



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

**Civil Case 399 of 1995**

**MARINA MACHINERIES (K) LIMITED.....PLAINTIFF**

**VERSUS**

**BANK OF BARODA (K) LIMITED. ....DEFENDANT**

**RULING**

By its amended Motion on Notice dated 23<sup>rd</sup> February 2005 and amended on 18<sup>th</sup> July 2005 expressed to be brought under the provisions of Order 8 rule 3 of the Civil Procedure Rules, Sections 3A and 63 of the Civil Procedure Act, filed in court on 20<sup>th</sup> July 2005, the defendant seeks the following orders:

- 1. That this application be certified as urgent.**
- 2. That pending the hearing of the application inter partes, there be a stay of the judgement delivered on 8<sup>th</sup> October 2004.**
- 3. That the judgement delivered herein on 8<sup>th</sup> October 2004 and all processes and proceedings from the date of inception of this suit be set aside.**
- 4. That a valid summons to enter appearance be served on the defendant.**
- 5. That costs of this application be provided for.**

The application is based on the grounds that the summons to enter appearance served on the Defendant is invalid and of no effect and all the subsequent proceedings herein including the judgement delivered on 8<sup>th</sup> October 2004 are a nullity and *coram non judice*; that due to the incurably defective Summons issued herein, this Honourable Court had no jurisdiction to hear and determine the issues arising out of the Plaintiff's suit and all the proceedings following the filing of the Plaint are a nullity; and the parties hereto appear to have proceeded herein being ignorant of the incurable defect of the Summons and under the mistaken belief that this Honourable Court had jurisdiction to hear and determine this suit.

The Motion is supported by **David Ogega Nyaboga**, a Senior Branch Manager of the Defendant herein on 23<sup>rd</sup> February 2005. According to the deponent, the Summons to Enter Appearance was served on the Defendant on or about 30<sup>th</sup> March 1995 together with the plaint in this matter. According to the said summons the defendant was required **within 10 days** of service thereof to enter appearance to the this suit in default of which the plaintiff would proceed with the suit leading to judgement in the absence of the defendant. On the advice from the defendant's legal adviser the said summons are in clear breach of the

provisions of Order IV rule 3(4) of the Civil Procedure Rules which renders the Summons totally invalid and of no effect. Therefore, according to the deponent, all the subsequent processes and proceedings herein including the judgement delivered on 8<sup>th</sup> October 2004 are a nullity and of no effect and the Court lacks jurisdiction to hear and/or determine the suit until a valid Summons is issued. The parties, it is deposed, appear to have proceeded in the mistaken belief that the Court had the jurisdiction to hear and determine the suit, oblivious of the fact that the Summons issued herein was incurably defective and of no consequence. Therefore, the deponent contends the Defendant is entitled to have the judgement and proceedings herein set aside *ex debito justitiae* as the same are based on a Summons which is a nullity. In any case, it is deposed, the Defendant has a good and a proper Defence to the Plaintiff's claim herein.

Apparently, this application was heard in the absence of the plaintiff and the application was allowed on 28<sup>th</sup> February, 2008. However, by its application dated 11<sup>th</sup> March 2008, the plaintiff applied for review of the said decision and by a ruling delivered on 11<sup>th</sup> of February 2011 the Court reviewed its decision dated 28<sup>th</sup> February 2008, set aside the said decision and directed that the amended Motion dated 18<sup>th</sup> July 2005 be heard afresh.

The plaintiff opposed the application by way of a replying affidavit sworn by **Jayendra R. Patel** on 4<sup>th</sup> April 2005. According to the deponent, this matter proceeded to full hearing during the course of which no issue was raised with respect to the validity of the summons and therefore it is amazing that it has taken the defendant 10 years to raise the issue of the validity of the summons. According to the plaintiff the term "within" could mean 10 days and not less. Since the matter is raised after the entry of the judgement, it is deposed that the Defendant's averment in the affidavit dated 23<sup>rd</sup> February 2005 are ill-timed and meant to defeat the due course of justice. The deponent's view is that once Judgement was delivered, the court became functus officio on the issue of summons which issue ought to have been raised on receipt thereof rather than to wait for 10 years and after judgement has been entered against the defendant. The averment that the Defendant has a good defence, according to the deponent, is a blatant lie based on procedural technicalities meant to revive an already determined matter. Since the defendant has already filed an appeal and sought for stay pending appeal, this application, it is submitted, amounts to an abuse of the court process. The applicant's application in so far as it seeks both setting aside and stay of judgement is, in the deponent's view, misplaced and an award of the reliefs sought would be ridiculous in the circumstances, frivolous and abuse of the process of the court.

The application was prosecuted by way of written submissions. According to the defendant, the summons to enter appearance which was served on the defendant was incurably defective and constituted an irregularity rendering the service a nullity and as such if allowed to stand would prejudice the defendant resulting in grave injustice. It is further submitted that at no time did the defendant waive his right to enter appearance and as such the Summons to Enter Appearance was not only irregular but a nullity. Due to the said defect, it is submitted that the jurisdiction of this Court was wrongly admitted therefore it cannot hear and determine the issues arising out of this suit since all the proceedings following the filing of the plaint are a nullity, The plaintiff, it is submitted, was gravely mistaken and ignorant of the fact that this court had no jurisdiction in the matter by proceeding with the case in this court. In support of the submissions the defendant relies on **Ceneast Airlines Limited vs. Kenya Shell Limited [2000] 2 EA 362; Patel vs. E A Cargo Handling Services [1974] EA; Church Commissioners of Kenya vs. Julia Ayengo & 4 Others [2006] eKLR; Erastus Adero Gogo vs. Nicodemus Waite Muraguri & 2 Others [2006] KLR.**

On the part of the plaintiff it is admitted that following the substantive hearing of both the plaintiff's and the defendant's cases, judgement was entered on 8<sup>th</sup> October 2004, after which the Defendant filed a Notice of Appeal against the entire judgement and Decree on 21<sup>st</sup> October 2004. The defendant, it is submitted, then filed a Notice of Motion dated 28<sup>th</sup> October 2004 seeking stay of execution pending appeal. After giving the history of this suit, the plaintiff submits that allowing the amended Notice of Motion dated 18<sup>th</sup> July 2005 as grounded would be offensive to the express provisions sections 19 and 28 of the Interpretation and General Provisions Act Cap 2 under which subsidiary legislation is stated to operate from the date of gazettment and in any case where it is expressed to apply retrospectively, no person is to be held liable in respect of an act committed or omission which took place before the gazettment of the legislation. According to the plaintiff prior to the year 1996 there was no proviso to

Order IV rule 3(4) of the Civil Procedure Rules under which it was expressly provided that the time of appearance is not to be less than 10 days. The proviso, it is submitted was introduced vide Legal Notice No. 5 of 1996. In this case, it is submitted the summons were issued on 15<sup>th</sup> March 1995 and therefore the subsequent amendment of Order IV rule 3(4) cannot be relied upon by the Defendant with a view to seeking the orders sought as that would be tantamount to the legal notice being applied retrospectively to the detriment of the plaintiff. Support for this line of submissions is sought from **Kenya Collodis Ltd vs. The Owners of M V Teleorman Mombasa HCCC No. 71 of 2006 [2006] eKLR**. It is further submitted, without prejudice to the foregoing, that the defendant having entered an unconditional appearance and made substantive representations in the suit on numerous occasions with a view to protecting its interests by substantially conducting defence hearing upon the close of the Plaintiff's case without raising the issue of the validity of the summons acquiesced into the hearing process notwithstanding the invalidity of the summons and hence the doctrine of waiver and/or estoppel applies in the extended sense to stop the Defendant from raising the issue 10 years after service of the summons. The defendant relies on the case of **Nanjibhai Prabhudas & Company Limited vs. Standard Bank Limited [1968] EA 670** and submits that the test to be applied is whether the irregularity has caused a failure of justice and where no such injustice is caused there is no point in setting aside the entire judgement and process. Based on the same decision, it is submitted that delay also constitutes a waiver. The plaintiff similarly relies on **Hussein Mohamed Awadh vs. First American Bank of Kenya Limited Mombasa HCCC No. 445 of 2001** for the holding that by entering unconditional appearance the defendant waived the right to raise the irregularity; that the test where the summons are invalid is the purpose of fixing time to enter appearance which is to give the Defendant sufficient time to enter appearance; that if time specified in the summons is less than that specified in the rules the court is bound to set aside the summons but where an appearance is entered pursuant thereto before judgement, there is no sense in setting the same aside; and that a defect is excusable where no prejudice suffered. Taking into account the history of the matter it is submitted that the Defendant has been indolent thus occasioning delay. Since the effect of amendment is to supersede the original pleadings, it is submitted on the authority of **Mutuku & 3 Others vs. United Insurance Company Limited [2002] 1 KLR 250**, that the amended Notice of Motion in so far as it relies on the affidavit in support of the original Motion is bad in law and is technically not supported by an affidavit contrary to the provisions of the Civil Procedure Rules. In the absence of authorisation of the deponent of the said affidavit under corporate seal, it is the plaintiff's contention based on **Affordable Homes vs. Ian Henderson & 2 Others [2004] 2 KLR 473**. Again the said affidavit is also defective in that it does not contrary to the holding in **Kisya Investment Limited** specify what facts are based on information, knowledge and/or belief. With respect to the decisions relied upon by the defendant, it is the plaintiff's submissions that they are distinguishable on the ground that the issue of validity of summons was dealt with without the benefit of submissions; that the partes were not subjected to the process of hearing; and that defence was not filed after the lapse of 10 days as in the present case. Accordingly the plaintiff submits that the application ought to be dismissed with costs to the plaintiff.

