REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 23 OF 2011

JOHN NGUGI MUIGAI …….……PLAINTIFF

VERSUS

FAMILY BANK LIMITED ……..……..1ST DEFENDANT

JOSRICK MERCHANTS ……2ND DEFENDANT

PANGANI AUCTION CENTRE ……...……..3RD DEFENDANT

RULING

By an application dated 30th September 2014 and filed in court on 6th October 2014 the 1st defendant Family Bank Ltd seeks from this court orders that:-

1. The suit against the defendant herein be dismissed with costs for want of prosecution.
2. In the alternative, this honourable court be pleased to order that this suit has abated and order to issue accordingly.
3. The costs of this application and the entire suit be awarded to the 1st defendant.

The application is predicated on the grounds that:-

1. The plaintiff has neglected and or otherwise failed to set down the suit for hearing and or to take any steps to prosecute the suit for a period of over one year.
2. The last time the matter was before court was on 25th March 2011.
3. The plaintiff has not bothered to take out summons in the matter and serve the same upon the defendant in order to progress the matter in contravention of the provisions of Order 5 of the Civil Procedure Rules 2010.
4. This matter was filed subsequent to another matter filed in a competent jurisdiction reflecting the same issues being PMCC 90/2010 John Ngugi Muigai vs James Gachira Nganga and PMCC 15/2011 James Gichira Nganga vs Family Bank Ltd (Githunguri branch) and John Ngugi Muigai contrary to Sections 6 and 7 of the Civil Procedure Act.
5. That this cause does not subsist because on 25th March 2011 the plaintiff withdrew an application whose prayers were the same as those in the plaint.
6. The subsisting plaint has no life on account of the provisions of Order 3 Rule 2.

The application is further supported by the affidavit of Viola Odhiambo counsel for the 1st defendant who deposes that the plaintiff has for the last two years not taken any steps to have the suit herein prosecuted and therefore it is only fair and just that the suit be dismissed for want of prosecution.

MS Odhiambo deposes that as no summons to enter appearance have been taken out since the suit was filed on 8th December 2011, the suit has abated.

Further, that the plaintiff must have lost interest in this matter and therefore he only thing to do is to bring this litigation to an end as the prolonged delay in its prosecution continues to occasion anxiety, worry, inconvenience and uncertainty to the defendants. In addition, it is deposed that there are other pending suits before competent jurisdiction touching on the same subject matter hence the suit herein offends the provisions of Sections 6 and 7 of the Civil Procedure Act .

The application by the 1st defendant was opposed by the plaintiff John Ngugi Muigai who swore replying affidavit on 9th February 2015 filed in court on 10th February 2015. The plaintiff acts in person.

He denies that he has neglected or failed to set down the case for hearing. He also states that the suit cannot be set down for hearing since there is no defence filed by the 1st defendant despite being served with copies of plaint and verifying affidavit. In his view, the applicant/defendant had notice of the suit being instituted hence they do not require summons to enter appearance. He laments that the applicant sold his motor vehicle KBJ 307 G in total disregard of a court order issued on 27th January 2011 and served on 28th January 2011.

Further that the plaintiff withdrew his application for injunction upon learning that the suit motor vehicle had been sold to avoid engaging the court in academic exercise. That he was to amend his pleadings to plead for special damages being the value of the motor vehicle sold but that he was hampered by the required court fees of shs 70,000/- as the value of the suit motor vehicle was kshs 1.1 million but that he is saving money and by August 2015 he would have raised court fees to enable him pay court fees for amending his claim. In addition, that he does not feel that it is morally right for him, a young man of his age to seek an order of suing as a pauper.

The plaintiff further deposes that the defendant who sold his motor vehicle should not be allowed to benefit from such an action. The plaintiff admits that there is pending Githunguri SPM CC 90/2010 over the same subject matter wherein he has sued the person who sold to him the suit motor vehicle yet it was on loan from the 1st defendant herein Family Bank Ltd and that he is considering seeking to have the said suit consolidated with this suit.

The application was canvassed by way of oral submissions on 4th March 2015 when the applicant also sought and obtained leave to file supplementary affidavit sworn 4th March 2015 by Viola Odhiambo emphasizing that service of summons to enter appearance is mandatory and that the earlier interim orders of injunction obtained by the plaintiff against the defendant lapsed after he failed to attend court ton 17th February 2011. In addition, that the Githunguri application in that suit was on 11th February 2011 dismissed with costs. The applicant maintains that there are no reasons to warrant sustaining this suit.

In their submissions the applicants counsel M/S Viola Odhiambo reiterated the contents of the application, their supporting affidavit and supplementary affidavit, urging this court to dismiss the suit herein mainly for reason that no action has been taken since March 2011 to set it down for hearing; the suit in any case abated as no summons to enter appearance have ever been taken out and served upon the defendants to enable them enter appearance and file defence;there is a similar suit filed in Githunguri court where the application for injunction was dismissed and the suit therein is still pending over the same subject matter, which matter had initially caused this suit to be temporarily stayed by Honourable Justice Mwera J(as he then was).

Mr Muigai, the plaintiff herein vigorously opposed the application seeking to dismiss his suit and relied on his replying affidavit whose depositions I have reproduced above. He urged that Article 159 2(d) the Constitution is applicable to his case and therefore this court should not dismiss his case based on procedural technicalities. He submitted that he served a plaint and an application and being a layman

he did not know that he was supposed to serve summons to enter appearance. The plaintiff also submitted that the Githunguri case was only against the person who sold to him the suit motor vehicle James Gachira Nganga and that he only filed this suit in the High Court after realizing that the Bank had sold the motor vehicle because of a loan default on the motor vehicle by James Gachira Nganga. In his view, the vehicle was sold while he court order was in force and maintained that he will apply to consolidate this suit with the Githunguri suit so that the two can be heard together.

In a brief rejoinder, Miss Odhiambo responded that ignorance of the law is no defence and that justice is for both parties. She maintained that the Githunguri case is still pending and that there was no court order stopping sale of his motor vehicle for a loan default when it was sold.

Having set out the parties respective positions, I now turn to the issues for determination which in my view are

1. Whether the suit herein is sustainable.
2. What orders should this court make.
3. Who should bear the costs.

On the first issue, of whether the suit herein is sustainable, there are two important ancillary questions to be considered .

The first question is whether the suit herein has abated. This question must be considered first since it is a serious point of law which is likely to determine all other questions of whether or not the suit is sustainable ad therefore the second question which would be whether there has been failure or delay to set down the suit for prosecution warranting a dismissal for want of prosecution would not arise; save for purposes for closure of the proceedings.

Brief background to this matter is that the plaintiff John Ngugi Muigai instituted this suit on 25th January 2011 against the defendants Family Bank Ltd, Josrick Merchants and Pangani Auction Centre seeking for mandatory injunction requiring each of the named defendants to jointly and or in the alternative forthwith deliver motor vehicle KBJ 301G to its lawful owner, the plaintiff; A prohibitory injunction prohibiting the defendants their agents, servants or any other person claiming from or under them from interfering in whatever manner with the said motor vehicle; and costs of the suit and any other relief the Honourable court may deem fit to grant.

The plaint was filed under a (multi-track) series , not fast track.

In the body of the plaint, the plaintiff averred that the defendants had jointly and unlawfully and without any probable or reasonable cause taken possession of the plaintiff's motor vehicle KBJ 307G which they had detained and converted into their use and that the 1st defendant had maliciously through his agents the 2nd defendant claiming under Mr James Gachira Nganga had been served with court order on 19th January 2011 restraining them from interfering with the said motor vehicle but that they had nonetheless ignored that court order and had gone ahead to advertise the said motor vehicle for sale hence they had defamed the plaintiff and put him to odium and contempt before right thinking members of the society generally, which action annoyed the plaintiff since he was the rightful owner of the said motor vehicle .

The plaintiff then under certificate of urgency sought and obtained an order of injunction to restrain the defendants from selling the said motor vehicle. He annexed copy of sale agreement showing that he had lawfully purchased the suit motor vehicle from James Gachira Nganga on 10th May 2010 at an agreed sum of kshs 1.1.million out of which he had already parted with kshs 440,000. Nothing else is mentioned concerning the balance due. There is also evidence by way of annextures on the plaintiff's affidavit that he filed Githunguri C.C. 90/2010 to stop the sale of the vehicle and served an order of stay of sale on 19th January 2011.

However, there is further evidence in his affidavits that the 1st defendant had on 3rd January 2011 instructed Josrick Merchants the 2nd defendant to seize the said motor vehicle and recover kshs 309,043.73 and on 15th January 2011 the said vehicle was bailed to Pangani Auction centre. It is not clear when the said motor vehicle was sold by the defendants .

Upon the filing of this suit; the record shows that there are summons to enter appearance which are however unsigned and are still lying in situ. In other words, the plaintiff did not take out the summons to enter appearance for purposes of service upon the defendants herein, inviting them to enter an appearance and file defence within the prescribed period as required by Order 5 Rule 1 of the Civil Procedure Rules.

The said Rule requires that every summons shall be accompanied by a copy of the plaint. The provisions are mandatory in nature and hence service of the plaint alone without summons to enter appearance renders the plaint a nullity.

That notwithstanding the law is clear that the summons once issued ate only for one year after which the lapse and the plaintiff can nonetheless apply for extension.

