REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 227 OF 2010

SANDHURST LIMITED……..….1ST PLAINTIFF

LANCASTER LIMITED ……..…….2ND PLAINTIFF

LANGATA ROAD ARCADE LIMITED …….3RD PLAINTIFF

REST VILLA LIMITED ……..…….4TH PLAINTIFF

- **VERSUS -**

KENYA COMMERCIAL BANK LIMITED ….....1ST DEFENDANT

EAST AND SOUTHERN AFRICAN TRADE

AND DEVELOPMENT BANK …….2ND DEFENDANT

TRITON PETROLEUM COMPANY LIMITED

(IN RECEIVERSHIP)……..…..……..3RD DEFENDANT

NELLEA LIMITED ……..…....4TH DEFENDANT

RULING

1. I have three applications before me. There is a notice of motion dated 22nd February 2012 taken out by the 1st and 2nd defendants to dismiss the action. The two defendants have also filed a motion dated 8th October 2012 to set aside an order of court dated 22nd August 2012. That order was in the plaintiffs' favour and required the court to "sign, seal and issue summons to enter appearance which were filed simultaneously with the plaint on 14th April 2010". Lastly, there is a notice of motion dated 17th October 2012 taken out by the 4th defendant. It also seeks, in the main, to set aside the order of court of 22nd August 2012 and to strike out the suit. The motions also seek to stay the filing of appearance and defence by the defendants.
2. In a synopsis, the applicants contend that there is no valid suit as no summons to enter appearance were taken out or served within the prescribed time. The applicants take up cudgels on the order of court of 22nd August 2012 directing the execution, sealing and issue of summons. They submitted that the order cannot lie. This is because the suit was filed on 14th April 2010. The

validity of summons thus expired a year later and no extension was made. The 4th defendant also raised another matter: the suit against the 3rd defendant was struck out and yet the summons now are meant to be served upon that defendant. The 1st and 2nd defendants also submitted that the application by the plaintiffs for issue of summons was a direct response to the motion for dismissal dated 22nd February 2012. Lastly, it was contended that the plaintiffs went to sleep on the action and the suit should be dismissed.

3. The plaintiffs have filed grounds of opposition and a replying affidavit both dated 8th November 2012. They are in reply to the 1st and 2nd defendants' notice of motion dated 8th October 2012. The affidavit is sworn by Cecil Miller, an advocate for the plaintiffs. There is no formal reply to the application dated 22nd February 2012 or the 4th defendant's motion dated 17th October 2012. The plaintiffs filed written submissions opposing all the three applications. In a nutshell, they state that the 4th defendant's motion is overtaken by events because it has filed and served a memorandum of appearance and statement of defence. The plaintiffs' counsel came on record on 20th July 2010. On 22nd August 2012, he filed a motion to have the summons issued, executed and sealed by the court. He denied being indolent. In his view, the plaintiffs had focused their energies on an interlocutory application for injunction filed with the suit. It was dismissed. A Notice of Appeal has been lodged. A ruling was delivered by the Court of Appeal on 29th June 2012 extending the time for filing of the Notice of Appeal. It is then that it dawned on the plaintiffs that summons to enter appearance had never been issued. The plaintiffs' position is that it was not their fault that summons were not sealed by the court. In their view, that is the work of the court registry. And since the original summons were not issued until after 22nd August 2012, the question of their validity or extension of validity is a misnomer. In their learned counsel's words, the plaintiffs were "quite ingenious" to get the summons sealed "within the law" and very quickly. To the plaintiffs, the court had jurisdiction to grant the orders made on 22nd August 2012. Lastly, the plaintiffs beseeched the court to act fairly and in line with the overriding objective to do justice. In this regard, it was submitted that the subject matter of the suit is land with substantial value "running into millions" and that no prejudice would be suffered by the defendants if the suit proceeds to trial.
4. I have heard the rival submissions. It is common ground that this suit was filed on 14th April 2010. It is also conceded by the plaintiffs that they simultaneously lodged with the plaint a set of summons to enter appearance. That is why they sought an order on 22nd August 2012 for the court to seal, sign and deliver the "summons …. filed simultaneously with the suit on 14th April 2010". Those summons were not signed until 22nd August 2012 as per the exhibit in the replying affidavit of Cecil Miller. The plaintiffs had moved the court ex-parte during the court vacation for those orders. The orders and record of the court before the Honourable Justice Isaac Lenaola were brief:

