



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI LAW COURTS  
COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 407 OF 2015

JOHN NGUNJIRI MWANGI T/A EBENEZER

AUTOSPARES & MOTORCYCLES.....1<sup>ST</sup> PLAINTIFF/RESPONDENT

ERIC MUCHINA KIMANI.....2<sup>ND</sup> PLAINTIFF/RESPONDENT

VERSUS

COOPERATIVE BANK OF KENYA.....DEFENDANT/APPLICANT

RULING

1. The application for consideration is the Defendant/Applicant's Notice of Motion dated 21<sup>st</sup> September, 2020 brought under **Section 1A & 1B** of the **Civil Procedure Act, Order 5 Rule 1 (1), (2), (3) and (6)** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. The Application seeks the following orders:

**1. THAT this Honourable Court be pleased to strike out the plaintiff's suit for want of summons.**

**2. THAT the costs of the application be provided for.**

3. The application is based on the grounds on the face of it and supported by the Affidavit of **KENNETH WILSON**, an Advocate of the High Court of Kenya from the firm of Muriu, Mungai & Co Advocates LLP who have the conduct of this matter on behalf of the Defendant herein. He averred that this suit was instituted by way of a plaint which was filed in this court on 25<sup>th</sup> August, 2015 together with a Notice of Motion Application under a certificate of urgency. Consequently, the Defendant through the firm of Muriu Mungai & Company Advocates filed a Notice of Appointment of Advocates on 10<sup>th</sup> September, 2015.

4. It is noted that it was now five (5) years since the institution of the suit and the Plaintiffs have failed to take out or serve summons to enter appearance. Counsel contended that summons is a judicial document calling a party to submit to the jurisdiction of the Court and in the absence of summons the Defendant cannot enter appearance or file a Defence as encapsulated under **Order 5 Rule 1** of the **Civil Procedure Rules, 2010**. That collection and service of summons upon a Defendant under the Civil Procedure Rules is in mandatory terms and failure to do so is a fundamental defect in the proceedings.

5. In opposition, the Plaintiffs filed a Replying Affidavit sworn on 28<sup>th</sup> September, 2020 by their Advocate on record, **TITUS KOCEYO**. He confirmed that the matter was filed together with an Application for temporary injunction under Certificate of Urgency and the proceedings commenced immediately. Thereafter, the Defendant filed a Notice of Appointment of Advocate on 10<sup>th</sup> September, 2015. Since then, the firm proceeded to and has been prosecuting the matter on various Applications from time to time including the last action where the matter was set for pre-trial on 1<sup>st</sup> October, 2020.

6. He averred that all this while including the time of filing the pre-trial check list, it had not occurred to the Plaintiffs that Summons had not been extracted and served due to the various Applications made in the file and that this was inadvertent and an honest mistake. He stated that since Summons had not been issued, the same has not expired and thus urged the court to allow for the issuance of the same as the case involves a colossal claim on properties which ought not to be struck out on technicality.

7. He averred that the suit has been ongoing for five years now and the Plaintiffs will face injustice if the suit was struck out for want of summons, yet they have all along been vigilant and desirous of prosecuting the same. He argued that in any event, costs will adequately

compensate the Defendant as it will not suffer any prejudice if the court was to allow the case to proceed on merits. Further, that the Defendant will still have an opportunity to file pleadings in opposition to the case.

8. The Application was dispensed with by way of written submissions. In its written submissions dated 15<sup>th</sup> April, 2021, the Defendant reiterated the grounds in support of its application and formulated only one issue for determination namely whether the suit should be struck out for want of Summons. The Defendant faulted the Plaintiff for failing to comply with the provisions of **Order 5 Rule 1** of the **Civil Procedure Rules, 2010** which in its view is couched in mandatory terms. It submitted that it is clear from **Order 5 Rule 1 (5)** that summons must be filed with the Plaintiff in question.

9. Further, it argued that the Plaintiffs' failure to observe rules of procedure as set out in the said provision is fatal. It argued that, the failure by the Plaintiffs to take out Summons for over years since the institution of the suit means that the suit herein remained stillborn and has never commenced. The Defendant also argued that the failure to serve process cannot be wished away as a mere technicality as it goes to the root of the conceptions of proper procedure in litigation.

