

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
NRBI SUIT NO. 2231 OF 1999
MOMBASA CIVIL SUIT NO. 524 OF 1999**

FIRENZE INVESTMENTS LIMITEDPLAINTIFF

VERSUS

KENYA WAY LIMITEDDEFENDANT

R U L I N G:

There is an interlocutory Judgement recorded by the Deputy Registrar of this court on 20.9.00 pursuant to a request made by counsel for the plaintiff on 19.9.00. The interlocutory Judgement was in default of filing defence to the main suit. It was subsequently set down for Formal proof on 2.11.00 but the defendant became aware of the date and filed an Application for setting aside the interlocutory judgement on 25.10.00. That is the application argued and the subject matter of this ruling.

The defendant's contention is two pronged. Firstly that this suit originated in Nairobi as HCCC 2231/99 and summons to enter appearance were prepared but not served before the suit was transferred to Mombasa on 24.11.99. On arrival in Mombasa it was given a different Registration No.524/99 but no fresh summons to enter appearance were drawn up or served with that case number. What Counsel for the Defendant received in August, 2000 (according to him) or June/July 2000 (according to the plaintiff's Counsel) was the summons to enter appearance drawn in Nairobi on 23.11.99. It was however, not sealed with the seal of the court as required under order 4 r 3 Civil Procedure Rules. A Memorandum of Appearance was filed on 17.8.00 pursuant to that service but it is contended that no appearance or defence could have been based in law on that summons to enter appearance as it was defective.

On this prong of argument Counsel for the Plaintiff/Respondent submitted that the suit was transferred from Nairobi together with the summons to enter Appearance and there was no reason or requirement to have another summons drawn up since the one issued was valid for one year.

I respectfully agree with that submission since the transfer of suit did not mean discontinuance of the suit or documents transferred with it. The suit was filed when it was registered in Nairobi Registry but not in Mombasa Registry which was merely a re-registration to fit into the Registry system of that station.

There is however the fundamental point raised as to whether the summons served without the seal of the court was a valid document or was incurably defective. It is a requirement of Order 4 r 3(2) in mandatory terms that a summons shall be signed by the Judge or an officer appointed by him and shall be sealed with the seal of the court. Although the summons to enter appearance exhibited appears to have been signed by a Deputy Register, it has no court seal and the respondent does not say it had.

A summons to enter Appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the timetable of pleadings and the Rules governing Issuance and Service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of appeal in CA 85/96 UDAY KUMAR CHANDULLAL RAJANI & ORS T/A LIT PETROL STATION vs. CHARLES THAITHI (UR) where a defective summons was issued and served (beyond the validity of one year) but objection was raised to its validity although the defendant had already accepted it and entered unconditional Appearance. The High Court was of the view that any irregularity in the issuance of summons was cured by the fact that the defendant had entered appearance without protest and the court could issue orders to meet the ends of Justice by validating it under S.3A of the Civil Procedure Rules. But the Court of Appeal held that:

“Order V r 1 provided a comprehensive Code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under S.3A of the Civil Procedure Act cannot cure”.

It was declared that there was no valid summons in existence and the suit was dismissed. And so it is with the summons issued and served herein.

As it was not in compliance with a procedural Rule of a fundamental nature, it has to be regularized if the suit is to be legitimized. That would be sufficient to dispose of the application for setting aside the ex parte judgement entered herein pursuant to the summons to enter Appearance which was invalid.

I would nevertheless have set aside the ex parte judgement on the second prong of the Applicant's Application even if the summons to enter appearance was upheld as valid.

That is in line with the principles established that the discretion to set aside is very wide and unfettered and there is no requirement for a party to show sufficient cause – see Joseph Ngunje Waweru v Joel Wilfred Ndiga (1983) 1 KAR210. The Court's duty is only to do justice between the parties and to ensure that injustice is not caused through inadvertence or mistake even though negligent. It is only where a party deliberately seeks by evasion or otherwise to obstruct or delay the course of Justice that the court would be loath to view the matter favourably. The discretion ought to be exercised judicially and the court will look at all the circumstances both before and after judgement.

In this matter the plaintiff obtained the summons to enter appearance upon filing the suit on 23.11.99. They have since pre-occupied themselves with fighting interlocutory applications rather than serving the summons for the main suit to proceed to hearing. It took the defendants letter dated 22.2.00, which the Plaintiffs have exhibited, to realize that they had not served the summons and even then they waited according to the Affidavit of Service, until 27th June, 2000 to deliver the summons. One week later they appear to have amended the Plaint (which I cannot find in the file although the photocopy exhibited has a court stamp of 3.7.00) which they also served on 4.7.00. The delay in serving the summons is not explained.

The defendant's Counsel depones that he filed a defence on 22.9.00, two days after entry of the interlocutory judgement, after looking for the court file to do so without success. It is reasonable to suspect that it was with the Deputy Registrar for entry of the interlocutory judgement applied for on 19.9.00. Nothing substantive has happened since the interlocutory judgement was entered. The delay in filing the defence has been explained on oath and I accept the explanation as reasonable in the circumstances and I find no deliberate evasion or obstruction to cause delay. On the whole the application is allowed. The interlocutory judgement recorded herein on 20.9.00 is hereby set aside. Costs in the Cause.

Dated at Mombasa this 10th Day of January, 2001.

P.N. WAKI

J U D G E