



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 514 OF 2015**

**MARY WARIARAMBUGUA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CHASE BANK KENYA LTD.....DEFENDANT/APPLICANT**

**RULING**

1. This ruling relates to a Notice of Motion Application dated 28<sup>th</sup> July 2017, brought under the provisions of Section 1A, 1B, & 3A of the Civil Procedure Act, Order 5 Rule 1 (1) & (6), Order 17 Rule 2 (1) & (3) and Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) (b) of the Constitution and all enabling provisions of the Law.

2. The Applicant is seeking for orders;-

*(a) That the suit be struck out for want of extraction of Summons to Enter Appearance or service of the same upon the Defendant;*

*(b) That in the alternative, the suit be dismissed for want of prosecution by the Plaintiff;*

*(c) Costs of this application and of the suit be borne by the Plaintiff*

3. The Application is premised on the grounds on the face of it and an affidavit dated 28<sup>th</sup> July 2017, sworn by Kevin Kimani, an Advocate of the High Court of Kenya and the Legal Counsel of the Defendant. He deposed that the Plaintiff (herein "the Respondent") filed the suit herein against the Defendant (herein "the Applicant") vide a Plaint dated 22<sup>nd</sup> October 2015, and filed in Court on the same date, seeking for inter alia permanent injunction orders against the Applicant, restraining it from selling by public auction the property known as L.R No. Ngong/Ngong/9198-Matasia.

4. That the Respondent additionally, filed an application under Certificate of Urgency on the 22<sup>nd</sup> October 2015, seeking temporary injunction orders to prevent the Applicant, from selling the said property. Upon being served with the Plaint and the application, the Applicant instructed Mr. Benard Chenge of M/S CFL & Company advocates representing it whereupon he filed a Replying Affidavit in opposition to the Application. The application was heard inter-parties and a ruling delivered dismissing the same.

5. The Applicant avers that at the point of filing the Plaint, no summons to Enter appearance were taken out by the Respondent's Advocates as required in law and thus the Applicant has never been served with the Summons to Enter Appearance, thus the suit herein is bad in law, and non-starter, and has abated. Further that since the 22<sup>nd</sup> October 2015 when the Respondent's application was dismissed, the Respondent has deliberately not taken any practical steps whatsoever to fix the matter for trial and thus has lost interest in the matter.

6. It was argued that the delay in prosecuting the suit is intentional, inordinate, contumelious, inexcusable, amounts to an abuse of the Court process and has caused serious prejudice to the Applicant and therefore it is in the interest of justice that the application be allowed as it is not possible to have a fair trial on the issues in the action.

7. The Respondent filed a Replying Affidavit dated 12<sup>th</sup> January 2018, sworn by Mark Wangai, an Advocate of the High Court of Kenya who has conduct of the matter on behalf of the Respondent. He joined issues on the date of filing the Plaint, the accompanying certificate of urgency application and the appearance by the Firm of Messrs. CFL & Company Advocates.

8. He deposed that the purpose of extraction and service of summons to enter appearance is to inform a party and/or parties that legal action

has been instituted or is in progress against the person, and the person's presence as witness may be required. That by filing and serving the Notice of Appointment dated 9<sup>th</sup> November 2015; the Applicant rendered the need for summons to issue as redundant in that there was an appearance entered by a representative on their behalf. Thus, the first Prayer in their application is unfounded.

9. That as regards prayer (2) in the application, it was argued that the parties have been in negotiations in pursuit to settling the matter out of court, a process duly acknowledged and encouraged by the Honorable Court in pursuit of the overriding objective. That the Respondent has pursued their main claim through alternative dispute resolution mechanism. Further, the Applicant has not shown any sign that parties have reached an impasse and/or that negotiations between the Parties have broken down.

10. The application was disposed of through the filing of written submissions. The Applicant submitted that Order 5, of the Civil Procedure Rules, 2010 makes it a mandatory that the Plaint must be accompanied by the summons and failure to collect the same within thirty (30) days for service results to the abatement of the suit. The case of; Bonventure Tours & Travel Limited vs Julius Kiplagat & Edison Kiplagat Bundotich & 7 Others [2013] eKLR was relied on, where the Court held that;

*'Failure to serve process where service of process is required is a failure which goes to the root of the commencement of proper procedure of litigation. The summons having remained unserved for over seven years, the interest of justice requires that the suit be declared to have abated as provided for in the Civil Procedure Rules.'*