In this case the summons to enter appearance were drafted but not dated or signed.

In **Frenze Investments Ltd vs Kenya Way Ltd HCC 524/1999** the court stated , and I agree, persuasively, that:

> *" A summons to enter appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the time table of pleadings and the rules governing the issuance and service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of Appeal in CA 85/96 Uday Kumar Chanullal Rajan & RS T/A Lit Petrol Station vs Charles Thaithi (UR) where a defective summons was issued and served beyond the validity of the one year but objection was raised to its validity although the defendant had already accepted it and entered appearance".*

In **Antony Wechuli Odwisa vs Alfred Munyanganyi (2006) e KLR** the court held that a court can move suo moto to strike out the suit where no summons to enter appearance are issued or served. See also in **David Njuguna Karanja vs HFCK Ltd HCC 733/2008** where summons to enter appearance were not taken out and the court held that it is a mandatory requirement that the plaint must be accompanied by summons and where the plaintiff has not taken out summons the court cannot invoke its inherent jurisdiction to save the said suit. **In Mobil Kitale Service Station vs Mobil Oil Kenya Ltd & another (2004),KLR Warsame J** (as he then was) held:

> ***" Order 4 (now Order 5) of the Civil Procedure Rules contemplate that summons will be issued and served at the same time as the plaint and the duty according to Rule 3(5) of the Civil Procedure Rules is placed upon the plaintiff. It is the responsibility of the plaintiff or his advocate to prepare the summons so that the court may sign the documents to give it validity.***
>
> ***According to Order 5 Rule 1 (7), the life span of summons is 24 months and after the expiry of 24 months if no application has been made to extend them, then the court without notice would dismiss the suit.***
>
> ***In the present matter, no summons was issued, leave alone seeking extension of time. If there is no summons which was issued in the first instance, there is nothing capable of being extended. The failure of the plaintiff to issue and give summons is in clear contravention of the order of injunction granted to the plaintiff and it would be impossible for the defendant to respond to the suit.***

Parties ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties. Summons is a judicial document calling a party to submit to the jurisdiction of the court and if the party is not given that opportunity how else would he submit to the jurisdiction of the court.

Order 4 and 5 of the Civil Procedure Rules are designed to enable the parties to follow certain procedures. The word " shall" which makes it mandatory to comply with the direction and if there is no explanation as to why the summons were not taken out, then the court has no discretion but a judicial duty to ensure the Rules of procedure are followed and failure to observe would be fatal."

Applying the above principles to this suit and application by the 1st defendant that the suit has abated, it is that there is no suit before this court even capable of being prosecuted as 24 months have elapsed since 25th January 2011 when the plaint was filed in court. There has been no application seeking to extend the validity of summons and even if there was such application, there are no valid summons issued, capable of being validated by the court. The suit, I hold is fatally defective and incurable.

Albeit the plaintiff submitted that he is a layman who did not know the procedure for issuing and service of summons to enter appearance and sought to hide under Article 159(2) (d) of the Constitution to the effect that justice shall be done without undue regard to procedural technicalities, there is no application before this court seeking to revive a suit which has abated for want of summons to enter appearance being issued or served for a period of over 3 ½ years from 25th January 2011 to date.

Indeed, the defendants have not filed any defence because they have not been invited to enter an appearance a file a defence. The 1st defendant only field a notice of appointment of advocates on 9th February 2011 after being served with the order of injunction issued on 26th January 2011 stopping sale of a motor vehicle which they state had already been sold by the time the said order was issued. To date, no contempt proceedings have been commenced against the 1st defendant or it agents, servants the 2nd and 3rd defendants herein who were in actual possession of the said motor vehicle.

While I agree with the plaintiff that Article 159 2 (d) of the Constitution enjoins this court to be focused on substantive justice as opposed to concentrating on procedural technicalities that may vitiate the course of justice, I shall in determining that issue re-examine the issue vis a vis how the said constitutional provisions have been interpreted by the Court of Appeal. But first, what does Order 5 Rule 1 say verbatim ?

1. *When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.*
2. *Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay and in any event not more than thirty days from the date of filing suit.*
3. *Every summons shall be accompanied by a copy of the plaint.*
4. ……..
5. ……..
6. ……..

The many decisions I have referred to above demonstrate that failure to comply with Order 5 Rule 1 has far-reaching consequences which are that judgment will be entered against the plaintiff.

A summons issued under Order 5 Rule 1 is a court summons, not the plaintiff's document. It carries appropriate legal weight in the civil process. If that were not to be the case, then the rule would not have provision of expiry with possibility of renewal thereof under Order 5 Rule 2.

In my view, where there are no summons like in this case or where the summons issued have lapsed and not validated; there is no suit.

