



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 603 OF 2009

PAULINA WANZA MAINGI.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK LIMITED1ST DEFENDANT

FRANCIS KOMU GITAU T/A

BOMAS MOTOR MART.....2ND DEFENDANT

RULING

1. Before this court for determination is the 1st defendant's Notice of Motion dated and filed on 11th June 2013 seeking orders:
 - i. That this court be pleased to dismiss the suit herein for failure to issue and serve summons to enter appearance on the 1st defendant
 - ii. That costs of the application and the suit be awarded to the 1st defendant.
2. The application is brought under the provisions of Order 5 Rule 2 (7), Sections 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the law. The grounds upon which the application is predicated is that :
 - a. Over 24 months have lapsed since the suit was filed and no summons have been issued and or served on the 1st defendant
 - b. That the delay is inordinate and inexcusable and it is an abuse of the process of the court.
 - c. The suit has abated.
 - d. The plaintiff's indolence is prejudicial to the 1st defendant as its employees who had necessary knowledge of the case have left employment.
 - e. The pendency of the suit against the 1st defendant would lead to an injustice.
3. The application is supported by the affidavit of Stephen Kodumbe who is the 1st defendant's Company Secretary with authority to swear the affidavit on behalf of the bank, reiterating the grounds on the face of the application and deposing in addition that Elizabeth Hinga who was the 1st defendant's employee and who had necessary knowledge had since left the bank, and urging the court to dismiss this suit.
4. The plaintiff opposes the application by the 1st defendant and deposes an affidavit through her

lawyer Monica Mwongeli Nzive sworn on 1st November 2013. She deposes that the suit was instituted under certificate of urgency simultaneous with an application for interim orders which was argued and ruling delivered and that in 2010, while the ruling was pending, the judge presiding over the matter was transferred to Machakos and since the matter was pending a ruling, the plaintiff's advocates were unable to extract summons for service. That the ruling was delivered on 20th September 2012 and that is when the advocate accessed the file, which delay is acknowledged by the judge due to poor health. That immediately after the ruling was delivered on 20th September 2012 the plaintiff sought leave of court to amend her plaint and it is only upon such amendment of the plaint that the plaintiff extracted summons to enter appearance for service upon the 1st defendant. That since the purpose of the summons is to inform a party of the existence of the suit, the 1st defendant having already entered an appearance and filed defence in the suit, it would not serve the interest of justice to have this suit dismissed on account of non service of summons to enter appearance, which act would be contrary to the overriding objectives of the law that justice should be administered without due regard to procedural technicalities. That no prejudice will be suffered since the 1st defendant was all along aware of the suit and has actively participated in it.

