



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL SUIT NO.102 OF 2013**  
**BELL ATLANTIC COMMUNICATIONS LIMITED.....PLAINTIFF**  
**VERSUS**  
**ECOBANK KENYA LIMITED.....DEFENDANT**  
**AND**  
**PENNINAH WANJIKU MWANGI.....INTERESTED PARTY**  
**RULING**

1. The Plaintiff herein, Bell Atlantic Communications Limited filed this suit against Ecobank Kenya Limited on **27<sup>th</sup> February, 2013** for a Declaration that without a valid notification of sale the Defendant is disentitled from realizing, by way of sale, the security comprised of a charge over property known as **No. LR Naivasha/Maraigushu Block 20/58**. Simultaneously, the Plaintiff filed under Certificate of Urgency, a Notice of Motion for temporary injunctive relief pending the hearing and final determination of the suit. That application was certified urgent on **27<sup>th</sup> February, 2013** and fixed for hearing on **6<sup>th</sup> March, 2013**. It later transpired that the sale did take place on **27<sup>th</sup> February, 2013** as had been scheduled, and the sale proceeds accounted for. These facts were deponed to in the Replying Affidavit sworn on **12<sup>th</sup> March, 2013** by **Leah Mosomi Apale**, the Legal Officer of the Defendant.

2. On the **14<sup>th</sup> August, 2015** the Defendant filed the Notice of Motion that is the subject of this Ruling, praying for orders that the Plaint be struck out and the suit dismissed with costs, including the costs of the application. The application is premised on the grounds that the Plaintiff has never taken out Summons to Enter Appearance and that over 24 months have since elapsed from the date of filing of these proceedings. It was further contended that the proceedings are an abuse of the Court process in so far as they seek to restrain the Defendant from exercising its statutory power of sale in respect of property **No.Naivasha/Maraigushu Block 20/58** yet that power has since been exercised and ownership transferred and vested in the Interested Party herein. That any orders against the Defendant in the manner proposed by the Plaintiff would therefore be in vain. The application was supported by the Affidavit of **JACK KIMATHI** annexed thereto.

3. In the Replying Affidavit sworn by **FRANCIS MWAURA IKINU** on **25<sup>th</sup> January, 2016** the Plaintiff/Respondent averred that the delay in the prosecution of this case was occasioned by the death of one of the Directors of the Plaintiff, and the consequential restructuring of the company due to that death;

but that the Plaintiff is keen and remains keen on prosecuting this suit to its logical conclusion for a decision on the merits. The Plaintiff urged not to be driven out of the Judgment seat unheard.

4. The application was canvassed by way of written submissions which I have carefully perused and considered. I have also perused the pleadings and the proceedings to date and note from the record that although the Plaintiff prepared and filed Summons to Enter Appearance along with the Plaint on **27<sup>th</sup> February, 2013** the same have neither been signed, sealed or issued by the Court.

5. **What Order 5 Rule 1 (5) of the Civil Procedure Rules** requires of a Plaintiff or his advocate upon the filing of Plaint is to prepare Summons to Enter Appearance and file the same with the Plaint for signature by the Court. It is thereafter the duty of the Court to sign or cause the summons to be signed, sealed and issued for service by the Plaintiff within a period of 30 days (Order 5 Rule 1(2) of the Civil Procedure Rules). The Plaintiff duly complied with Order 5 Rule 1(5) but the summons are yet to be signed or issued by the Court. In the premises, the question that arises is whether the suit would be liable to striking out in the circumstances for being an abuse of the process of the Court as sought.

6. First and foremost, although the Application was expressed as having been brought under **Order 2 Rule 15 of the Civil Procedure Rules**, it is my considered view that that provision is inapplicable to the facts hereof in so far as that provision deals with the striking out of pleadings on account of some deficiency in the pleading itself. Where it is said, as is the case herein, that the defect is in connection with failure by the Plaintiff to lift and serve Summons to Enter Appearance, **Order 5 Rule 1 of the Civil Procedure Rules** is the appropriate provision to come under with a view of abatement of the suit. **Order 5 Rule 1(6) of the Civil Procedure Rules** states thus:

*"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 added)