> *"Mrs Makasila for applicant.*
>
> *<u>By Court</u>*
>
> *Prayers 1 and 2 of the application dated 22.8.2012 is allowed as prayed. No orders as to costs".*

5. There is no record showing that the Judge was given the history of the matter or why the summons had not been issued over two years later or why the court was being commanded "to sign, seal and issue summons to enter appearance". The obvious impression created was that it was the fault of the court. Prayer 1 was to certify the motion urgent. Prayer 2 of the motion had sought the following order:

> *"That the honourable court do sign, seal and issue summons to enter appearance which were filed simultaneously with the plaint herein on 14th April 2010".*

6. Orders IV and V of the repealed Civil Procedure Rules (which were ruling at the time of filing this suit) required the plaintiff to file the summons with the suit. They provided an elaborate code for duration of summons, renewal and penalties for non-compliance. Failure to follow the code is a fundamental defect incurable by the inherent powers of the court. See *UdayKumar Chandulal Rajani and 4 others Vs Charles Thaithi*, Court of Appeal, Nairobi, Civil Appeal 85 of 1996 [1997] e KLR, *Nagendra Saxena Vs Miwani Sugar Mills Limited and 3 others*, Court of Appeal, Kisumu, Civil Appeal 261 of 2008 [2011] e KLR, *Kenya Industrial Estates Limited Vs Ogana & another* [2004] 1 E.A 96.
7. Without the summons there is no suit to proceed with. The nexus is obvious. It is the summons and their service that activate the suit: they bring the proposed defendants to defend the action by entering an appearance and defence within the prescribed time. It then behoves a plaintiff to ensure that the summons filed are signed, sealed and collected for service. Under order 5 rule 1 (6) of the new Civil Procedure rules 2010 the summons must be collected within 30 days of issue or notification. In default, the suit abates. That rule was not in force at the time the summons here were filed. But even under the repealed rules, it remained the duty of the plaintiff to file and pursue execution of summons. True, the actual execution or sealing of summons is the duty of the court: but courts by their very nature must be moved by a diligent plaintiff. The plaintiffs here did not do so. They were distracted by the interlocutory proceedings I mentioned earlier and forgot about the main suit. They would in my view have continued in their deep slumber were it not for the filing of the defendants' motion for dismissal dated 22nd February 2012. That is when the plaintiffs crafted an "ingenious" vehicle to quickly deliver the summons. That ex-parte motion during the court vacation on 22nd August 2012 was not ingenious at all. It misled the court substantially to defeat the defendants' motion. It is a classic case of abuse of court process. It is doubtful that the Judge had jurisdiction to grant it in the proposed terms.
8. That said, the court did order that the summons be signed, sealed and issued. Did that validate the summons and the suit? The defendants made arguments that since 24 months had passed without renewal of summons or an application for renewal, the summons were void *ab initio.* However, no summons here were ever issued. The question of renewal of validity is thus at large. What is clear to me is that the suit having lain dormant for 24 months from 14th April 2010 to 22nd August 2012 without summons, there was no suit to which the defendants could enter a defence. The appearance and defence filed by the 4th defendant were gratuitous: they could not cure that defect. And they cannot be the answer proffered by the plaintiffs that the motions for dismissal or stay are overtaken.
9. In *Mobile Kitale Service Station Vs Mobil Oil Kenya Limited and another* [2004] 1 KLR 1, the court was faced with a similar situation. Warsame J (as he then was) held as follows;

> *"The plaint was filed in court on 10/6/1999 and it is not in dispute that to date the plaintiff, has not taken out summons and no service of the said summons was effected on the defendants. It has been contended by the 1st defendant that it has not been possible to enter appearance and file its defence. In my calculation its now 4 years and 10 months since the suit was filed in court and in my understanding order 4 of the Civil Procedure contemplates that summons will be issued and served at the same time with the plaint. That duty according to order 4 rule 3 (5) is placed on the plaintiff. It is the responsibility of the plaintiff or his advocate to prepare the summons so that the Court may sign the document to give it validity. See order 4 rule 3 (1).*
>
> > *"When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein".*
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> *Order 4 rule 3 (3) "Every summons shall be accompanied by a copy of the plaint"*
>
> *According to order 5 rule 1 (7), the life span of summons is 24 months and after the expiry 24 months, if no application has been made to extend, 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 then there is*

nothing capable of being extended".

