



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 209 OF 2016

NATHAN LOYD NDUNGU.....PLAINTIFF

- VERSUS -

THEMIS INVESTMENT LIMITED.....1ST DEFENDANT

RICHARD NJOBA.....2ND DEFENDANT

VICTORIA ESTATE INVESTMENT & DEVL P K LTD.....3RD DEFENDANT

WU YIBAO.....4TH DEFENDANT

HUANG CAIWEN.....5TH DEFENDANT

DAVID RUTO CHERUIYOT.....6TH DEFENDANT

AVO-HEALTH (EPZ) LIMITED.....7TH DEFENDANT

RULING

1. **Notice of Motion** dated **12th March, 2018** is brought by the 1st and 2nd defendants. That application prays for orders that:

a. The suit against the 1st and 2nd defendants be struck out for failure by the plaintiff to extract and serve summons to enter appearance; or alternatively

b. The suit against the 1st and 2nd defendant be struck out for want of prosecution.

2. That application was served on the plaintiff's counsel but there was no appearance in court on **22nd May, 2018**, for the plaintiff, when that application was considered.

3. The application is supported by affidavit of the 2nd defendant. He deponed that although the suit was filed on **30th May, 2016**, the summons to enter appearance have never been served upon the applicant's defendant. The deponent referred to his learned counsel's letter addressed to **E. Wafula & Associates Advocate**, the plaintiff's counsel, dated **5th October, 2017**, and which is stamped as received by the plaintiff's counsel. In that letter, it was stated as follows:

"RE: HCCC NO. 209 OF 2016

NATHAN LOYD NDUNG'U VS THEMIS INVESTMENT LTD & 6 OTHERS

The above matter refers.

We write to inform you of our intention to file an application to strike out your plaint in this suit for breach of Order 5 rules (2) and (3) of the Civil Procedure Rules. Under the said rules, summons are supposed to be extracted no later than 30 days from the day the suit was filed on the 30th May 2016. You are yet to extract the said summons to date, more than 360 days later.

Even if indeed you have extracted the said summons, you never served the summons when serving the plaint upon our client. This is in breach of Order 5 rule (3). All said, it appears the suit was filed without an intention of prosecuting it since you did not even appear in court on the 15th February, 2017 when your application dated 22nd August 2016 was set to be heard. Further, you are yet to fix a hearing for the said application to date.

Therefore, be it known to you that if our client is not served with the said summons by the 5th November, 2017, we shall apply for striking out of your plaint with costs.

Notice that we have no duty in law to inform you of our impending application to strike out your plaint, we merely do this as a matter of professional courtesy to avoid putting you and your client in solemn relations. But should push come to shove, we shall not hesitate on following the strict letter of the law and filing the application without further notice.

Yours faithfully,

GIKERA & VADGAMA ADVOCATES

KALII P. DAVID

ADVOCATE/CERTIFIED PROFESSIONAL MEDIATOR.”

4. I have perused the court file and I have not seen the summons to enter appearance in this matter. It does seem that the plaintiff filed the plaint without the summons.

5. Failure to file the summons, is in breach of the Civil Procedure Rules (herein after referred to as the rules). Order 5 rule 1 (3) of the rules requires every summons to be accompanied by a plaint. The converse is that no plaint can be filed without summons. Rule 1 (5) of that order 5 lays the responsibility on the plaintiff or his advocate to prepare the summons. Order 5 rule 1(6) makes a declaration that if summons are not served within 30 days of issue the suit is abated.

6. The importance of following the procedure of preparing, filing the summons with the plaint, and serving the summons within 30 days was considered in the case of Kiriinya Mukiira – Milimani HCCC No. 134 of 2014 as thus:

“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.”

7. The plaintiff undoubtedly, failed to follow the procedure of procuring and serving the summons on the all defendants, and not only the applicant who are before the court. It is because of that the Notice of Motion dated **12th March, 2018** succeeds. The court also finds that the 1st and 2nd Defendants have shown sufficient cause why this suit should be dismissed for want of prosecution, since plaintiff has failed to take steps in this suit for more than one year.

8. The orders of this court are:

a. The plaintiff's case, against all the defendants is hereby **struck out** with costs.

b. The 1st and 2nd defendants are awarded costs of the **Notice of Motion dated 12th March, 2018**.

DATED, SIGNED and DELIVERED at NAIROBI this 19th day of July 2018.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendants