



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. 314 OF 2015**

**BETWEEN**

**COLOUR PLANET LIMITED.....PLAINTIFF**

**AND**

**SAFARICOM LIMITED.....1<sup>ST</sup> DEFENDANT**

**JULIA OBURA.....2<sup>ND</sup> DEFENDANT**

**KENYA POWER & LIGHTING COMPANY LIMITED..3<sup>RD</sup> DEFENDANT**

**RULING NO.3**

1. The application for consideration is the 1<sup>st</sup> and 2<sup>nd</sup> defendant's ("the defendants'") Notice of Motion dated 17<sup>th</sup> September 2019 made primarily under **Order 2 rule 15** and **Order 5 rules 1(2)** and **6** of the **Civil Procedure Rules** ("the **Rules**") seeking the following orders:

*[2] An Order be and is hereby made that the Plaintiff's suit instituted by the Plaintiff dated 26<sup>th</sup> June, 2015 is deemed to have abated on 27<sup>th</sup> July, 2015, for want of issuance and service of Summons to Enter Appearance upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

*[3] The Plaintiff dated 26<sup>th</sup> June, 2015 be and is hereby struck out and the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, dismissed.*

2. As the prayers show, the defendants seek to strike out the suit against the plaintiff on the ground that it is deemed to have abated as the court did not issue Summons to enter appearance ("the Summons") and the plaintiff did not serve them as required by the **Rules**. The application is supported by the affidavit of Daniel Ndaba, the Principal In-House Counsel–Litigation of the 1<sup>st</sup> defendant.

3. Although the application is opposed though grounds of opposition filed on 15<sup>th</sup> October 2019 and the affidavit of Issac Wanjohi, counsel for the defendant. The facts upon which the application is grounded are not disputed. The plaintiff does not dispute that it filed a plaint together with Summons but to date the Summons have not been signed and sealed and still remain in the court file. The plaintiff also admits that it has not served the defendants with the plaint and Summons.

4. The defendants' application deals with consequences of failure to comply with the provisions of **Order 5 rule 1** of the **Rules** which provides as follows:

*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. [Emphasis mine]*

5. The defendants submit that the use of the word “shall” in the **Rules** aforesaid imports mandatory compliance hence the issue and service of Summons is not a mere technicality but goes to the root of the substantive validity of the suit and the jurisdiction of the court. They argue that as a result of non-compliance, the entire suit is invalid, vexatious and abuse of the process of the court and should be struck out. Counsel for the defendant urged that the mandatory provisions cannot be waived by the defendants’ active participation in the proceedings.

6. The plaintiff submitted that while it complied with **Order 5** of the **Rules** by filing the plaint and Summons, it was the duty of the court to sign and issue the Summons and that it was never notified that the same were ready for collection. The plaintiff contended that since the Summons were neither signed nor issued, the suit could not have abated hence the application should be dismissed. In the plaintiff’s view compliance with **Order 5** of the **Rules** was not mandatory and in that context the word “shall” did not render compliance with those provisions mandatory.

7. The plaintiff further submitted that despite non-compliance with the **Rules**, the defendants participated actively in the proceedings by entering appearance through the firm of *Havi and Company Advocates* and actively participated in the suit hence it would not serve the interests of justice to dismiss the suit.

8. As I understand, the thrust of the defendants’ case is that the suit has now abated under **Order 5 rule 5(6)** of the **Rules**. Under those provisions, a suit can only abate where the Summons is not collected within 30 days of issue or notification whichever is later. This means that if the Summons is not collected then time for purposes of abatement only runs when the court has notified the plaintiff.

9. A condition precedent for collection and notification is that the Summons must be signed and sealed in accordance with **Order 5 rule 1(2)** of the **Rules**. The duty to sign and seal the Summons and notify the plaintiff falls squarely on the court. Thus, apart from failure to sign and seal the Summons, the court never notified the plaintiffs that the Summons were ready for service. Consequently, the defendants’ application cannot survive the shadow of **Order 5 rule 1(6)** of the **Rules**. In this respect, I agree with the observations of Aburili J., in **Paulina Wanza Maingi v Diamond Trust Bank Limited NRB HCCC No. 603 of 2009 [2015] eKLR** that:

*[31] On the other hand, sub rule 6 is clear that every Summons except where the court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate. In my understanding, the Summons can only be collected for service if they are issued or a notification made to the plaintiff. In this case, there was no issue/notification of the Summons which was filed together with the plaint. In my view, therefore, this suit could not have abated since the Summons has not been issued for collection for service. A Summons only becomes valid for service when it is signed or issued. That also means that this court declines to find that the Summons that accompanied the plaint are invalid, since they were never signed or issued for service and hence, the issue of extension or failure to serve the said Summons upon the 1<sup>st</sup> defendant does not arise.*

10. Although the defendants’ application has failed, the fact remains that they only filed a Notice of Appointment and participated in the interlocutory proceedings. They have not entered appearance or filed a defence and rightly so as they have not been served with Summons. As I have held, the duty to sign, seal and notify the plaintiff is imposed on the court, however the plaintiff and their advocates cannot escape blame for their tardiness for which they must suffer the penalty of costs. In order for the suit to proceed, I now direct the Deputy Registrar of this Court to sign and seal the Summons in accordance with **Order 5 rule 2** of the **Rules** within 7 days. The plaintiff may then proceed with the matter accordingly. In the meantime, as the plaintiff has caused the defendants inconvenience, it shall pay costs of the application and the proceedings so far and which I assess at Kshs. 50,000/-.

11. For the reasons I have set out above, I now order as follows:

- (a) The 1<sup>st</sup> and 2<sup>nd</sup> defendant’s Notice of Motion dated 17<sup>th</sup> September 2019 is dismissed.
- (b) The Deputy Registrar is directed to sign and seal Summons to Enter Appearance within 7 days from the date hereof.
- (c) The Plaintiff shall pay the 1<sup>st</sup> and 2<sup>nd</sup> defendant costs of **Kshs. 50,000/-** within 7 days.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of NOVEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

**Mr Wanjohi instructed by Michael, Daud and Associates Advocates for the plaintiff.**

**Mr Rene instructed by Havi and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> defendant.**