5. The parties' advocates agreed to file and exchange written submissions to dispose of the application.
6. In the 1st defendant's submissions dated 28th September 2015 and filed on 29th September 2015, the applicant gives the history of this matter and maintains that failure to issue and serve summons to enter appearance on the defendant as required under Order 5 Rule 1 (5); Order 5 Rule 1(7) of the Civil Procedure Rules is fatal to the suit because summons to enter appearance are a legal process and that courts in various cases inter alia (**Grace Wairimu Mungai V Catherine Njambi Muya (2014) e KLR** Mutungi J; **Karandeep Singh Dhilon & another V Nteppes Enterprises Ltd & Another (2010) eKLR** Onyancha J; **Tana Trading Ltd V National Cereals & Produce Board (2014)e KLR** have interpreted the above provisions of law to mean that it is the responsibility of the plaintiff to extract and serve summons failing which the suits shall abate.
7. In the 1st defendant's view, the jurisdiction of the court is yet to be properly invoked with the effect that in the absence of the summons to enter appearance, the plaintiff's suit is still-born.
8. On the contention that the file was unavailable, the 1st defendant submitted that it is an afterthought since it took them nearly 10 months from 21st September 2012 when the ruling was delivered to 11th June 2013 when they filed this application and still no summons had been extracted.
9. According to the 1st defendant, the requirements of Order 5 on service of summons and the effect of non service is not a mere procedural technicality to be disregarded. Relying on **Tana Trading Ltd V NCPB (supra)** and **Anthony Wechuli Odwisa V Alfred Khisa Menya Nganyi (2006) e KLR**, the 1st defendant's counsel urged the court to dismiss the suit.
10. In her submissions filed on her behalf by her advocate on record, the plaintiff contended that failure to serve summons to enter appearance upon the 1st defendant is not fatal to this case since the 1st defendant had already entered appearance and filed defence. She relied on the decision in **Fredrick Kibet Chesire V Raymond W. Bomet & 3 Others (2006) e KLR** by Jeanne Gacheche J that summons to enter appearance are meant to inform the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint. It was submitted that in this case the 1st defendant became aware of the suit by way of an application and a plaint which was sufficient notice to the 1st defendant of the existence of the suit and that in this case, this application has come too late in the day for the 1st defendant had already filed defence referring to the Fredrick Kibet Chesire case(supra).
11. In addition, it was submitted by the plaintiff that it has not been shown what prejudice the 1st defendant will suffer if this suit is sustained as it is an institution and an employee leaving employment does not leave with documents. That the entry of appearance and filing of defence is an indication that the 1st defendant has already submitted to the jurisdiction of the court hence it is outrageous to demand for dismissal of the plaintiff's suit for want of summons to enter

appearance. She relied on **Lukas Njuguna v S.Karobia V consolidated Bank Ltd** (no citation) where the court stated that ***“ I do not think that failure to serve the plaint and summons would by itself be a sufficient ground to strike out or dismiss the application or plaint.”***

12. Further, the plaintiff respondent submitted that the threshold for striking out suit had not been met and that in any event, Article 159(2) (d) of the Constitution provides that justice shall be administered without undue regard to procedural technicalities, like the one raised herein by the 1st defendant which would in effect be driving the plaintiff away from the judgment seat of justice.
13. I have carefully considered the 1st defendant's application, grounds, supporting affidavit, the submissions as well as the replying affidavit, submissions and authorities and statutory as well as constitutional provisions cited by both parties' advocates in their respective submissions. The only issue for determination in this application is whether failure to issue and serve summons to enter appearance upon the 1st defendant is fatal to the plaintiff's suit.
14. The law relating to issuance and service of summons to enter appearance is Order 5 Rule (5) of the Civil Procedure Rules provides that which enact that:

“ Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with Subrule (2) of this Rule “

15. Further, Order 5 Rule (1) (7) of the Civil Procedure Rules enacts that:

“When no application has been made under Subrule (2) the court may without notice dismiss the suit at the expiry of 24 months from the date of issue of the original summons.” Subrule (2) concerns the validity of summons. ingH

16. It is trite law that where no summons to enter appearance are served within 12 months, the suit abates. However, the validity of summons can be extended where such summons are issued but not served within 12 months from the date of the first issue.
17. There are as many different interpretations of Order 5 Rules 1,2,3,5 and 7 of the Civil Procedure Rules on this issue of service of summons to enter appearance as there are many judges of the High Court and of the two courts of equal status. In other words, there are two schools of thought. The first school opines that failure to obtain and serve summons to enter appearance upon the defendant within the prescribed period is fatal to the suit and that it goes to the jurisdiction of the court whereas the second school of thought is that depending on the circumstances of each case, failure to issue and serve summons to enter appearance upon the defendant is not fatal to the suit unless prejudice is demonstrated or unless such failure goes to the root of a jurisdiction of the court.
18. In the instant case, the brief facts set out by the 1st defendant in their submissions is that on 5th November 2009, the plaintiff instituted suit against the defendants herein jointly seeking for a declaration that motor vehicle registration No. KAW 790/- belonged to the plaintiff and further seeking damages of shs 9,000/- per day for hiring alternative means of transport plus costs of the suit. On 5th June 2013 the plaintiff filed an amended plaint enjoining the 2nd defendant and also seeking for shs 2.6 million being the purchase price of the subject motor vehicle KAW 790L Toyota Prado. She also claimed that the 2nd defendant had fraudulently sold the suit motor vehicle to her when he did not have the right to sell to her the said motor vehicle. She also claimed for general damages for breach of contract and trespass to property.
19. When the suit herein was initially instituted on 5th November 2009 against the 1st defendant alone, simultaneous with the filing of the plaint, the plaintiff sought for interlocutory injunction restraining the 1st defendant from alienating, disposing of, transferring to themselves or to any other person the subject motor vehicle pending hearing and determination of the application interpartes and suit. The plaint was accompanied by a copy of filled summons to enter appearance which are still unissued and unsigned /unsealed and insitu as the first documents at the rear of this file.
20. On 25th January 2013, the plaintiff sought leave of court to amend the plaint to enjoin the 2nd

- defendant herein Francis Komu Gitau t/a Bomas Motor Mart, which amended plaintiff dated 29th May 2013 was filed on 5th June 2013. Honourable Hatari Waweru J did on 29th May 2013 on granting the plaintiff leave to amend the plaintiff to enjoin the 2nd defendant also order that summons to enter appearance be served upon the 2nd defendant together with that amended plaintiff.
21. In the meantime, the plaintiff's application for injunction was heard inter partes by way of written submissions and a ruling date reserved on 16th December 2009 for 26th February 2010. That ruling was never delivered until 21st September 2010 with the learned Judge dismissing the plaintiff's application with costs and deeply regretting the delay in delivery of the ruling caused by his poor state of health. In other words, between 16th December 2009 and 21st September 2010, about 10 months, the court file was indeed in the custody of the Learned Judge awaiting delivery of the ruling on the application for injunction filed on 5th November 2009 with the suit. By that time the draft summons to enter appearance to be served upon the 1st defendant were still insitu and to date, they have never been signed and or issued.
 22. The 1st defendant filed notice of appointment of advocates on 11th November 2009. On 5th June 2013, summons to enter appearance for service upon the 2nd defendant were issued and by an affidavit of service sworn by Peter Ongiri on 20th April 2015, he effected service on the 2nd defendant on 18th June 2013.
 23. Interlocutory judgment in default was entered on 20th May 2015 against the said 2nd defendant. On 25th June 2013, the 1st defendant issued notice of claim against the 2nd defendant pursuant to Order 1 Rule 24 (1) of the Civil Procedure Rules. The 1st defendant also filed statement of defence dated 20th June 2013 on 25th June 2013. It also filed a list of witnesses subsequent to which the plaintiff filed a reply to the 1st defendant's defence dated 10th July 2013 on 27th August 2013.
 24. With the above background, the question that begs answers, therefore is, is the suit against the 1st defendant valid or it should be dismissed for want of issue and service of summons to enter appearance?
 25. First, is that the plaintiff no doubt complied with the provisions of Order 5 Rule 3 (5) which stipulates that:

“ Every summons shall be prepared by the plaintiff or his advocate and filed with the plaintiff to be signed in accordance with Subrule (2) of this Rule.”

26. In other words, the plaintiffs did prepare and file together with the plaintiff, summons to enter appearance. However, those summons which are still housed in this file, have never been signed in accordance with Subrule (2) of Rule 3 of the Civil Procedure Rules.
27. Order 5 Rule 1 of the Civil Procedure Rules provides that:
 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 accompanied by a copy of the plaintiff.***
 3. ***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.***

The language used is in mandatory terms.

28. Under Subrule 2 of Order 5 Rule 1,

2(1) A summons other than a concurrent summons shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of the validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant the court may extend the validity of a summons from time to time if satisfied it is just to do.

(7) where no application has been made under Subrule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.