11. That the aforementioned provisions seek to ensure expeditious disposal of suits, to meet the ends of justice, preventing an abuse of court process to the detriment and anxiety of the Applicant. The case of; Trust Bank (In Liquidation) –vs. - Kiprono Kittony & 2 Others Civil Suit No 223 Of 2002 was cited where it was held as follows:

*"legal disputes do cause anxiety to parties and if that anxiety is extended for a long period of time it would naturally be prejudicial to the party if not justified "*

12. The Applicant further submitted that failure to extraction of summons goes to the root of the commencement of proper litigation, and renders the suit incompetent. The cases of; Alfred Makhongo & 3 Others vs. Prof. Bishop Zablon Nthamburi HCCC No. 133 of 2005 , which adopted Mobile Kitale Station vs. Mobil Kenya Limited & Another [2004] 1 KLR 1 were cited to argue that failure to comply therewith cannot be cured by section 1A and 1B of the Civil Procedure Act.

13. Further reference was made to the cases of; Grace Wairimu Mungai vs Catherine Njambi Muya [2014] Eklr and Lee Mwathi Kimani vs National Social Security Fund & Another [2014] Eklr where the Court held that;

*"...The provisions of order 5 Rule 1 are elaborate and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons Order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended. Service of summons in my view is a vital step in initiating the litigation and thus until a summons is properly served the Defendant has no valid invitation to defend the suit. Besides the plaintiff in initiating and commencing the suit ought to be prepared and ready to abide with the rules of engagement and the service of summons on the Defendant is one of the primary requirements.'*

14. Finally, reference was made to the case of; Abdulbasit Mohamed Ahmed Dahman & Another V Fidelity Commercial Bank Limited [2016] Eklr, where it was held;-

*"...The suit has abated for lack of service of summons. In law the suit is null and void as it has terminated on its own. I will add that the suit abated thirty (30) days after the suit was filed. Order 5 rule 1 calls for the signing of the summons not more than thirty (30) days after the date of filing the suit. Order 5 rule (5) calls upon a plaintiff or his advocate to prepare and file summons together with the plaint. No summons seems to have been filed with the suit...*

*In the end, I do find that the preliminary objection is merited and is hereby allowed. The plaintiffs' suit has abated for lack of service of summons upon the defendant"*

15. As regards the prayer for dismissal of the suit, it was argued that the Respondent has not explained the delay having failed to file a Repling Affidavit and thus the averments in the application and the supporting affidavit thereto are uncontroverted.

16. That, Article 159(2) of the Constitution of Kenya clearly provides that;-

*"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-*

*(a) justice shall be done to all, irrespective of status;*

*(b) justice shall not be delayed.*

*(c) .....*

17. Further, Order 17 Rules 2(3), of the Civil Procedure Act, 2010, provides that any party to a suit may apply for its dismissal if no action is taken within a year. Reference was made to the case of; Moses Mwangi Kimari vs Shammi Kanjirapparambil Thomas & 2 Others [2014] eKLR where the Court held that, in determining an application for dismissal of a suit for want of prosecution, the Court should be guided by

the principles as to; whether there has been inordinate delay by the Plaintiff in prosecuting the case, whether the delay is intentional and inexcusable, whether the delay is an abuse of Court process, whether the delay gives rise to substantial risk to fair trial or causes serious prejudice to the Defendant; what prejudice will the dismissal occasion to the Plaintiff, whether the Plaintiff has offered a reasonable explanation for the delay; even if there has been delay, what does the interest of justice dictate: lenient exercise of discretion by the Court.

18. Finally, the Applicant argued that the Respondent should bear the costs of this application and relied on the case of; Jasbir Sing Rai & 3 Others-Vs- Tarchan Sing Rai & 4 Others [2014] eKLR where the Supreme Court held as follows:-

*“So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba’s words [Judicial Hints on Civil Procedure, at p.94]:*

The court went further to state as follow;

***“It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs.***

19. In response submissions, the Respondent argued that it filed this suit against the Defendant through a Plaint dated 22<sup>nd</sup> October 2015 seeking the following;

*i. An injunction against the Defendant; its agents, servants employees and/or any other persons acting on its behalf from selling or conducting a public auction any day thereof, alienating taking over or occupying and or in any other manner whatsoever from interfering with Property L.R. no. Ngong/Ngong/9198-Matasia;*

