



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 389 OF 2018

KUNDAN SINGH UBHI.....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....DEFENDANT

RULING

1. Through its application dated 7th December 2018 brought pursuant to the provisions of Order 5 Rules 1(6) and (7) of the Civil Procedure Rules (CPR) the defendant seeks orders that the suit be marked as abated or in the alternative, that the court be pleased to dismiss the suit. The defendant also prays for the costs of the application.

2. The application is premised in the grounds that the plaintiff has failed to collect the Summons to Enter Appearance (hereinafter “summons”) for service for more than 2 years since the suit was filed and that no application has been made to extend the validity of the summons.

3. The application is supported by the affidavit of the applicant’s Account Manager one **Josephine Warutere** and further affidavit sworn by **Kenneth Fraser** on 22nd February 2019. The applicant’s deponent avers that on 9th November, 2016, the plaintiff served the defendant with the plaint and an application for injunction dated 2nd November 2016 but that the defendant was not served with summons thereby prompting the defendant’s advocate to file only a notice of appointment.

4. She further avers that the ruling on the application for injunction was delivered on 9th October 2018 but that the summons to enter appearance were, as at 30th October 2018, still lying in the court file as the same had not been collected by the plaintiff for service upon the defendant. She reiterates that for the reason that there has been failure to collect and serve the summons, the same have expired.

5. At the hearing of the application Mr. Ondieki learned counsel for applicant, submitted that the issuance and service of summons is a vital part of instituting and progressing any civil suit and that under Order 5 Rule 1 of the Civil Procedure Rule, the plaintiff is obligated to prepare summons, file the same together with the plaint and thereafter follow up on the signature, sealing and service of the same. For this argument counsel relied on the decision in the case of **Grace Wairimu Mungai –vs Catherine Njambi Muya [2014] eKLR** where it was held that the obligation to follow up on summons to enter appearance is not a procedural technicality as it provides for the procedure by which the defendant is called upon to answer to a suit.

6. Counsel submitted that the plaintiff had not made any efforts to obtain the signed and sealed summons for the entire 2 year period that the suit has been pending in court and that the inaction by the plaintiff was an indication that he is no longer interested in the case.

The Respondent’s case.

7. The respondent opposed the application through his replying affidavit sworn on 7th February 2019 wherein he avers that the suit was filed on 3rd November 2016 together with the summons in accordance with the provisions of Order 5(1) (3) of the Civil Procedure Rule, and an application for injunction.

8. He avers that in view of the then urgent application for injunction, the summons that accompanied the plaint were not signed or sealed by the court’s Deputy Registrar and were therefore not issued to the plaintiff so as to justify the applicants claim that the same had abated.

9. He further avers that upon noting that the summons had not been signed, his advocates on 5th November 2018 wrote to the Deputy

Registrar requesting that the said summons be signed but that the said letter did not elicit any response thereby prompting the said advocates to write another letter dated 13th December 2018 reiterating the earlier request.

10. He states that through a letter dated 18th January 2019 the Deputy Registrar replied to the plaintiff's earlier letters by stating that she was not in a position to sign the said summons as the matter had originated from the Environment and Land Court (ELC) yet she was only authorized to sign summons in respect to the matters filed before the Commercial and Tax Division. He attached copies of the advocates' letters and the Deputy Registrar's response as annexures "KSU1", "KSU2" respectively.

11. He further states that in the circumstances of this case, the summons have never been issued, signed, dated and sealed by the court and that he should therefore not be blamed for the failure on the part of the court to issue the summons.

12. At the hearing of the application Miss Kibirungi, learned counsel for the respondent submitted that the plaintiff could not have applied for an extension of summons which had not been issued in the first place.

13. Counsel submitted that the sole purpose of summons is for purposes of tabulating time for entry of appearance in a suit and that in this case, no prejudice had been occasioned to the defendant by the failure to serve the summons. Counsel relied on the decision in the case of **Azhar Mohammed Sheikh & Others -vs- Velji Narshi Shah & Another [2017] eKLR** wherein Sewe J. held inter alia that:

"Accordingly, not much would turn on the argument by the defendants that the suit has abated for failure to serve summons, for in Central Bank of Kenya vs. Uhuru Highway Development Ltd & 3 Others Civil Appeal No. 75 of 1998, the Court of Appeal held that:

"Service of summons to enter appearance sets on the clock for counting the time, within which to enter appearance, and no more. If, however the defendant becomes aware of the suit against him, otherwise than through formal service, there is nothing in law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the plaintiff and the proceedings are supposed to continue in the normal manner."

14. Counsel argued that an order dismissing the instant suit would hinder the plaintiff's access to justice this infringing his right to fair hearing as envisaged under Article 50 of the Constitution. While relying on the decision in the case of **James Muniu Muchiri vs National Bank of Kenya Limited [2010] eKLR**, counsel submitted that even in instances where summons have expired, courts have held that the same can be reissued.