7. It is plain from the foregoing provision that time would only start to run from the date of **issuance or notification**. It is an indubitable fact that summons only issues upon **signature and sealing** by the Deputy Registrar. To the extent therefore that the summons herein had not been signed and sealed by the time the instant application was filed, it is my considered view that the question of abatement of the suit on that ground could not have arisen. In **Laserview Systems Limited Vs Crissam Acres Limited & Another [2012] eKLR Musinga J** (as he then was) expressed the view that:

*"Order 5 rule 1(6) is explicit that every summons (except where the court is to effect service) should be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. In this case no summons have been issued and consequently there cannot be any notification by the registry regarding collection of the same. Even though thirty days have since lapsed from the date the suit was filed, it is doubtful whether in the circumstances the court can declare that the suit has abated."*

8. I would be of the same persuasion. The foregoing being my view, I find the second scenario posed by Counsel for the Defendant/Applicant to be irrelevant to the facts of this particular case. To my mind, summons can only be extended pursuant to **Order 5 Rule 2 of the Civil Procedure Rules** where the same had been signed and issued in the first place, and it is for this reason that **Order 5 Rule 2(1)** provides that:

*"A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue..."* (emphasis added)

9. Accordingly, the 12 months validity of summons would only kick in and be reckoned from the date of its issue, such that if it is not served within the duration of its validity, then under **Order 5 Rule 2(2) to (7) of the Civil Procedure Rules** would come into play. In this regard, I share the views of **Dulu, J** as expressed in **Sudi Chemical Industries Limited & 2 Others vs Shaima Investments Limited [2011] eKLR** thus:

**"The argument by the defendant that summons cannot be issued or signed after 12 months is not sustainable. The relevant rule only refers to extension of summons that has already lapsed. There is no time limit for the Registrar to sign and issue the initial summons..."**

10. The same position was taken in the case of **Republic vs Senior Principal Magistrate, Limuru Law Courts & Others [2015] eKLR** in which **Odunga, J** had the following to say in respect of the wording of **Order 5 Rule 1 of the Civil Procedure Rules**:

**"Since the Civil Procedure Rules do not prescribe sanctions for not filing a plaint with summons as opposed to where the summons are not served within 30 days of notification, it is my view and I so hold that even if Order 5 Rule 1(3) was to be read as meaning that the plaint must be accompanied by the summons, being a procedural rule, the failure to comply therewith is curable and is not fatal to the suit. As to whether the Court was justified in curing the defect is a matter of discretion and merits of the case..."**

I would thus be of the same view and hold that in so far as the Court is yet to sign and issue Summons to Enter Appearance herein, the suit is competently before the court.

11. The second aspect of the application is in respect of the Defendant's posturing that the entire substratum of the suit has been displaced by the sale and transfer of the suit property to the interested party. The averments in this regard in paragraphs 7, 8 and 9 of the Affidavit of Jack Kimathi have not been responded to or controverted by the Plaintiff. Hence a valid question to pose is whether it would serve any useful purpose in sustaining this suit.

12. The Plaintiff/Respondent urged the Court not to drive it out of the seat of judgment unheard and relied on the case of **Patel vs. E.A. Cargo Handling Services Limited [1974] EA 75** among others to stress the point that the main concern of the Court is to do justice to the parties, and that to strike out a party's pleadings should be a last resort. It is apparent the application for temporary injunction, would be a non-starter granted the supervening events since the filing of the suit in that the suit property has since been sold and title vested in the interested party. I however do not think the same would obtain in respect of the substantive suit, for the reason that Permanent Injunction is not the only remedy sought in the Plaint. In the spirit of Article 159(2)(d) of the Constitution of Kenya and bearing in mind the Overriding Objective of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, I would be of the view that the Plaintiff/Applicant be heard for a determination on the merits.

13. In the case of **DT Dobie & Co vs Muchina [1980] e KLR** the Court expressed the view that:

**" No suit ought to be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with a real life by amendment, it ought to be allowed to go forward for a court of Justice ought not to act in darkness without the full facts of a case before it."**

14 Accordingly, I would dismiss the application dated 14<sup>th</sup> August 2015 with an order that costs thereof be borne by the Plaintiff/Respondent on account of its indolence herein.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF JULY 2016**

**OLGA SEWE**

**JUDGE**