*ii. Allowing the plaintiff to exercise her right of redemption by selling part of the property title number L.R. no. Ngong/Ngong/9198-Matasia;*

*iii. Such other or further relief as this Honourable Court may deem fit.*

20. That the application accompanying the Plaint, sought for the following orders;

*i. That this Honourable court be pleased to issue a temporary injunction against the Defendants; its agents, servants, employees and/or any other person(s) acting on its behalf, from selling or conducting a public auction on 23rd October, 2015 or any other day thereof alienating, taking over, occupying and/or in any other manner whatsoever from interfering with property title number L.R. No. Ngong/ Ngong/9198 - Matasia pending the inter parties hearing of this Application;*

*ii. That this Honourable court be pleased to issue a temporary injunction against the Defendants; its agents, servants, employees and/or any other person(s) acting on its behalf, from selling or conducting a public auction on 23rd October, 2015 or any other day thereof alienating, taking over, occupying and/or in any other manner whatsoever from interfering with property title number L.R. No. Ngong/ Ngong/9198 - Matasia pending the hearing and determination of this suit;*

*iii. That costs of this Application be provided for.*

21. It was reiterated that the quintessential intent of Order 5 is to inform a party that there is a suit lodged against them and by right, their presence is required in court for purposes of admitting the claim or defending the suit against them. Reliance was placed on; Mulla, D., Paul, S. and Srivastava, A. (2001). The Code of Civil Procedure, Act V of 1908. 16th ed. New Delhi: Butterworths India, at Page 1702 where the author opined:

*“If the defendant party appears before the court after registration of the suit and he is informed about the case and the date fixed for reply, it must be deemed that the defendant has waived the right to have a summons served on him”*

22. That the same position was recapitulated in the Indian case of; Sri Nath Agrawal vs Sri Nath AIR 1981 All 400 where N. Mithal J held a similar position and stated;

*“[The Defendant] cannot now be allowed to take shelter behind a stale plea that summons had not been served on him, It is not possible for me to countenance a situation in which the defendant though present in the court and on all dates fixed therein, is still allowed to insist that unless proper summons be served upon him he should be deemed to be unaware of the proceeding”*

23. The Plaintiff humbly submit that not only was the Defendant aware of the suit but they instructed Messrs. CFL & Company Advocates who thereafter put in a Notice of Appointment pursuant to Order 9 of the Civil Procedure Rules, 2010.

24. The Respondent referred the Court to the case of; Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014]eKLR which enunciated the legal principles in the case of; Ivita vs Kyumbu [1984] Klr 441, Chesoni, J. (as he then was) adopted in the case of; Communications Courier & Another vs Telkom (K) Ltd [1999] eKLR and held that;

*“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to*

*both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

25. It was argued that the power to strike out a suit for want of prosecution is a discretionary remedy which discretion can only be exercised if the Court is satisfied that the certain ingredients have been met, in this case, the threshold that needs to be met is based on the test as highlighted in the case of; Moses Otsyula v Children of God Relief Institute [2015] eKLR in which the Court outlined the following objective test:

- (a) There has been inordinate delay on the part of the plaintiff in prosecuting the case.*
- (b) The delay is intentional, contumelious and therefore inexcusable;*
- (c) The delay is an abuse of the court process.*
- (d) The delay gives rise to substantial risk to fair trial or causes serious prejudice to the defendant.*
- (e) What prejudice will the dismissal occasion to the plaintiff?*
- (f) The plaintiff has offered a reasonable explanation for the delay.*
- (g) Even if there has been delay, what does the interest of justice dictate; lenient exercise of discretion by the court.*

26. Finally, it was submitted that the Applicant has not discharged its evidentiary burden to show that an injustice may, can or will be occasioned against them or that they will suffer any prejudice at all let alone a prejudicial act that cannot be compensated by way of damages. That to date parties are still negotiating and the Applicant had neither rhyme nor reason to file this application as there is no indication that negotiations had broken down or collapsed in view of the suit in question.

27. I have considered the application in total, the grounds and the affidavit in support thereof, and I find that, the issue to consider is whether, the Applicant has met the threshold for grant of the orders prayed for. Before I answer this question, I note that, in the submissions filed by the Applicant, they state that the application is unopposed as no Replying Affidavit was filed. However, the Court record indicates that a Replying Affidavit and submissions were filed in Court on 16<sup>th</sup> January 2018, the same being dated 12<sup>th</sup> January 2018. It is not clear whether they were served upon the Applicant's Advocates.