10. In this regard, it relied on the case of **Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR** cited in **Mary Thunguri Gitonga & Another v George William Mabinzi [2016] eKLR**, where it was held;

*"Having regard to the applicable provisions which I have highlighted above it is my view that order 5 Rules 1 and 2 set out a very elaborate procedure of how summons are to be processed issued and served and where there are difficulties of serving within the prescribed time frames an equally elaborate procedure for extending the validity of the summons is outlined. I am unable to accept that order 5 Rule 1 would fall to be considered as providing a mere procedural technicality as suggested by the plaintiff. It does in my view substantively provide the procedure under which a Defendant is called to answer to a suit and is thus core to the initiation of a suit as far as a defendant is concerned and it would be my holding that where no summons have been issued in accordance with Order 5 and appropriately served on the Defendant there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit."*

11. Reliance was also placed on the case of **Abdulbasit Mohamed Ahmed Dahman & Another v Fidelity Commercial Bank Limited [2016] eKLR**, the court held;

*"The suit has abated for lack of service of summons. In law the suit is null and void as it has terminated on its own. I will add that the suit abated thirty (30) days after the suit was filed. Order 5 Rule 1 calls for the signing of the summons not more than thirty (30) days after the date of filing the suit. Order 5 rule (5) calls upon a plaintiff or his advocate to prepare and file summons together with the plaint. No summons seems to have been filed with the suit."*

12. The Defendant thus urged that the Plaintiffs' suit should be struck out with costs.

13. In its written submissions dated 22<sup>nd</sup> April, 2021, the Plaintiffs restated the averments in their Replying Affidavit and concurred that the only issue for determination is whether the suit should be struck out for want of summons. They cited on the case of **Mary Wariara mbugua v Chase Bank Kenya Ltd [2018] eKLR**, where Nzioka, J. when dealing with an issue of whether the suit ought to be dismissed for want of summons held that:

*"I find that the provisions of Order 5 Rules (1),(1) and (5) states as follows:-"5 (1) (1) When a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein. (5) Every summons shall be prepared by the Plaintiff or his Advocate and filed with the Plaintiff 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.'" It is therefore a mandatory requirement that summons be served in the manner stipulated above and failure to serve the suit abates. However, this presumes that the Defendant has not entered appearance and/or participated in the proceedings. In the instant case, the Defendant entered appearance vide the notice of appointment of an Advocate dated 9th November 2015 and filed in Court on 11th November 2015. Thereafter they participated in the hearing of the Notice of Motion dated 22nd October 2015. If the suit therefore abated as they have submitted, due to non-service of the summons within 30 days as argued, then there is no suit within which they have filed this application. In the given circumstances, I find that the Applicants by conduct of actively participating in this matter led all sundry to believe that they are fully informed of the matter and were ready to proceed with the same. The striking out of the suit at this stage for want of extraction and service of summons will not be in the interest of justice. Even if the Court were to hold that there has been failure on the part of the Respondent, parties having come this far, it will only be in the interest of justice to order that the summons be extracted and served."*

14. Further, the Plaintiffs maintained that this was inadvertent and an honest mistake which should not prevent this case from being heard on merit. In this regard, they relied on the case of **Philip Chemwolo & Another v Augustine Kubende [1982]-88) KAR 103**, where it was held that:

*"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. This court as is often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."*

15. The Plaintiffs were also emphatic that costs will adequately compensate the Defendant in case any proven loss has been suffered and it will still file the pleadings in opposition to the case. Additionally, they argued that **Article 159(2) (d)** of the **Constitution of Kenya** requires

that justice be administered without undue regard to procedural technicalities. They also argued that **Order 51 Rule 10(2)** of the **Civil Procedure Rules** states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. In the circumstances, they urged that the Defendant's Application dated 21<sup>st</sup> September, 2020 be dismissed.

### **Analysis and Determination**

16. I have accordingly considered the Defendant's application, the Plaintiffs' response thereto and the parties' respective submissions. The only issue that arises for determination is whether the suit should be struck out for want of summons.

17. It is well settled that when a suit is filed, summons must issue to a Defendant to appear within a specified period of time. In this case, it is not in dispute that on 25<sup>th</sup> August, 2015, the Plaintiffs filed the Plaint contemporaneously with an application seeking for an interlocutory order of injunction against the Defendant. It is also apparent that the Plaintiffs' Advocate has never taken out summons for purposes of service upon the Defendant, inviting it to enter appearance and file defence within the prescribed period as required by Order 5 Rule 1 of the Civil Procedure Rules. Counsel for the Plaintiff has admitted as much and stated that the same was occasioned by the various Applications made in the file.

18. The Defendant has urged that the suit be struck out in view of the same whereas counsel noted that this was an inadvertent and honest mistake and has beseeched this court to excuse them and allow them to take out Summons.

19. **Order 5 Rule 1** of the **Civil Procedure Rules** provides as follows regarding the issuance of summons to enter appearance:

***"1. Issue of summons [Order 5, rule 1.]***

***(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 sub rule (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, failing which the suit shall abate." (emphasis added)***

19. Before I render myself, it is important to understand the background of the entire suit. The Plaintiff instituted the suit herein by way of a Plaint filed on 25<sup>th</sup> August, 2015 seeking the following prayers:

***(a) A Permanent injunction be issued restraining the Defendant whether by itself, officers, Directors, servants and/or its agents Messrs Nguru Auctioneers or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with the Plaintiffs Title Number THIKA Municipality BLOCK 19/196, and LR No. LOC. 2/KANGARI/2786 for the 1 Plaintiff and Nairobi/Block 97/387 for the 2nd Plaintiff in any manner whatsoever.***

***b) A declaration that the Charges registered by the Defendant over the Plaintiffs Title Number THIKA Municipality BLOCK 19/196, and LR No. LOC. 2/KANGARI/2786 for the 1 Plaintiff and Nairobi/Block 97/387 for the 2 Plaintiff are null and void and that the Plaintiffs have been discharged from their obligations to the defendant and an order for release of their titles duly discharged.***

***c) General Damages.***

***d) Costs of the suit.***

***e) Interest on (c) and (d) above at court rates from the date of filing suit.***

20. The Plaint was filed alongside an application for the following reliefs:

***a) THAT this Application be certified as urgent, and heard exparte in the first instance and admitted to hearing during the current court Vacation.***

***b) THAT the a temporary injunction be issued restraining the Defendant whether by itself, officers, Directors, servants and/or its agents Messrs Nguru Auctioneers or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with the Plaintiffs Title Number THIKA Municipality BLOCK 19/196, and LR No. LOC.2/KANGARI/2786 for the 1 Plaintiff and Nairobi/Block 97/387 for the 2nd Plaintiff in any manner whatsoever pending the hearing and determination of***

*this application.*

c) ***THAT the A Temporary injunction be issued restraining the Defendant whether by itself, officers, Directors, servants and/or its agents Messrs Nguru Auctioneers or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with the Plaintiffs Title Number THIKA Municipality BLOCK 19/196, and LR No. LOC. 2/KANGARI/2786 for the 1 Plaintiff and Nairobi/Block 97/387 for the 2nd Plaintiff in any manner whatsoever pending the hearing and determination of this suit***

d) ***THAT cost of these proceeding be met by the Defendant/ Respondent.***

21. The application for injunction was canvassed and on 31<sup>st</sup> January, 2016 when it was set for a Ruling, the court directed parties to file updated statements of the loan and ordered that status quo be maintained.

22. On 12<sup>th</sup> April, 2017, the court granted prayer 2 of the application on condition that the Plaintiffs pay Ksh. 15 Million within 30 days of the ruling. In defeat, the injunction was to be vacated and the Defendant would be at liberty to exercise its statutory power of sale.

23. The Plaintiffs failed to pay the monies as ordered. Instead, they filed an application dated 27<sup>th</sup> June, 2018 seeking review of the orders of 12<sup>th</sup> April, 2017 and more specifically, the reduction of the monies that were to be deposited in court. The application was dismissed in a ruling delivered on 14<sup>th</sup> October, 2019. The court further ordered that the suit be fixed for hearing on a priority basis.

24. The Plaintiffs again did not heed the court's call as the suit was never settled for hearing.

25. I have taken the liberty to give the brief background of the matter to disprove the Plaintiffs' assertion that by oversight, they and/or their counsel failed to settle the matter for hearing. From the beginning, the court rang a bell that the Plaintiffs ought to prepare for the hearing. On the first instance when the court directed for filing of updated statements of accounts, which in essence comprise part of the evidence they would adduce in court. On the second instance, when the court directed that the matter be fixed for hearing on priority basis. The latter must have been premised upon noting that its (court) orders were not complied with.

26. It is clear that the Plaintiffs were never intent on taking out the Summons to Enter Appearance because they or their advocates took no move even when the court was to hear them on priority basis. Clearly, the motivation must be because, in defeat of the conditional injunctive orders by failing to deposit the monies as ordered by the court, the substratum of the suit had already been defeated. Hence, the best tactic and approach they have taken is to keep the court busy with applications. But again, the applications failed on their part and when the door was opened to them generously to be heard, they did not reciprocate.

27. On the above grounds, the court is not convinced that Summons were not taken out by oversight. It is a deliberate machination that the suit should not be heard. As Order 5 Rule 1 (5) states that "**Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.**" the Plaintiffs and their counsel having failed to comply with a mandatory provision of the law implies that the court cannot come to their aid. Indeed, this is a case where Article 159(2)(b) of the Constitution cannot salvage the situation either. I say so because when a party deliberately fails to comply with court's directions for selfish interests, the court cannot imply that such failure was occasioned by a procedural technicality. To the contrary, it is the finding of the court that the Plaintiffs have fettered the expeditious and just disposal of the matter by failing to take out and serve the Summons on which every suit is hinged.

28. From the foregoing, it follows that the suit has abated for want of service of the Summons. The Plaint as it were cannot stand on its own. That means the Plaint is a nullity. There is no suit the Plaintiffs can prosecute. Consequently, I cannot hesitate but to find for the Applicant.

29. In the result, I allow the Defendant's Notice of Motion dated 21<sup>st</sup> September, 2020. The suit herein is struck out with costs to the Defendant.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> JUNE, 2021.**

**G.W.NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Opole h/b for Kenneth Wilson for the Defendant/ Applicant.*

2. *No appearance for the Plaintiffs/ Respondents.*