



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

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 614 OF 2010**

**LEONARD NJOGU.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**BARCLAYS BANK OF KENYA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**NGINA WANYOIKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The ultimate Order of Gikonyo J. of 28<sup>th</sup> October 2014 has come round to haunt the Plaintiff. In it the Judge ordered:-

“The upshot of the above analysis is that I dismiss the application dated 14<sup>th</sup> March, 2014. Costs will be in the cause. But I hereby direct that the Plaintiff shall, within 30 days from today, set this suit down for hearing. In default thereof, the suit will stand dismissed without the necessity of a formal application to that effect. It is so ordered”.

2. Thirty days lapsed before the Plaintiff set down the suit for hearing and on 18<sup>th</sup> June 2015 Honourable P. Okwaro, Deputy Registrar, confirmed that the default clause of the order had taken effect.

3. Stung by that order, the Plaintiff had filed a Notice of Motion dated 25<sup>th</sup> April 2016 seeking the following orders:-

1. THAT the orders dismissing the suit herein be set aside.

2. THAT the Plaintiff be allowed to take out fresh Summons for service against the Defendants and proceed with the suit to its natural conclusion on merit.

3. THAT the costs of this application be provided for.

4. In the Affidavit in support of the Application, the Plaintiff state that after the order of the Judge of 28<sup>th</sup> October 2014 his Advocates could not set down the matter for hearing because there was no defence on record. That state of affairs would be because although both Defendants had appointed Advocates to act for them herein they have to date not entered appearance because no Summons to Enter Appearance was

served on them. As well they have not filed Defences.

5. That required the Advocates for the Plaintiff to apply for Summons to Enter Appearance for the purpose of serving the same on the Defendants. The Plaintiff explains that the Advocates obtained Summons dated and issued on 6<sup>th</sup> November 2014. The same were served on the 1<sup>st</sup> Defendant but the 2<sup>nd</sup> Defendant could not be traced for purposes of service.

6. The Plaintiff avers that as the 1<sup>st</sup> Defendant never entered appearance as required by the Summons, his advocate requested for Judgment against it. The request was not acted upon because the original Summons was misplaced. This forced the Plaintiff Advocate to apply for a fresh set of Summons. That does not seem to have happened and his Advocate eventually learnt of the Order of 18<sup>th</sup> June 2015 confirming the Orders of Gikonyo J. of 28<sup>th</sup> October 2014. The Plaintiff blames this, partly, on non-availability of the Court file.

7. That Application is opposed and the 1<sup>st</sup> Defendant through Mr. Samuel Njuguna, a Recoveries Officer, swore a Replying Affidavit on 24<sup>th</sup> May 2014. The 1<sup>st</sup> Defendant's position is that the suit abated 30 days after the Plaintiff had failed to collect Summons. Secondly, the Summons obtained by the Plaintiff on 6<sup>th</sup> November 2014 were irregular as they were obtained over 4 years from the date of filing and institution of the suit. That at any rate the Summons could not be validly reissued as the law requires the Plaintiff to apply for re-issuing within 12 months from the date of issuance.

8. The 1<sup>st</sup> Defendant thinks that Plaintiff has lost interest in pursuing his claim and the continued subsistence of the suit is occasioning prejudice to the 1<sup>st</sup> Defendant.

9. Ground (d) of the Notice of Motion under consideration is very telling. The Plaintiff states:-

“That it was impossible for the Plaintiff to set down the matter for hearing within 30 days as ordered by Justice Gikonyo, because Summons had not been served against the Defendants, no defence had been filed and pre-trial processes had not been complied with”.

It ought to have been clear to the Plaintiff at the time the order was made, that there would be a difficulty complying.

10. After the Decision of the Court, the Plaintiff took out Summons which were issued by Court on 6<sup>th</sup> November 2014. Those Summons were served upon the 1<sup>st</sup> Defendant on 13<sup>th</sup> November 2014 as is evidenced by the Affidavit of the Process Server Samsom Ndegwa Thuku sworn on 23<sup>rd</sup> June 2015. These facts are not controverted by the 1<sup>st</sup> Defendant and this Court accepts them as true.

11. When the 1<sup>st</sup> Defendant apparently failed to answer to the Summons served on it on 13<sup>th</sup> November 2014, the Plaintiff, on 23<sup>rd</sup> June 2015, filed a request for Judgement against the 1<sup>st</sup> Defendant. This as pointed out by the Defence Counsel, came late because the confirmation for dismissal of the suit had been endorsed by the Deputy Registrar on 11<sup>th</sup> June 2015.

12. Can these steps taken by the Plaintiff, be said to be attentive steps in compliance or towards compliance with the Order of the Judge?

13. Counsel for the 1<sup>st</sup> Defendant was of the view that all the steps taken by the Plaintiff were in vain as the suit had abated by dint of the provisions of Order 5 Rule 6 of The Civil Procedure Rules which provides:-

‘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’.

