intention appears –

(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the even happens or the act or thing is done:”

That section, clearly provides, that its provisions only apply where contrary intentions do not appear. Order 5 Rule 1 (1) provides that: -

“A summonsshall; be valid in the first instance for twelve months beginning with the date of its issue.....”

That rule does provide contrary intention to those provided in Section 57 Cap 2. Similarly Order 49 Rule 8 (1) specifically prohibits its application to summonses on plaint.

Order 5 Rule 1 (1) does include the first day of issue, in the computation of the period of validity and accordingly section 57 of Cap 2 also will not apply in this matter. Indeed it is clear that the court's finding is that the summons in this matter were valid from 17th June 2004 and in calculating the twelve months validity, they expired on 16th June 2005. It would therefore follow that by the 17th June 2005 when the defendant was served, the summons had expired.

What then is the effect of the expired summons being served on the defendant? Summons is defined in the Black Law Dictionary as: -

“To serve summons; to cite a defendant to appear in court to answer a suit which has been begun against him, to notify the defendant that an action has been instituted against him, and that he is required to answer to it at a time and place named.”

It is clear from that definition that a plaint, on its own, has no power to summon a defendant to court and its power to be adjudicated upon, lies squarely on the summons that are issued. In the absence of those summons the plaint remain impotent. That being my finding the plaint cannot then be allowed to continue to subsist on record when it lacks valid summons. That finding indeed is resonant with the judgment in Rajani's case (Supra). The end result is that the plaint hereof will be struck out. The orders of this court are as follows: -

(1) That the summons served hereof on the defendant had expired in terms of Order 5 Rule 1 (1) of the civil Procedure Rules.

(2) In view of the finding in (1) above, the plaint is hereby struck out with costs being awarded to the defendant.

(3) The defendant is also awarded costs of the chamber summons dated 18th October 2005.

Dated and delivered this 6th day of December 2005.

**MARY KASANGO
JUDGE**