28. To address this issue, I took regard of the proceedings of the Court on the 10<sup>th</sup> October 2017, whereby the Respondents were given 14 days to file and serve their Replying Affidavit and their submissions within 7 days of the service of the Applicant's submissions. The parties were to return to Court on 4<sup>th</sup> December 2017 for further orders. The Replying Affidavit should therefore have been filed on or before 24<sup>th</sup> October 2017 and the submissions on or before the 4<sup>th</sup> December 2017. A further record of the Court shows that there was no leave sought for the filing of the Replying Affidavit and/or submissions out of time.

29. The rules of natural justice require that, a person be given a fair opportunity to respond to any allegations leveled against them. It is trite law that matters trials should not be canvassed by ambush. In the same vein, the provisions of order 51 rule 14 provides as follows:-

*"Order 51, rule 14.*

*(1) Any respondent who wishes to oppose any application may file t any one or a combination of the following documents —*

*(a) a notice preliminary objection: and/or;*

*(b) replying affidavit; and/or*

*(c) a statement of grounds of opposition;*

*(2) The said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.*

*(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.*

*(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte"*

30. In the given circumstances, the Respondent having filed their documents out of time given by the Court and without leave, the same are deemed to be improperly on record and I order them expunged. It therefore follows that the application has been heard unopposed.

However, it is the responsibility of the Court to deal with the application on its merit.

31. As regards the failure to serve summons, I find that the provisions of Order 5 Rules (1) and (5) states as follows:-

*“5 (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) .....*

*(3) .....*

*(4) .....*

*(5) Every summons shall be prepared by the Plaintiff or his Advocate and filed with the Court 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.’*

32. It is therefore a mandatory requirement that summons be served in the manner stipulated above and failure to serve the suit abates. However, this presumes that the Defendant has not entered appearance and/or participated in the proceedings. In the instant case, the Defendant entered appearance vide the notice of appointment of an Advocate dated 9<sup>th</sup> November 2015 and filed in Court on 11<sup>th</sup> November 2015. Thereafter they participated in the hearing of the Notice of Motion dated 22<sup>nd</sup> October 2015. If the suit therefore abated as they have submitted, due to non-service of the summons within 30 days as argued, then there is no suit within which they have filed this application. In the given circumstances, I find that the Applicants by conduct of actively participating in this matter led all sundry to believe that they are fully informed of the matter and were ready to proceed with the same. The striking out of the suit at this stage for want of extraction and service of summons will not be in the interest of justice. Even if the Court were to hold that there has been failure on the part of the Respondent, parties having come this far, it will only be in the interest of justice to order that the summons be extracted and served. On that ground I will not allow prayer (1) of the application.

33. In relation to the alternative of the dismissal of the suit for want of prosecution, I find that the matter has been active in Court from the time it was filed in 2015 to 2017, when the Applicant filed this application and which application has kept the matter active to date. It is however true, after the Respondent’s application was dismissed on 20<sup>th</sup> February 2016, no active step has been taken to set down the suit for prosecution. But as aforesaid, the matter remained active as evidenced by the proceedings of 10<sup>th</sup> October 2017 whereby the Counsel for the Respondent informed the Court that they had instructions from their client to negotiate a settlement out of court. It is therefore clear that, the matter has not just been dormant since its filing. In the given circumstance, dismissal thereof will not serve the interest of justice and/or the parties.

34. In conclusion, I find that though the application is unopposed, having analysed it on its merit, as aforesaid, I will not allow it, but make the following orders to expedite the hearing of this matter;

(a) The Plaintiff/Respondent will extract and serve summons herein upon the Defendant/Applicant within seven (7) days of this order;

(b) The Defendant/Applicant will file its statement of defence within the stipulated period under the law;

(c) The Plaintiff/Respondent will facilitate compliance with the pretrial directions within a period of 2 months from the date of this order and the Defendant/Applicant will deal accordingly in the same period of time;

(d) If there is no compliance on the part of the Plaintiff/Respondent the suit shall stand dismissed at the expiry of 2 months from the date of this order without further recourse to court;

(e) The costs of this application will be in favour of the Defendant/Applicant to be borne by the Plaintiff/Respondent.

35. Those are the orders of the Court.

**Dated, delivered and signed in an open Court, this 1<sup>st</sup> day of October 2018.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Chenge for the Plaintiff/Respondent

Mr. Wangai for the Defendant/Applicant

Dennis.....Court Assistant