29. In this case, the summons to enter appearance were filed with the plaintiff but they have never been signed/issued or served upon the 1st defendant. Nonetheless, the 1st defendant filed a notice of appointment of advocates and proceeded to file defence. The filing of notice of appointment of advocates was prompted by the application for injunction which was served on the 1st defendant together with copy of plaint to protect their interest in the matter.
30. From the provisions of Order 5 of the Civil Procedure Rules that I have reproduced above, it is understood clearly that whereas it is the duty of the plaintiff to file summons together with the plaint while instituting suit, the issuance /signing of summons is the duty of the court, which also directs the defendant to appear within the time specified therein.
31. On the other hand, sub rule 6 is clear that every summons except where the court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate. In my understanding, the summons can only be collected for service if they are issued or a notification made to the plaintiff. In this case, there was no issue/notification of the summons which was filed together with the plaint. In my view, therefore, this suit could not have abated since the summons has not been issued for collection for service. A summons only becomes valid for service when it is signed or issued. That also means that this court declines to find that the summons that accompanied the plaint are invalid, since they were never signed or issued for service and hence, the issue of extension or failure to serve the said summons upon the 1st defendant does not arise.
32. In my view, therefore the applicable provision is Subrule 2(2) of Order 5 which provides that where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do.
33. In this case, I find that the plaintiff complied with the rules on the filing of summons, which were never signed/issued. The suit was filed under certificate of urgency and as correctly submitted by the plaintiff's counsel, the file herein was in the custody of the Honourable Judge Waweru J for close to 10 months while he was indisposed, awaiting the writing a ruling. After the delivery of the said ruling, it then became necessary for the plaintiff to amend the plaint to enjoin the 2nd defendant to these proceedings and still, the 1st defendant never raised any issue with the non issue/service of summons to enter appearance. The 1st defendant went ahead and filed a statement of defence dated 20th June 2013 on 20th June 2013 as well as a list of witnesses and Notice to Claim against the 2nd defendant on the same date.
34. While I am of the view that the plaintiff has an obligation to ensure the summons to enter appearance is prepared and signed by the court to facilitate service upon the defendant, and that it is apparent that in this case the plaintiff did not follow up and or ensure the summons were signed/issued and collected for service, and that there is no indication that the plaintiff has applied for issuance (not reissue since there were no summons issued in the first instance), I find that the circumstances of this case do not warrant a dismissal of this suit for want of summons to enter appearance being issued/collected and or served upon the 1st defendant. Albeit the provisions of Order 5 are comprehensive and are couched in mandatory terms, parties must understand the purpose of issuance of summons to enter appearance which in this case, has been overtaken by events. Those events include the acknowledgment by the 1st defendant of the existence of this suit, the filing of notice of appointment, the filing of defence, list of witnesses and Notice of Claim against the 2nd defendant.
35. In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and six years having elapsed since this suit was instituted, it would be a traversity of justice to

dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in **Fredrick Kibet Chesire V Paymond W. Bomet (supra) case (2006) e KLR-** that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply.

