



REPUBLIC OF KENYA



**Malela v Whitespace Technologies Limited (Civil Suit E170 of 2020)
[2024] KEHC 13785 (KLR) (Commercial and Tax) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E170 OF 2020
JWW MONG'ARE, J
NOVEMBER 4, 2024**

BETWEEN

BAUDRY EVRARD MALELA PLAINTIFF

AND

WHITESPACE TECHNOLOGIES LIMITED DEFENDANT

RULING

1. The application before this court is the Notice of Motion dated 8th July 2022 (the subject application) filed by the Defendant, Whitespace Technologies Limited. The prayers being sought in that application are:
 - i. That this suit be dismissed for failure to issue and serve summons to enter an appearance on the Defendant.
 - ii. That in the alternative, this suit be deemed to have abated from want of service of summons.
 - iii. That further in the alternative this suit be dismissed for want of prosecution.
 - iv. The costs of the application and the suit be borne by the Plaintiff.
2. The application is predicated on the grounds set on the face of it and supported by an affidavit sworn on even date by Rose Mweru. The Defendant avers that the Plaintiff failed to serve summons to enter appearance within the requisite period of 24 months from the date of issue. That no action has been taken after the Application was dismissed and therefore, the Defendant argued that the suit abated by virtue of Order 5 Rule 1(6).
3. The Plaintiff opposed the subject application and filed grounds of opposition dated 1st November 2023. The Plaintiff submitted that the suit herein was filed alongside an application under Certificate



of Urgency which was served on the Defendant and the Defendant participated in the determination of the application and was fully aware of the existence of the main suit. The Plaintiff contended that the matter being a 2020 matter was caught up in the Judiciary transitioning to the E-filing portal due to COVID-19 hence a difficulty faced by the Plaintiff to obtain the summons to enter appearance on time. It was further submitted that Plaintiff obtained a summons to enter an appearance dated the 22nd August, 2022 in March 2023 and served them upon the Defendant/Applicant's Advocates on record on 28th March, 2023.

Analysis and Determination

4. I have carefully considered the Defendant's application, grounds of opposition and both the supporting affidavit and the replying affidavit alongside the list and bundle of authorities cited by the parties in support and opposition thereto. To my mind the only issue that this court is called to determine is "whether the failure to issue and serve summons within the stipulated times is fatal to the suit."
5. Before I analyse the issue, I will give a brief background of the matter. The Plaintiff, Baudry Evrard Malela by his plaint dated 27th May 2020 filed a claim against the Defendant. The Plaintiff, simultaneously with the filing of the plaint also filed a Notice of Motion application, similarly dated 27th May 2020. By that application, the Plaintiff sought for an order of a mandatory injunction against Defendant, its agents, servants and or representatives from utilizing, accessing, and operating the information technology system developed, controlled and/ or maintained by Plaintiff. The Defendant through its head of finance and administration responded to the application and filed a replying affidavit sworn on 26th June 2020 by ROSE MWERU. On 22nd July, 2021 the court held that Plaintiff had not established a prima facie case, dismissed the application and directed that the parties proceed to hearing of the main suit.
6. In the instant application, the Defendant argues that despite the suit being filed on 27th May 2020, summons to enter appearance were served on the Defendant's advocate on 28th March 2023 after the present application was filed. The Plaintiff acknowledges the omissions and attributed the failure to serve the summons to the court's transition to the E-filing amidst the COVID-19 Pandemic. He avers that summons have since been served.
7. The law relating to the service of summons is Order 5 Rule 1 of the [Civil Procedure Rules](#). the provision provides:
 1. When a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.
 2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
 3. Every summons shall be accompanied by a copy of the plaint.
 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 that the time for appearance shall not be less than ten days.
 5. Every summons shall be prepared by the Plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.



6. Every summons, 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.
8. Order 5 Rule (1) provides that the purpose of the summons is to notify the Defendant of the suit filed against it and require the Defendant to appear within the required timelines. In the instant case Plaintiff filed the present suit together with a Notice of Motion under Certificate of Urgency, the Defendant responded to the application and participated in the determination of the application. It cannot be said that Defendant was unaware of the suit and that it will be prejudiced by the existence of the suit or the delay in issuing the summons to enter an appearance.
9. The law provides for the validity of summons to enter appearance as 24 months. I will thus address the issue whether failure to file summons within a year is fatal to a suit. Order 5 Rules 1 (6) of the Civil Procedure Rules provides that a suit will be abated if the Summons to Enter Appearance are not collected within 30 days of their issue or notification thereof. In this case, summons to enter an appearance dated 22nd August, 2022 were issued to the Plaintiff in March 2023 and served upon the Defendant/Applicant's Advocates on record on 28th March, 2023. It is therefore the courts' view that the same having been served within 30 days from the date of their issuance the suit cannot be said to have abated.
10. The Defendant urges this court to dismiss the plaint, in my view dismissal of a suit is a draconian measure which amounts to driving a party out of the seat of justice without giving the party a fair hearing as envisaged under Article 50 of the Constitution. Further Article 159(1)(d) of the Constitution of Kenya vests the courts, with judicial authority to administer justice without regard to status and or procedural technicalities.
11. Section 95 of the Civil Procedure Rules also empowers the court to extend the time fixed for doing any act. The provision provides as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
12. The provisions of Section 95 ought to be read together with Order 50 Rule 6 of the Civil Procedure Rules. In the administration of justice, the Court ought to balance the right of fair hearing of both parties. In my view, in the instant case, the balance of convenience tilts in favour of the Plaintiff who will be ousted from the seat of justice and be denied an opportunity to ventilate her grievances if the suit is dismissed, as opposed to the Defendant who will have a chance to defend the allegations levelled against it in the suit, if the matter is sustained.
13. In my view, I find the reason advance for the delay which is the transition of the court to E- filing during the COVID-19 Pandemic to be reasonable explanation for the delay. Summons having already been served during the pendency of this application; I find no prejudice will be suffered by the Defendant if the suit goes to full trial as it shall have adequate opportunity to defend itself.
14. Due to the forgoing the Defendant's Notice of Motion dated 8th July 2022 is denied. The plaintiff is at liberty to pursue this matter to its logical conclusion. Costs are in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 4TH DAY OF NOVEMBER 2024.

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J.W.W. MONG'ARE



JUDGE

In the Presence of:-

1. Ms. Nafuna holding brief for the Plaintiff.
2. Mr. Muguna for the Defendant.
3. Amos - Court Assistant