10. But that is only one side of the coin. In *Kenya Industrial Estates Limited Vs Mohamed Abdalla and another*, Malindi, High Court case 37 of 2012 [2012] e KLR Meoli J was of a contrary opinion. She delivered herself as follows;

> *"That if it was the intention of the makers of the rules to provide for the automatic abatement of suits in cases where summons to enter appearance are not filed with the plaint and extracted for service, they could have so provided.*
>
> *And secondly, that it does not follow automatically that the breach of any of those rules, without the express provision thereto, must lead to the most extreme consequence, in this case the rendering of the suit a nullity".*

I find the decision in *Kenya Industrial Estates Limited* case (supra) more persuasive and in tandem with the dictates of the constitution and the overriding objective of the court to do substantial justice to the parties.

11. The summons that were issued on 22nd August 2012 were the first or the original summons. For the reasons I have stated, I would have been inclined to set aside the order of 22nd August 2012. But I have to be careful before interfering with an order made by a Judge of concurrent jurisdiction in exercise of his discretion. Times have also changed. Order V (now repealed) or the current order 5 of the Civil Procedure Rules are subsidiary legislation made under section 81 of the Civil Procedure Act. Procedural rules have aptly been described as handmaidens and not mistresses of justice. The court is now enjoined by article 159 of the constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. The overriding objective of the court requires the court to dig deeper into the root of the dispute. The suit here relates to land and a dispute over legal charges created by the parties. In such contentious matters, counsel for the plaintiffs should have resisted the temptation to depone to the matters in his replying affidavit. They are best left to the parties. See *M'kiara M'mbijiwe Vs Frankline Mugambi and others* [2007] e KLR, *Small Enterprises Finance Company Limited Vs George Gikubu Mbuthia* Nairobi High Court case 3088 of 1994 (unreported) *Salim Alhamed Ali and another Vs Emag Ag* Nairobi, High Court case 1806 of 2000 (unreported). I am alive to the notion that such depositions may be allowed in interlocutory proceedings under order 19 of the Civil Procedure Rules. But that should be an exception rather than the norm.
12. The overriding objective however *"overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way".* See *Stephen Boro Gitiha Vs Family Finance Building Society & 3 others* Court of Appeal, Nairobi, Civil Application NAI 263 of 2009 (unreported). The court must then execute a delicate balancing act. Each case must be decided on its unique facts and circumstances.
13. The defendants here are pleading that this suit be summarily terminated. Considering the subject matter, I see no prejudice to the defendants that cannot be compensated by costs. And I am prepared to grant them thrown away costs. I remain alive that the overriding objective frowns upon such summary dismissal unless its basis is so fundamental as to have no alternative cure. See *Kenya Finance Company Limited Vs Richard Akwesera Onditi* Nairobi, Court of Appeal, Civil Appeal 329 of 2009 (unreported). Considering that the summons have been sealed pursuant to an order of court (notwithstanding the irregularity) and that they have been served, the dictates of justice demand that the suit proceed on its merits. Granted the unique circumstances in this case, setting aside the order of 22nd August 2012 or dismissing the suit would cause a serious miscarriage of justice.
14. In the end, I dismiss the defendants' notices of motion dated 22nd February 2012, 8th October 2012 and 17th October 2012. The plaintiffs shall however pay the 1st, 2nd and 4th defendants thrown away costs assessed at Kshs 20,000 each (total Kshs 60,000) to be paid within 30 days or before the next mention or hearing of the suit whichever is earlier. The 1st, 2nd and 4th defendants shall enter a formal appearance within 15 days of the date hereof and enter a statement of defence

within a further 14 days. The 4th defendant may nevertheless choose to retain the appearance and defence already on record. The plaintiffs shall be at liberty to reply to the defences within the prescribed time in the rules.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 1st day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. C. Miller for the plaintiffs.

Mr. G. Karungo for Mr.A. Gichuhi for the 1st and 2nd Defendants.

Mr. C.M. Chege for the 4th Defendant.

Mr. Collins Odhiambo Court Clerk.