36. In this case, whether the summons to enter appearance were served appears to be an issue which is being taken up rather too late in the day for not only has the defendant filed his defence but the matter has been listed severally at which point it was ably represented by advocates. It has not escaped my attention that consent orders were also recorded at one or other point during the subsistence of this suit between the plaintiff and defendant, allowing the joinder of the second defendant.
37. I reiterate that in this matter just like in the **Fredrick Kibet Chesire (supra)** case, the 1st defendant has fully participated in the proceedings including the application for injunction after filing notice of appointment of advocates and replying affidavit, culminating into the ruling of 21st September 2010 by Honourable Waweru J; entering into a consent with the plaintiff on the application for leave to amend suit to enjoin the 2nd defendant on 29th May 2013 before filing this application; and subsequently filing statement of defence and list of witnesses as well as Notice to Claim against the 2nd defendant.
38. That being the case, the 1st defendant's submission that summons to enter appearance is what invites the defendant to submit to the jurisdiction of the court, while that is absolutely correct, but it did submit itself to the jurisdiction of the court by full and active participation in the proceedings, hence the claim that the suit is a nullity in limine has absolutely no merit. Further, the 1st defendant has not demonstrated how its participation in these proceedings without being served with summons to enter appearance has been prejudicial to it.
39. I hold the view that what the 1st defendant seeks to rely on to defeat this suit and hence defeat justice for the plaintiff is what the overriding objectives of the Civil Procedure Act and Rules as well as Article 159(2) (d) of the Constitution, that justice shall be administered without undue regard to procedural technicalities, were intended to cure. To dismiss this suit in the circumstances that I have described herein in detail is unforgivable in this new constitutional dispensation and will be to deny justice for the plaintiff contrary to Article 48 of the Constitution and therefore oust her from the judgment seat of justice as well as to deny her a right to a hearing and fair trial espoused in Article 50(1) of the Constitution. Courts of law ought not to do injustice to the parties and I am not just about to do any injustice to any parties to this suit.
40. The Constitution commands the courts to, in the exercise of judicial authority which is derived from the people, to administer justice without regard to status and or procedural technicalities. All persons are equal before the law and therefore I must weigh the prejudice that is likely to be occasioned to either party if this suit is dismissed on the grounds provided.
41. In my view, the balance of convenience tilts in favour of the plaintiff who will be ousted from the judgment seat to ventilate her grievances if the suit is dismissed, as opposed to the 1st defendant who, despite swearing an affidavit that its only witness, a former employee Elizabeth Hinga who had necessary knowledge of the case had since left the bank, the 1st defendant went ahead and on 25th June 2013 filed a list of witnesses and listed one Stephen Kodumbe as its witness which means it still has a witness who is well versed with the matters in issue since a banking institution is a going concern and documents relating to bank transactions cannot be held

in custody of an individual but an institution whose memory cannot be said to have lapsed.

42. As earlier stated, there are two schools of thought on this issue of whether failure to issue and serve summons to enter appearance is fatal to the plaintiff's case and having considered the circumstances of this case, I am not persuaded by the decisions relied on by the 1st defendant namely; **Wairimu Mungai V Catherine Njambi Munya, Karandeep Singh Dhillon & Others V Nteppes Enterprises Ltd & Another, Tana Trading Limited V National Cereals & Produce Board; Anthony Wechuli Odwisa V Alfred Munyanganyi [supra]**, which are all decisions of this court hence none of them is binding on me and circumstances for each case are different. Although the rules are couched in mandatory terms, each case has to be decided on its own merits and circumstances vary. While in one case the court may proceed and dismiss the suit for want of summons, in another, the circumstances may dictate otherwise. As was held by Ringera J (as he then was) on issues of the mandatory or directory language used by the statutes and or rules, in **Standard Chartered Bank Ltd V Lucton (K) Ltd HCC 462 of 1997** (unreported).

“There appears to be a common belief by many in those courts that the use of the word “shall” in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word “shall” in a statute only signifies that the matter is prima facie mandatory. The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only.

43. Consequently, faced with two rival positions each supported by persuasive authority of this court, I would adopt the holding in the **Standard Chartered Bank Ltd V Lucton (K) Ltd (supra)** wherein the Learned Judge received some guidance from “*principles of statutory interpretation*” by G.P Singh, a former Chief Justice of Madhya Pradesh High Court in India who states this at page 242.

“The use of word “shall” raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration – such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word “shall” has, therefore, been construed as merely directory.”

44. None of the cases relied on by the applicant considered the above decision which though persuasive, serves the interest of justice since, like in the present case, the purpose of the requirement for summons to be issued and served upon the 1st defendant has been served and therefore overtaken by events.

45. The upshot of all the above expositions is that I find the 1st defendant's application not merited on all fours and I proceed and dismiss it with costs to the plaintiff respondent.

46. As this suit is quite old, I direct that all the parties comply with all pre-trial requirements under Order 11 within 45 from the date of this ruling. Mention 15th December 2015 to confirm compliance for pre-trial directions to be given. The Plaintiff/ Applicant to serve the respondent with a mention date.

Dated, signed and delivered at Nairobi this 10th day of November 2015.

R.E. ABURILI

JUDGE