



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL SUIT NO. 33 OF 2015**

**NAIROBI AVIATION LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATION MEDIA GROUP LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The plaintiff filed an application dated 27<sup>th</sup> March, 2019 to amend his pleadings. The defendant then raised a preliminary objection on the grounds that summons to enter appearance were never served upon it. In effect, the suit was said to have abetted pursuant to Order 5 of the Civil Procedure Rules. The preliminary objection was opposed by the plaintiff/applicant. Parties have filed their respective submissions and cited several authorities. These I have considered.

I have taken time to go through this record. After the filing of the pleadings, the parties engaged in some litigation relating to an application for injunction. That application was determined in favour of the plaintiff and it would appear the interim orders are still in place pending the hearing of the main suit. An application to commit the directors and officers of the defendant was dismissed by the court. It is true that no summons were ever served upon the defendant.

Order 5 rule 1 (5) of the Civil Procedure Rules requires that the advocate for the plaintiff shall prepare the summons to be filed with a plaint to be signed by the Judge or an officer appointed by the judge in accordance with rule 1 (2).

There is no evidence that this was done in this particular case. The defendant however has admitted through the replying affidavit sworn by Sekuo Owino on 25<sup>th</sup> June, 2019 and filed on the same day that,

**“I received the plaint verifying affidavit, list of witnesses, list of documents together with the application dated the 30<sup>th</sup> January, 2015 on the 2<sup>nd</sup> of February, 2019.**

**That summons to enter appearance were however never served upon the defendant.”**

There is a memorandum of appearance dated 3<sup>rd</sup> February, 2015 and filed on 4<sup>th</sup> February, 2015 on behalf of the defendant. No statement of defence was ever filed thereafter. It is clear from the proceedings relating to the injunction application that the defendant was aware of the plaintiff's suit against it. The memorandum of appearance was not filed in protest. If anything, it was an acknowledgement of the pleadings by the plaintiff against the defendant, the contents of which were contained in the plaint and the statement served.

This raises the question of whether or not any prejudice has been occasioned to the defendant by failure to serve summons under the rules. Parties have filed submissions and cited several authorities. This I have considered. The following cases stand out in addressing the issues raised by the parties. In the case of **Industrial and Commercial Development Corporation vs. Sam Model Industries Limited (2007) e KLR** the court stated inter alia as follows,

**“The appellant entered appearance unconditionally, proceeded on with the case without any complaint in that regard including filing a written statement of defence without any protest. It is now too late in the day to raise the issue. The appellant conceded that the issue was not raised before the trial court. That being so, we think it has been raised before us as an afterthought. Service of the summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on circumstances of each case. On the facts and circumstances of this case, we do not think anything turns on the issue.”**

I have already observed that the defendant has already participated in proceedings relating to the injunction application and at no time was service of summons raised as an issue.

In the case of Abdulahi Mohamed Sheikh vs. Gulf African Bank 2019 e KLR the same proposition was observed in the following terms,

**“10) The purpose of service of summons is to notify the Defendant of the existence of the suit against it and to prompt the Defendant to enter appearance and to file a Defence to the suit. This is a suit which was filed on 19<sup>th</sup> December 2016.**

**(11) I take notice of the fact that the Defendant has fully participated in the prosecution of all the applications filed in this suit and that the Defendant has also filed applications in the case. As such it is manifest that the Defendant was fully cognizant of the existence of this suit against and even instructed Counsel who have vigorously represented the Defendant 36in all stages of the proceedings.**

**In TEJ PRAKASH SHEM –VS- PETROAFRIC COMPANY LIMITED & 2 OTHERS 2014 eKLR, the Court held as follows:-**

**“In addition, Order 5 Rule (1) provides the function of summons as being to order the Defendant to appear within a specified time. In my view, where a Defendant gets notice of a suit against him through other means other than summons and participates in subsequent proceedings, there is no prejudice occasioned by the delay in the issue and service of summons that would warrant the dismissal of a suit” [emphasis supplied].**

**(12) Similarly in TROPICAL FOODS INTERNATIONAL & ANOTHER –VS- EASTERN AND SOUTHERN AFRICAN TRADE & DEVELOPMENT BANK & ANOTHER [2017] eKLR my learned brother Justice Tuiyott held thus:-**

**“The purpose of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If therefore the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings, then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non - service has caused some prejudice on the Defendant.”**

The introduction of Sections 1A, 1B and 3A of the Civil Procedure Act has given the courts a very wide discretion in implementing the overriding objective contained therein. The outstanding observation by Nyamu JA in the case of Stephen Boro Gitaha vs. Family Finance Building Society and 3 others in Nairobi Civil Application No. 263 of 2009 aptly captures the thrust and import of this provision.

Going by the thrust of the cited cases above, the defendant cannot claim any prejudice and therefore after considering all the materials presented by the parties, I find no merit in the preliminary objection which is accordingly dismissed. Since both parties are to blame, each party shall bear their own costs. The application by the plaintiff dated 27<sup>th</sup> March, 2019 shall now be heard on merit on a date to be allocated in the registry.

**Dated and delivered at Nairobi this 15<sup>th</sup> day of October, 2020.**

**A.MBOGHOLI MSAGHA**

**JUDGE**