



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
HCCC NO. E 100 OF 2019

SEALINK HOLDINGS LIMITEDPLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. This Suit was filed on 23rd April 2019. Two years later, the Plaintiff is yet to take out summons to enter appearance.

2. Order 5 Rule 1 in respect to issue of summons:-

“Issue of summons.

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 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.”

3. Rule (1) (6) brooks of no ambiguity. Except where the Court is to effect service, every summons ought to be collected for service within 30 days of issue. A consequence of failure is that the suit shall abate. In the matter before Court there is no evidence that the summons was ever prepared by the Plaintiff or his advocate and filed with the Plaintiff. As a result, no summons have issued.

4. That said, the Plaintiff herein was filed together with an application for injunction dated 23rd April 2019. The Defendant responded to it through an affidavit of Lucas Gikunju sworn on 7th May 2019 after the firm of Muriu Mungai & co. advocates filing a Notice of Appointment on their behalf. Although not served with summons, the Defendant is aware of this suit and participated in the proceedings. Indeed, on more than one occasion counsel for both sides have informed Court of some negotiations between the parties.

5. In **Nanjibhai Prabhudas & Company Ltd V Standard Bank Ltd [1968] EA (K) 670**, the Court of Appeal held, that:

“(i) Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.

(ii) Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;”

Sir Charles Newbold at page 681 and 683 of Prabhudas’ case (supra) observed:-

“The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant.”

“The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”

He further observed at page 684:

“In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MACDUFF J, in the Jethalal case (supra) is an incorrect statement of the law and should not be followed.” I consider that the defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred. I also consider that in as much as these two irregularities have clearly not prejudiced the defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of those irregularities and, accordingly, I would not set it aside.”

6. The Prabhudas case was cited by counsel in Equatorial Commercial Bank Ltd V Mohan Sons (K) Ltd [2012] eKLR where the Court of Appeal similarly stated:

“Considering the facts and circumstances before us can summons be treated as void though because it has not complied strictly with the statutory provisions? Can a litigant after having fully participated in the legal process on service of such summons, resile on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondent either in law or in equity. We shall emphatically decline to find so. We shall find that the respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties.”

...We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter. The following passages from the Halsbury’s Laws of England, Vol. 16(2) at Paragraph 907 on page 390 stipulate the meaning of ‘waiver’ and we reproduce it:-

“The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct.”

“A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist

Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent.”

7. While in this matter the Defendant never entered appearance, still its active and unconditional participation in the proceedings can be construed to be that it waived its right to insist on the strict compliance of the provisions of Order 5 Rule 1(6) CPR. The dictates of justice does not allow the Defendant to use the failure of issuance and service of summons as a reason to have the matter dismissed.

8. The Application of 7th October 2020 fails but with no order on costs.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of June 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Court assistant: Nixon

Kaula for Mwangi for Respondent

No appearance for Applicant