



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1398 OF 2016

NAZAMBA KAVILI.....PLAINTIFF

=VERSUS=

KENYA COMMERCIAL BANK (K) LIMITED..... DEFENDANT

RULING

1. This is the Notice of Motion dated 1st March 2019 brought under order 5 rule 6, order 2 rule 14 and order 50 rule 1 of the Civil Procedure Rules and Section 1A, 1B of the Civil Procedure act and all other enabling provisions of the law.

2. It seeks orders:-

- 1. That the court be pleased to strike out the plaintiff's suit.***
- 2. That the costs of this application and of the suit be borne by the plaintiff.***

3. The grounds are on the face of the application and are:-

- 1. That the plaintiff has since the filing of the suit on 11th November 2016, failed to comply with the requirements of Order 5 rule 6 of the Civil Procedure Rules by failing to serve summons to enter appearance on the defendant.***
- 2. That if any summons were issued then the same have now expired.***
- 3. That the failure by the plaintiff to comply with order 5 rule 6 of the Civil Procedure Rules means that the same herein has abated.***
- 4. That it will be in the interests of justice and principles of equity to have this suit against the defendant struck out by this honourable court.***

4. The application is supported by the affidavit of Tom Ogola, Legal Manager of the defendant/applicant sworn on the 1st March 2019.

5. The application is opposed. There is a replying affidavit sworn by Nzamba Kavili, the plaintiff/respondent herein, sworn on the 6th December 2019.

6. On the 24th November 2020, the court with the consent of the parties directed that the application be canvassed by written submissions. Parties were given twenty one (21) days to file, and exchange submissions..

7. By 22nd February 2021, the plaintiff/respondent had not filed his submissions. The matter was given a further mention on 4th March 2021. On the 4th March 2021, there was no appearance for the plaintiff/respondent. He had not filed any submissions and this court gave a ruling date.

8. I have considered the Notice of Motion and the affidavit in support. I have considered the replying affidavit, the written submissions filed on behalf of the defendant and the authorities cited. The issue for determination is whether this application is merited.

9. Order 5 rule 1 (6) of the Civil Procedure Rules provides that:-

“Every summon, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate”.

The above provision is set in mandatory terms.

10. I have gone through the affidavit of Nzamba Kavili sworn on the 6th December 2019. He has annexed an affidavit of service marked “NK-2”. The same is sworn by Arthur Kimamo, court process server, on the 17th November 2016. In paragraph 2 he states:-

“That on the 16th November 2016, I received a certificate of urgency dated 8th November 2016 and hearing notice dated 15th November 2016 from M/s Dennis Kinaro & Co. Advocates with instructions to the defendant herein”.

It is clear from the above averments that the documents served did not include summons to enter appearance.

11. The plaintiff/respondent on his replying affidavit also claims the defendant/applicant fixed a pretrial date for 4th March 2019. I have gone through the court record. The ruling on the Notice of Motion dated 8th November 2016 was delivered on 13/2/2019 in the absence of the plaintiff and his counsel and in the presence of Mr. Gichuki for Ms Mwangi for the defendant. The court in its own motion fixed a date for pretrial on the 14th March 2019.

12. It is not in dispute that the plaintiff /respondent has failed to demonstrate that summons to enter appearance were served on the defendant/applicant as per the rules. In the case of Grace **Wambui Mungai vs Catherine Njambi Muya [2014] eKLR. J Mutungi** held as follows:-

“ My understanding of order 5 rules 1 and 2 and order 6 rule 1 and order 7 rule 1 is that until the defendant is served with the summons to enter appearance there is no basis for him to answer to the suit. In the present suit the plaintiff served the suit documents excluding the summons to enter appearance and the defendant’s advocates filed a notice of appointment ostensibly to defend the application for injunction that had been served and required to be responded to. The defendant did not file an appearance and never filed a defence since no summons had been served on her. It is instructive that the ruling on the injunction application was delivered by Hon. Lady Justice Ougo on 17th December 2021 when she directed the parties to prepare the suit for trial as provided under order 11 and required that they do so within 40 days from the date of the ruling and take a date for pretrial conference for pretrial directions on the hearing date”.

13. As stated earlier the plaintiff/respondent has failed to demonstrate that summons to enter appearance were effected on the defendant/applicant to enable it file a defence. The plaintiff/respondent has failed to comply with the provisions of order 5 rule 1(6) of the Civil Procedure Rules.

14. In conclusion, I find merit in this application and the same is allowed in its entirety.

15. Accordingly, I grant the following orders:-

(a) That the plaintiff’s suit is hereby struck out.

(b) That costs of this application and the suit be borne by the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 17TH DAY OF JUNE 2021.

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiff

Ms Ndirangu for Mr. Mwangi for the Defendant

Phyllis - Court Assistant