



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 524 OF 1998

EQUATORIAL COMMERCIAL BANK.....

PLAINTIFF

VERSUS

MOHANSONS (K) LTD.....

RESPONDENT

R U L I N G

The defendant's application dated 29th March 2004 and brought under SS. 3A, 63 Civil Procedure Act had three (3) substantive prayers:

- (1) That the judgment entered herein on 20-2-2002 and all proceedings from the beginning of the suit be set aside.
- (2) That the memorandum of appearance and the defence filed here by M/s Atkinson Cleasby and Satchu on behalf of the defendant be struck out, and
- (3) That a valid summons to enter appearance be served on the defendant.

The grounds upon which the said application was based were to the effect that the summons to enter appearance which was served on the defendant was invalid and thus of no effect whereupon all proceedings including to consent judgment of 20/2/02 were a nullity and coram non iudice. That because the summons aforesaid was invalid consequently the defence that followed was irregular and a nullity. And that the court had no jurisdiction to determine issues arising out of the plaintiff's suit in such circumstances and therefore all the proceedings following the filing of the plaint were a nullity. That the parties herein seemed to have proceeded in the matter ignorant of the invalidity of the summons aforesaid and in the mistaken belief that this court had jurisdiction to hear and determine the suit. The other point which Mr. Kagram did not appear to press here was that the plaintiff had acted with mala fides and had come to court with unclean hands. This notice of motion was supported by the affidavit of one Sandeep Singh Kadhari, all based on facts mixed with aspects of law as advised. The copies of the summons to enter appearance complained of together with the plaint herein were annexed.

Mr. Mabeya opposed the application by filing grounds of opposition together with a replying affidavit by himself. He exhibited a copy of the memorandum of appearance a copy of the defence, a decree of 20-2-2002 after a consent judgement, plus evidence that the defendant had in fact endeavoured to begin liquidating the decretal sum but the cheques were not paid for one reason or another. Each side brought authorities which were referred to in the long and learned arguments that followed. Reference will be made to those authorities as and when necessary.

Mr. Kagram's argument may be compressed thus: That it was not in dispute that the plaintiff served summons to enter appearance stating that the defendant had ten (10) days within which to enter appearance. That the summons was served on 27.1.99. Appearance was entered on 5/2/99 and a defence by the defendant's initial lawyers followed on 19.2.99. The court was told that by entering appearance and even filing defence the defendant should not be presumed to have waived the irregularity of having been served with an invalid or defective summons at all. That a valid summons is one that would permit entering appearance in not less than 10 days as set out in the Civil Procedure Rules. That with this defect committed from the beginning of this suit it was such a fatal one that anything that followed was of no consequence. That what only remained valid was the plaint as filed and accordingly the plaintiff should begin from that point by serving a valid summons to enter appearance. Otherwise, the court was not seised of the case to proceed even to record a consent judgment because all along it should be taken that having been served with a defective summons to enter appearance it follows that the defendant was notified of no case at all and so it could not participate in it. That this state of things went to the jurisdiction and root of the case, a point that the defendant was at liberty to raise at any stage of the matter. That consent by parties would not cure, waive or regularize what was otherwise bad in law and therefore a nullity.

Mr. Mabeya had a contrary view. Again concisely put, the court was told that serving the summons to enter appearance, as it was commanding the defendant to enter appearance within 10 days and not more, was a mere irregularity. That it did not amount to a nullity whereby it can be said that a state of nothingness existed. That the defendant in fact did note that a case had been brought against it and it entered the appearance and even filed a defence. That these acts must be seen as a waiver of the irregularity on the part of the defendant thereby clearing the way for what has gone on for some 60 months culminating in the said consent judgment, decree and even moves to try to pay up. That the irregularity did not go to the jurisdiction and or to the root of this to make all that has gone on, subject to being undone by the orders sought are granted. That no fundamental defect has taken place here to warrant putting the plaintiff to the risk, loss and prejudice intended by the defendant. The court was thus urged to dismiss the application.

The matter that this court ought to decide now is whether the summons to enter appearance served in this matter was such as to be left as it is, presuming all that has gone on since, or that that summons is such as could not allow this court to go beyond the plaint filed and entertain the suit including recording the consent judgment. In one sentence: was the summons only irregular or it was null and void as to its effect?

The form CIVIL 1B, Summons to enter appearance completed and served read in pertinent parts, directed to the defendant:

"YOU ARE HEREBY REQUIRED within 10 days from the date of service hereof to enter an appearance in the said suit."

As has been said earlier the defendant was served with the summons on 27/1/99. It entered appearance on 5/2/99. And if the summons as served be found valid all was within ten days and one could not seek judgment against the defendant in default of this. And one can say all that fell within O 4 r. 3(1) Civil Procedure Rules. The plaintiff required the defendant to enter appearance within 10 days and it did so. But what does O 4 r. 3(4) say about the time to enter appearance?

"3. (1) _____ (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 of law is mandatory all the way. The summons shall issue to the defendant ordering him to appear within the time specified. 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. But even as the time to appear shall be specified, it shall not be less than 10 days. This is the law clear, firm and mandatory. Failing to

adhere and comply with it is not an irregularity. It is a nullity in law. A nullity cannot be made to be a basis of a valid action. If the defendant is notified by the plaintiff who prepares the summons (O 4 r 5 Civil Procedure Rules) that he should enter appearance within 10 days as the plaintiff did here all that fell foul of the law. A valid summons would give even as long as 11 days. This could be more than 10 days and therefore valid. It is no matter that the defendant entered appearance, filed a defence, signed a consent judgment and even attempted to liquidate the decretal sum. He had been notified of the suit by a process refused by the law and therefore anything done in pursuance of that course also lacked validity. It can be said that this court was in fact not seised of the case as by law mandated and so it could not entertain issues thereon. All the time the suit remained in a state of the plaint filed and plaintiff all the time remained to move it forward only by, as legally required, informing the defendant of its existence. In this regard and of all the authorities cited before this court, the most pertinent of them is **CENEAST AIRLINES LTD VS. KENYA SHELL LTD. C.A. NO.174/99 (C.A.)** where their lordships delivered themselves thus:

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

The learned judges who remarked that this aspect of the appeal had not been argued before them but nonetheless it was a matter worth notice and therefore made a ruling were referring to the very O 4 r. 3 (4) Civil Procedure Rules, the subject here. Before them was a summons to enter appearance which also required that the defendant would enter appearance within 10 from the date of service. They had no hesitation in concluding:

“This is a clear breach of O 4 r. 3(4) and makes the summons invalid and of no effect.”

This court could not agree more and in any case it is obliged to follow that decision. Ringera J, as he was then, did find and also follow the Ceneast case in the case of **ABRAHAM KIPTANUI VS. DELPHIS BANK LTD. & ANR NRI (MIL) H.C.C.C. 1864/1999.**

In sum the application is allowed as laid, with costs.

Orders delivered on 17th June 2004.

J.W. MWERA

JUDGE