In **African Banking Corporation Ltd vs Generations Famers Co. Ltd (2014) e KLR** it was held:

> ***" Order 3 of the Civil Procedure Rules is the supreme code that governs service of court processes in all civil proceedings under the Civil Procedure Act. Here we are concerned with service of summons and plaint. Order 5 of the Civil Procedure Rule is not a code of technicalities; rather , it is the enabler of fair trial because, service of summons and plaint brings to the attention of the defendant the kind of case he is faced with and for which he should defend: which is a step or procedure which cannot be supplanted merely because the defendant had some knowledge or was aware of the existence of the case. It is not impossible that a party learning of proceedings against him may rush to put in an appearance or instruct an advocate or even attend court. An appearance was filed by an advocate C.Mutito Thiongo & Co. advocates. But such filing of appearance alone, unless it is in reply to the summons and plaint served in accordance with order 5 of the Civil Procedure Rule, does not remove the necessity, and is not proof of service of summons. That is why Rule 15 of Order 5 of the Civil Procedure Rules requires that:***
>
> ***15(1) The serving officer in all cases in which summon has been served under any of the foregoing rules of this order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in form No. 4 of appendix A with such variations as circumstances may require'***
>
> ***(2) Any person who knowingly makes a false affidavit of service shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or one month's imprisonment or both.***
>
> ***Return of summons served in all cases together with evidence of service is mandatory and should be seen as a tool of accountability of court processes…….entry of appearance is not proof of service of summons".***

In my view, the requirement that summons to enter appearance must be issued and served is not a mere procedural technicality where there is default for the period in issue and in this case, since 25th January, 2011. For that reason, the plaintiff herein though acting ***prose,*** cannot hide or take umbrage in the provisions of Article 159(2) (d) of the Constitution.Taking the cue from the Court of Appeal decision of **Kakuta Marmai Hamisi vs Peris Pesi Tobiko & 2 others (2013) e KLR,** that ***" I do not consider that Article 159(2) (d) of the Constitution to be a panacea, nay a general white wash, that cures and mends all ills, misdeeds and defaults of litigation."***

The Court of Appeal in the above case cited with approval its earlier decision in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others CA 290/2012** that:

> ***" In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a hand maiden of just determination of case."***

In the instant case, issuance and service of summons to enter appearance is a procedural requirement that is essential and goes to the root or very heart of substantive validity of the suit and court processes and determination and therefore, certainly, it does not run a foul the substance –procedure dichotomy of Article 159 2 (d) of the Constitution.

It is on the basis of all the above expositions that I find that the suit herein abated upon expiry of 24 months from 25th January 2011, on 25th January 2013. Having found that the suit did abate for want of issuance and service of summons to enter appearance, I would not belabor delving into the

issue of whether or not the suit herein should be dismissed for want of prosecution and the principles and law governing the applications for dismissal of suits under Order 17 Rule 2 of the Civil procedure Rules as that would be wasting very precious judicial time.

On 25th March 2011Honourable Mwera J granted the plaintiff 14 days to amend and serve plaint together with summons within 14 days which has not been done. I must however mention that when this matter came up before me on two occasions I implored the plaintiff to seek for legal advice to enable him appreciate the implications herein since he was also stating that he had been given leave to amend his plaint which leave had lapsed. The plaintiff nonetheless informed the court that he was capable of handling the matter in person as he had no money to pay an advocate. The court went further to implore him to seek leave of court to proceed as a pauper but he declined and swore an affidavit at paragraph h and (i) of his replying affidavit that he is a young man who does not feel it morally right to seek an order of suing as a pauper .

The court, notwithstanding its appreciations of the fact that proceedings in this jurisdiction are of adversarial nature informed the plaintiff that Article 48 of the Constitution guarantees him the right to access justice and that if any fee is required, it should not impede his access to justice as he could apply a waiver of the required court fees as appropriate. The plaintiff did not find that to be useful hints to assist him access justice.

Nonetheless, the court notes that his suit No. 90/2010 at Githunguri is still pending. The plaintiff can still amend that suit sand proceed as appropriate as dismissal of this suit wherein the last action was in 2013 will not in any way oust him from the seat of justice. The law under Section 6 of the Civil Procedure Act abhors filing of multiple cases over the same subject matter. Since this suit has abated, he can do more than revert to the Githunguri case wherein he first obtained orders staying sale of his motor vehicle .

The upshot of all the above is that this suit is declared a nullity for having abated.

As to who should bear the costs of the application and the suit, albeit the law under Section 27 of the Civil Procedure Act is clear that costs follow the event, in this matter , I am inclined to order that each party shall bear their own costs.

Dated, signed and delivered in open court at Nairobi this 14th day of July 2015.

R.E. ABURILI

JUDGE