



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 134 OF 2014

KIRIINYA MUKIIRA.....PLAINTIFF/APPLICANT

- VERSUS -

MIDDLE EAST BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. **Kiriinya Mukiira** the plaintiff, filed his plaint in this matter on **9th April, 2014** against **Middle East Bank Ltd**, the defendant. The plaintiff simultaneously while filing his plaint filed a **Notice of Motion** dated **8th April, 2014**, seeking interlocutory orders for the defendant to pay to the plaintiff **Ksh 6 million** held in the plaintiff's deposit account with the defendant.

2. After a few attendances before court for the hearing of the interlocutory application, the plaintiff, on **16th October 2017**, withdrew that application.

3. It is not denied that the plaintiff did not file summons to enter appearance when filing the plaint. This is clear from the affidavit dated **15th May 2018** of **Churchil Midwa**, the plaintiff's advocate, where he stated that it was after the Interlocutory Application was withdrawn; which the court record shows occurred on **16th October 2017**; that the plaintiff applied for summons.

4. Section 19 of the Civil Procedure Act Cap 21 provides:

“every suit shall be instituted in such manner as may be prescribed by the rules”.

5. Section 20 of Cap 21 provides:

“where a suit has been duly instituted, the defendant shall be served in manner prescribed to enter an appearance and answer the claim”.

6. To therefore appreciate how a suit should be instituted and served on the defendant, one must look at Order 5 of the Civil Procedure Rules (*herein after referred to as the rules*). **Order 5 Rule 1 (1) of the Rules** provides:

“when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein”.

7. From that rule, it becomes clear that the defendant's appearance in a suit is determined by the summons served upon him.

8. Rule 1 (3) of that Order 5 provides:

“every summons shall be accompanied by a copy of the plaint”.

That rule mandatory requires that a plaint be accompanied by summons. Order 5 Rule 5 of the Rules requires the plaintiff or his advocate to file the summons.

9. The responsibility of filing the summons together with the plaint lies squarely on the plaintiff or his advocate.

10. In the case before the bar, plaintiff filed his case on **9th April, 2014**, which plaint was not accompanied by summons. That filing was therefore in breach of the aforesaid rules.

11. In the case of Grace Wairimu Mungai vs Catherine Njambi Muya J. M. Mutungi, J., sitting in the Environment and land court decided that where no summons had been issued as required under Order 5 the suit was incompetent. The learned judge in that case stated as follows:

“Having regard to the applicable provisions which I have highlighted above it is my view that Order 5 Rules 1 and 2 set out a very elaborate procedure of how summons are to be processed issued and served and where there are difficulties of serving within the prescribed time frames an equally elaborate procedure for extending the validity of the summons is outlined. I am unable to accept that Order 5 Rule 1 would, fall to be considered as providing a mere procedural technicality as suggested by the plaintiff. It does in my view substantively provide the procedure under which a Defendant is called to answer to a suit and is thus core to the initiation of a suit as far as a defendant is concerned and it would be my holding that where no summons have been issued in accordance with order 5 and appropriately served on the Defendant there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are couched in mandatory terms and cannot be taken casually and/or lightly. In my view service of summons on a defendant is a vital step in initiating the litigation against a Defendant and until a summons is properly served on the Defendant there is no valid invitation to the Defendant to defend the suit.”

12. Justice R. E. Aburili in the case of Law Society of Kenya v Martin Day & 3 Others [2015] eKLR considered a decision of the Court of Appeal on the importance of following the procedure in service of summons in the case of John Akasirwa v alfred Inai Kimuso (C. A. No. 164 of 1999) (UR) as follows:

“John Akasirwa v. Alfred Inai Kimuso (C.A. No. 164 of 1999) (UR) where the Court of Appeal held as follows:-

“Proper service of summons to enter appearance in litigation is a crucial matter in the process whereby the Court satisfies itself that the other party to litigation has notice of the same and therefore chose to enter appearance or not.”

13. The defendant has moved this court by application dated **1st November, 2017**. By that application, the defendant seeks an order for dismissal of the plaintiff’s suit as stipulated in Order 5 Rule 2 (7) of the Rules. In order to appreciate the provisions of Rule 2 (7), it is necessary to consider what Rule 2 (2) provides. It provides:

“a summons (other than a concurrent summons), shall be valid in the first instance for 12 months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for a period of validity of the original summons which is unexpired at the date of issue of concurrent summons”.

Rule 2 (7) provides:

“where no application has been made under subrule 2 the court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons”.

As it can be discerned, Rule 2 (7) provides that where the plaintiff applies for concurrent summons their validity is for the period the original summons were issued. Order 5 Rule 2 (2) of the rules however grants the court discretion to extend validity of summons from time to time if the defendant is not served.

14. Order 5 Rule 1(6) by implication provides where the summons were not served within 30 days of issue the suit abates.

15. My perusal of the court file revealed that the summons were first issued on **10th May, 2017**. The plaintiff however attached to the replying affidavit a summons which is clear that the year indicated thereof has been altered to read **10th May 2018**. The year of **2017** has been changed to read the year **2018**.

16. What however is the position in this matter is that the plaintiff failed to abide with the elaborate procedure provided under Order 5 of the Rules. That procedure in my view, is not there for no reason, it is there for parties to abide by it. The importance of following laid down procedure was considered in the case of Moses Mwicigi where the Supreme Court stated:

“This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.

Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the constitution, which proclaims that, **“...courts and tribunals shall be guided by...[the principle that] justice shall be administered without undue regard to procedural technicalities”**. This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts.”

17. In view of the above, I am not persuaded by the authority relied upon by the plaintiff namely Terry Wanjiru Kariuki vs Equity Bank Ltd & Another [2012] eKLR.

18. Bearing in mind the strict procedure of obtaining summons in Order 5 of the Rules, there is no doubt that the plaintiff’s plaint is

incompetent; it is abated.

19. Before concluding this ruling, I will respond to the plaintiff's argument that the defendant's application must fail because it was not supported by an affidavit. To the contrary, Order 51 of the Rules does not require an application to be supported by an affidavit. What however Order 51 Rule 4 of the rules requires, is that every application should state in general terms the grounds of the application. The defendant's application did state the grounds relied upon.

20. In the end the defendant succeeds and the orders of the court are:

a. The plaintiff's suit is **hereby struck out** with **costs** to the **defendant**.

b. The defendant is also awarded the costs of the Notice of Motion dated 1st November, 2017.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June, 2018.

MARY N. KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant