REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 124 OF 2012

JUMA ABDALLA VITU .....PLAINTIFF

- V E R S U S -

KWALE WATER AND SEWERAGE CO. LTD. ..... DEFENDANT

RULING

1. The application up for ruling is the one dated 31st October, 2014 seeking review orders and brought under Order 9 rule 9, Order 45 rule 1, Oder 51 rule 1 of the Civil Procedure Rules. The application is also premised on Section 63 (e), 1A,1B and 3A of the Civil Procedure Act and all enabling statutes. The application is also premised on the supporting affidavit sworn on 31st October and a further affidavit dated 5th December, 2014.

2. The application is opposed by the respondent. The respondent deposes that there is no error apparent on the face of the record and that the applicant was aware of the suit as early as 16th July 2012. The parties' advocates made oral submissions to argue the application which submissions I have taken into consideration when writing this ruling.

3. The applicant submits that the application meets the conditions for granting review. First that the applicant is aggrieved and that there exists an error on the face of the record in reference to the ruling of the court dated 20th June, 2014. The error is explained that the court dismissed the application for setting aside exparte judgment on the basis that the applicant was duly served with summons to enter appearance while the court records shows that summons to enter appearance were not taken out. The second error apparent as submitted by the applicant is that this suit was heard and determined when an interlocutory application dated 27th June 2012 filed on the same date with the plaint was still pending.

4. The respondent opposed the motion on the grounds first that there was no error in the ruling dated 20th June 2014 as the court relied on the material before it. The respondent submitted further that the applicant admitted service vide a letter dated 16th July 2012 annexed to their affidavit. The counsel also submitted that although he took over this matter after judgment had been given, there must have been summons to enter appearance that was served upon the defendant on 16th July, 2012. It is also the respondent's case that this application was brought after undue delay. Lastly the respondent submits that there was no error on the suit proceeding to full hearing while the interlocutory application was still pending. He urged the court to dismiss this application.

5. There are two issues for determination, first whether failure to take out summons to enter appearance is fatal and amounts to an error apparent on the face of the record therefore a ground to review the judgment. The second issue is whether hearing and determining the main suit when there was an

interlocutory application pending was erroneous making the applicant deserving the orders sought. The applicant cited the case of ***Orero vs Seko (1984) KLR 238*** which refers to grounds on which review can be granted as it also made reference to the issue of delay. The applicant also referred to the case of ***Magalala vs British Broadcasting Corporation (2002) 1 EA 132*** which again refers to the conditions for granting review and the judge quoted the provisions of order XLII rule 1 of the Civil Procedure Code. The applicant however failed to cite any provisions of statute or case law to support the submission that default of not taking out summons or proceeding with hearing when there is a pending interlocutory application was fatal to the plaintiff's case.

6. Under order 5 rule 1 it is provided that when a suit has been filed, summons shall issue to the defendant ordering him to appear within the time specified therein. Rule 1 (3) provides that every summons shall be accompanied by a copy of the plaint. Order 5 generally provides on preparation and service of summons. The clauses under order 5 are couched in mandatory terms which make this court to draw an inference that it is mandatory for summons to be taken out each time a suit is filed although no specific penalties are provided in an event of default to take out the summons. The respondent's advocate submitted that the suit was filed by the respondent in person but he is sure the summons to enter appearance must have been taken out. I have perused the file and did not see any copy of the summons to enter appearance in the court file. It appears none was taken out as hence the reason counsel for the plaintiff was unable to confirm.

7. The application before me is not seeking orders to set aside ex parte judgment for lack of service upon the defendant. Is it fatal if summons to enter appearance are not taken out where the defendant has not entered an appearance? There are decisions given in instances where the defendant has not appeared stating that it is crucial that summons must be proved to have been taken out. In the case of **Lee Mwathi Kimani vs NSSF & Another (2014) eKLR**, Mutungi J stated thus;

> ***"service of summons in my view is a vital step in initiating litigation and thus until the summons are served upon the defendant, there is no valid invitation to defend the suit. Besides the plaintiff in initiating and commencing the suit ought to be prepared and abide by the rules of engagement and the service of summons on the defendant is one of the primary requirements."***

This judge similarly in the case of ***Grace Wairimu Mungai vs Catherine N. Muya (2014) eKLR,*** held a similar view and quoted Onyancha J in ***Karandeep Singh Dhilon & another vs Nteppes Enterprises Ltd (2010) eKLR*** where the Onyancha J had this to say;

"It is my view that failure to have summons issued and served is as bad if not worse as failure to extend the same. A plaint filed in court carried no power to

summon a defendant to court. The plaint will lie there impotently. It will alone have no power to bring the parties before court for adjudication."

The two authorities are persuasive upon me but I see no reason to disagree with the views taken by the learned judges in regard to this subject. I do find therefore that in this instant where no summons to enter appearance was taken is an error on the face of the record as the defendant has not been called upon to defend the suit.

8. On the issue of this suit being heard while an interlocutory application was still pending, Order 11 refers to pre-trial directions which must be complied with before a suit is set down for hearing. Under Order 11 rule 3 (2) (a), the court has power to deal with any interlocutory applications or create a suitable timetable for their expeditious disposal. The provisions of this order are easily applied where the suit is defended. Since this suit was undefended, I do not find any error by virtue of the suit having proceeded when the application dated 27th June 2012 was still pending. In conclusion it is my finding that there is an error on record since summons to enter appearance were not taken out which is sufficient reason to review the judgment entered in favour of the plaintiff. Accordingly I grant prayer (c) and (d) of the application. This court suo moto extends time to the plaintiff /respondent to take out summons and serve

the defendant forthwith. I also find that this application was filed after undue delay as the issue of summons ought to have been raised in the application dated 21st August, 2013 that was seeking orders of setting aside. However the respondent can be compensated for the delay by payment of costs therefore I make an order that costs of this motion is awarded to the respondent.

Dated and delivered in open court at Mombasa this 11th day of February, 2015.

A. OMOLLO

JUDGE

11.2.2015