



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERICAL & TAX DIVISION

HCCC NO. 176 OF 2018

AMINA HERSI MOGHE.....1ST PLAINTIFF

MUHAMOUD KADHAR HERSI.....2ND PLAINTIFF

MT. ELGON HARDWARE LIMITED.....3RD PLAINTIFF

VERSUS

DIAMOND TRUST BANK KENYA LIMITED.....1ST DEFENDANT

DALALI TRADERS AUCTIONEERS.....2ND DEFENDANT

RULING

1. At the fore, again, is a discussion as to the legal effect of the failure of a Plaintiff to take out Summons to Enter Appearance and to serve them upon a Defendant within the time stipulated by statute.

2. It is common ground that this suit was filed on 8th May 2018 contemporaneously with an application for injunction. That application was determined in favour of the Defendants and the Plaintiffs, being aggrieved, have filed a Notice of Appeal. In the meantime, the Plaintiffs are yet to serve the Defendants with summons to enter appearance nor have they prosecuted the suit.

3. The Defendants posture is that the suit has abated and through the Notice of Motion dated 16th June 2020 ask this Court to declare it so and to dismiss it with costs.

4. Order 5 of the Civil Procedure Rules (2010) places a duty upon the Plaintiff to prepare and serve summons. On preparation, order 5 rule (1) (5) reads:-

“(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.”

5. There are consequences for inaction on the part of a plaintiff and order 5 rule 1 sub rule 6 reads:-

“(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.”

6. The language of these rules suggest that the provisions are of mandatory nature and some Courts have held the suit automatically abates upon the lapse of 24 months pursuant to Order 5 Rule 2 (7). In this league are the decisions of the Courts in Grace Wairimu Mungai v Catherine Njambi Muya [2014] eKLR, Karandeep Singh Dhillon & Another v Nteppes Enterprises Limited & Another [2010] eKLR and Tana Trading Limited v National Cereals and Produce Board [2014] eKLR. In the latter, Mabeya J expressed himself as follows:-

“18. From that letter, it is clear that the Plaintiff, only embarked on extracting the summons as at 11th April, 2013. That

was almost 2 years and 9 months after the filing of the suit. It was also about two (2) months after the present application had been filed. This long delay is inconsistent with the mandatory provisions of Order 5 Rule 1 (1) and (5) of the Civil Procedure Rules and in my view, is unfathomable. The same calls for sanctions against the Plaintiff to remind it of the mandatory provisions of the law requiring timely filing and service of summons to enter appearance so as a suit once filed can be prosecuted notwithstanding negotiations that might exist. See the case of *Mobile Kitale Service Station -v- Mobile Kenya Limited & Another* [2004] 1 KLR.

19. Further, the Plaintiff's approach is rather casual. To merely state that the Defendant had participated in the proceedings at the interlocutory stage and that nothing stopped it from filing its defence will not do. The failure to serve process cannot be wished away as a mere technicality. Failure to serve process where process is required is a failure which goes to the root of the conceptions of proper procedure in litigation. See the case of *Antony Wechuli Odwisa -v- Alfred Khisa Munyanganyi* [2006] eKLR. Given the mandatory terms in which Order 5 Rule 1 (5) is couched, I do not think the Court has discretion on this. The failure to observe rules of procedure as set out in Order 5 Rule 1 (5) is in my view fatal. The suit never commenced. It remained still born."

7. Other Courts have held that although the word used in the rules is "shall", the word is directory as opposed to mandatory and have taken the view that there are instances where a suit will survive the rigours of the rules. Decisions of the Court advocating this view include those in *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR, *Tropical Foods International & Another v Eastern and Southern African Trade and Development Bank & another* [2017] eKLR, and *Nairobi Aviation Limited v Nation Media Group Limited* [2020] eKLR.

8. In *Paulina Wanza Maingi (Supra)* Aburili J held:-

"35. In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and six years having elapsed since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in *Fredrick Kibet Chesire V Paymond W. Bomet (supra) case (2006) e KLR*- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply."

9. In reaching that outcome, the Hon. Judge observed:-

"42. As earlier stated, there are two schools of thought on this issue of whether failure to issue and serve summons to enter appearance is fatal to the plaintiff's case and having considered the circumstances of this case, I am not persuaded by the decisions relied on by the 1st defendant namely; *Wairimu Mungai V Catherine Njambi Munya, Karandeep Singh Dhillon & Others V Nteppes Enterprises Ltd & Another, Tana Trading Limited V National Cereals & Produce Board; Anthony Wechuli Odwisa V Alfred Munyanganyi [supra]*, which are all decisions of this court hence none of them is binding on me and circumstances for each case are different. Although the rules are couched in mandatory terms, each case has to be decided on its own merits and circumstances vary. While in one case the court may proceed and dismiss the suit for want of summons, in another, the circumstances may dictate otherwise. As was held by Ringera J (as he then was) on issues of the mandatory or directory language used by the statutes and or rules, in *Standard Chartered Bank Ltd V Lucton (K) Ltd HCC 462 of 1997* (unreported).

"There appears to be a common belief by many in those courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word "shall" in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only."

10. This Court identifies with the latter views. It takes the position that where, even without the issuance and service of summons, a Defendant enters appearance or files defence or otherwise actively participates in defending its position in proceedings without protesting that it has not been served then it will be taken to have waived its right to challenge the validity of the suit on account of failure to comply with order 5 rule 1. Unless, and this is the condition, it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.

11. The Plaintiffs filed this suit on 8th May 2018. The Defendants through a Notice filed on the following day (9th May 2018) appointed the firm of Mohamed Madhani & Co. Advocates to act on their behalf. The Defendants on 5th July 2018 filed a replying affidavit to the Defendants' Motion of 9th May 2018. The replying affidavit was detailed and had annexures running to 272 pages. In it, the Defendant makes reference to the prospects of the Plaintiffs' action and argues that it does not disclose a prima facie case.

12. On 10th May 2018, counsel for the parties appeared in Court when Mr. Shah for the Defendant gave an assurance that the intended auction will not proceed. With that the purpose of the Notice of Motion was spent.

13. Subsequently, the Bank advertised the suit property for sale on 16th August 2018. This prompted an application by the Plaintiffs dated 30th July 2018. The application was heard on 14th August 2018 and a Ruling delivered the next day in which the application was dismissed.

14. The Plaintiffs would not give up and in an application filed on 14th November 2018 sought to injunct the Bank from selling the suit properties citing that it had filed a Notice of Appeal against this Court's Ruling of 15th August 2018. The Defendant responded and argued, inter alia, that the application was *res judicata*.

15. What emerges from the Court record and proceedings is that the Defendants have actively defended their position in this matter and have scored some success in resisting the Plaintiffs request for injunction. In robustly defending themselves, they have argued against the strength of the Plaintiffs' case. The Defendants are fully aware of the suit and the contents of the Plaint.

16. For this reason, it would not be in tandem with the tenets of justice to allow the Defendants to now turn round and seek the dismissal of the Plaintiffs' suit only because the Plaintiffs have not taken out summons to enter appearance. The application of 16th June 2020 is dismissed with costs.

Dated and Signed this 5th Day of July 2021

F. TUIYOTT

JUDGE

Dated, Signed and Delivered at Nairobi this 7th Day of July 2021

D. S. MAJANJA

JUDGE