14. In answer Counsel for the Plaintiff thought that the issue of abatement was an afterthought and could not negate any action taken by the Plaintiff in the last 6 years.

15. With respect to the 1<sup>st</sup> Defendant's Counsel, the argument on abatement is completely misplaced. The Plaintiff herein was filed on 15<sup>th</sup> September 2010. This was in the era of pre-2010 Civil Procedure Rules. Then there was no consequence attached to the non-collection of Summons. Indeed the Rules did not provide for abatement of suit at all as consequence for non-compliance of the provisions in respect to issuance, collection or service of Summons. Order 5 Rule 6 was introduced through Legal Notice No.151 of 2010 which came into effect on 17<sup>th</sup> December 2010. This would be three months after the Plaintiff herein was filed. Given the Transitional provisions of the 2010 Rules (see Order 59 Rule 2 thereof) the provisions of Order 5 Rule 6 cannot be invoked retrospectively to prejudice the Plaintiff. I hold and find that the suit has not abated.

16. With that prefatory issue out of the way, I now examine whether the Plaintiff was vigilant towards compliance with the Judge's Order.

17. And I proceed, for arguments sake, on the footing that the retired Civil Procedure Rules did not impose a timeline within which original summons should issue.

18. The Plaintiff took out Summons on 6<sup>th</sup> November 2014. This was about 9 days after the Order of the Judge. Again the Plaintiff acted quickly in service of the Summons which were effected on 13<sup>th</sup> November 2014. This would be 4 days after the Summons were issued.

19. The Summons required that the 1<sup>st</sup> Defendant answers to the suit within 15 days of service and so the Defendant had up to 29<sup>th</sup> November 2014 or thereabout to Enter Appearance. The Court is told by the Plaintiff that the Defendant has not Entered Appearance todate. It is then explained that on 23<sup>rd</sup> June 2015, the Plaintiff's Advocate applied for Judgement against the 1<sup>st</sup> Defendant for failing to Enter Appearance. The Plaintiff then depones:-

- "THAT upon follow up, my Advocates discovered that the request was not successful as original Summons to Enter Appearance had been misplaced as they were mistakenly filed in the wrong Court, along with the Request for Judgement, ie. Milimani Commercial Court.
- THAT what was available was a copy of the duly stamped Summons served on the 1<sup>st</sup> Defendant, on which I am informed, default judgement could not be entered.
- THAT after being informed of the same, my Advocates applied for another set of Summons to Enter Appearance via a letter to the Deputy Registrar dated 18<sup>th</sup> September 2015 so that they could serve the 1<sup>st</sup> Defendant again. *(Attached and marked 'D' is a copy of the letter dated 18<sup>th</sup> September 2015.)*

20. Up to that point, it would seem, the court file was available. That is why the Plaintiff's Advocate was able to see 'a copy of the duly stamped Summons served on the 1<sup>st</sup> Defendant' in the Court file and this would be on a date after the said Advocate had requested for Default Judgement. It is my finding therefore that the Court file **had not disappeared** at least, by 23<sup>rd</sup> June 2015 when the request for Judgement was filed.

21. What was not explained by the Plaintiff is why it would take his Advocate over 8 months (from 13<sup>th</sup> November 2014 when Summons was served on the 1<sup>st</sup> Defendant upto 23<sup>rd</sup> June 2015) to request for Judgment in Default of Appearance. What is to be said of his Advocate's vigilance or lack of it when the Affidavit of Service of the Process Server was sworn on 23<sup>rd</sup> June 2014, 8 months after service had been effected? This delay must be seen in the context that the Plaintiff was obligated by a Court Order to set down the suit for hearing within 30 days of 28<sup>th</sup> October 2014. It must also be viewed in the context that, given the nature of the Plaintiff's cause of action and prayers sought, Formal Proof was necessary and further delay was inevitable. These stubborn facts do not favour the Plaintiff.

22. Even if it is accepted that, given the steps that the Plaintiff had to take, compliance within the timeframe was impractical, no explanation has been offered by the Plaintiff as to why it never promptly sought extension of time.

23. What the Plaintiff has explained is that it has only recently discovered that the Order of 18<sup>th</sup> June 2015 confirmed the Orders of 28<sup>th</sup> October 2014 and hence the filing of the present Application. That may be well and good! But that explanation without a reasonable account of the steps taken towards compliance with or seeking extension for compliance with the Order before the Court file disappeared does not suffice. While a Court must always lean towards resolution of disputes on merit, it cannot excuse the conduct of a litigant who displays indiligence at every turn.

24. In the circumstances of this case, this Court is unable to grant the Orders sought in the Notice of Motion dated 25<sup>th</sup> April 2016. The Plaintiff has once more, failed to diligently prosecute his case. The motion is dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 3<sup>rd</sup> day of**

**November ,2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Gakunya Kimani for Plaintiff

Wetangula for Muthee for 1<sup>st</sup> Defendant

Alex - Court clerk