15. It was further submitted that the plaintiff is committed to having the case prosecuted and that the failure to sign, date and issue the summons could not be attributed to any fault on the part of the plaintiff.

Analysis and determination.

16. I have considered the defendants application dated 7th December 20th 18, the plaintiff/respondent's response, the submissions made by the parties' respective counsel together with the authorities that they cited. The main issue for determination is whether the plaintiffs suit has abated on account of the plaintiffs alleged failure to obtain and serve summons for more than 2 years since the suit was instituted. Order 5 Rule 1(6) and 7 of the Civil Procedure Rules stipulates as follows:

"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."

17. The applicant's case is that there has been inaction on the part of the respondent in collecting the summons for a period of 2 years and according to the applicant, the inaction is a clear indication that the plaintiff has lost the interest in prosecuting his case.

18. The plaintiff, on the other hand, argues that he has done everything in his power to have the summons issued and blames on the court (Deputy Registrar) for failing to sign, seal and issue him with the summons for service upon the applicant.

19. In determining this matter, this court is required to consider the proceedings and pleadings that have so far been filed in court in order to discern whether the conduct of the plaintiff is such that any reasonable person can conclude that he is responsible for the state of affairs that culminated into the filing of the instant application.

20. A perusal of the court file shows that indeed the plaint was filed before the Environment and Land Court on 3rd November 2016 and that at the time of such filing, the plaintiff also filed duly filled summons to enter appearance forms for execution by the court's Deputy Registrar, and an application for injunction. The court record shows that the ruling on the said application was delivered on 9th October 2018 after which the file was transferred from the Environment and Land Court to this court and that as at the time of the said ruling and even up to date, the summons to Enter Appearance had not been signed or sealed by the Deputy Registrar of the said court as would have been expected under the provisions of Order 5 of the Civil Procedure Rule.

21. The question which then arises is whether the plaintiff is responsible for the failure, by the court to issue the said summons. I have perused the respondents annexures "KSU1" and "KSU2" to the replying affidavit and I note that in both annexures, the respondent wrote letters to the Deputy Registrar of this court regarding the failure or delay by the court to sign, date, seal and issue the summons that were filed together with the plaint on 2nd November 2016. The plaintiff's said letters are dated 5th November 2018 and 13th November 2018 which was well before the instant application was filed on 17th December 2018.

22. I further note, that in the response by the Deputy Registrar to the plaintiffs said letters, the registrar confirms the filing of the copies of summons but indicates that she is not in a position to sign them in view of the fact that they were directed to the Deputy Registrar of the Environment and Land Court. The Deputy Registrar directed the plaintiff to seek appropriate orders from the court on the way forward regarding the issuance of the said summons.

23. From the above chronology of the events that have taken place since the filing of this case, it is not disputed that the plaintiff prepared and filed the summons to enter appearance documents together with the plaint. It is also not disputed that the said summons were never signed, dated, sealed or issued by the Deputy Registrar of this court or the Environment and Land Court despite reminders by the plaintiff regarding the issuance of the said summons.

24. My finding is that in the circumstances of this case, the plaintiff did its parts as a party to this case in respect to the filing of the plaint together with the summons and cannot be faulted for any inaction or failure by the Deputy Registrar of the either the Environment and Land Court or this court to issue the summons on time or at all.

25. My take is that the lapse in issuing the summons can be attributed to the length of time that it took to conclude the application for injunction that was filed together with the plaint, and the subsequent transfer of the case from Environment and Land Court to this case.

26. I further find that the lapse on the said issuance of the summons has not prejudiced the applicant's position in any way whatsoever and is a matter that can be corrected through an order directing the Deputy Registrar of this court to immediately issue the said summons. In my humble view, the purpose of service summons to enter appearance is to bring the fact of the filing of the case to the attention of the Defendant and to require the defendant to respond to the claim. In the instant case, it is not in dispute that the defendant is already aware of the existence of this case and I am therefore of the view that there is nothing in law to preclude the defendant from filing its defence to the claim the service of summons notwithstanding. My finding is that in the circumstances of this case, the service of summons would ideally be a superfluous and a mere formality. Furthermore, the claim that the summons had abated or lapsed does not arise as it is not in dispute that the said summons had not been issued in the first place.

27. Be that as it may and considering that service of summons is provided for by the CPR and having found that failure by the Deputy Registrar to issue summons can be remedied, I decline to grant the prayers sought in the instant application and make the following orders:

a. That the plaintiff/respondent shall within 7 days from the date of this ruling file/present fresh summons to enter appearance under the title and number of the present case for the signing and sealing before the Deputy Registrar of this court.

b. The said summons shall be served upon the defendant applicant within 7 days from the dated of their issuance.

c. I make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 11th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Kebirungi for Sania for plaintiff

Mr. Ondieki for the defendant

Court Assistant – Margaret