Since the promulgation of the current Constitution on 27<sup>th</sup> August 2010, the starting point in cases where procedural flaws are alleged is Article 159(2)(d) which provides that in the exercise of judicial authority, which authority is derived from the people and vests in, and is to be exercised, by the courts and other tribunals established by or under the Constitution, the courts and the tribunals shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The law on the consequences of procedural lapses was adumbrated in the case of **Nanjibhai Prabhudas & Company Limited vs. Standard Bank Limited [1968] EA 670** in which it was held as follows:

**“It does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. The practical difference between an irregularity and a nullity is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgement on a writ which has never been served and one in which there has been a defect in the service but the writ had come to the knowledge of the defendant”.**

The question therefore where there is an allegation of defect is whether the defect is just an irregularity which is not fatal to the proceedings or the defect is so fundamental that it goes to the root of the matter in which case it renders the proceedings a nullity. The distinction between the two is not always an easy one. It has therefore been held that if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there, as it will collapse. But if an act is only voidable, then it is not automatically void as is only an irregularity, which may be waived and is not to be avoided unless something is done to avoid it. There must be an order of the Court setting it aside: and the Court has the discretion whether to set it aside or not and it will do so if the justice of the Court demands and not otherwise meanwhile it remains good and a support for all that has been done under it. See *Association of Member Episcopal Conference in East Africa (Amecea) vs. Alfred Roman T/A Romani Architects & Others Civil Appeal (Application) No. 22 of 2001*; *Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75*; *Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172*.

The *locus classicus* on procedural irregularities is the case of **Boyes vs. Gathure [1969] EA 385**, which was followed in **Satakam Industries Ltd. vs. Barclays Bank of Kenya Ltd & Another Kisumu HCCC No. 17 of 2003** in which it was held that:

**“Where summons to enter appearance though not filed with the plaint was subsequently filed and served and the defendant has not demonstrated any prejudice save for the non-compliance with the rule, it cannot be said that the suit is invalid as Courts should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a fundamental nature and matters of procedure are not normally of a fundamental nature”.**

The question that has to be tackled in the present circumstances is whether the failure to provide in the summons a period more than 10 days in which to enter appearance amounted to the proceedings emanating therefrom being a nullity.

The plaintiff’s position is that the requirement that the time for appearance be not less than 10 days was introduced by the Legal Notice No. 5 of 1996 after this suit had been instituted. I have confirmed that that is the correct position. Section 27(1) of the Interpretations and General Provisions Act Cap 2 Laws of Kenya provides as follows:

**All subsidiary legislation shall, unless it is otherwise expressly provided in a written law, be published in the Gazette, and shall come into operation on the day of publication, or, if it is enacted either in the subsidiary legislation or in some other written law that the subsidiary legislation shall come into operation on some other day, on that day, subject to annulment where applicable.**

It is not in doubt that the Civil Procedure Rules are made by the Rules Committee pursuant to the powers conferred upon that Committee by section 81 of the Civil Procedure Act. Therefore ordinarily the Civil Procedure Rules unless expressly applied retrospectively by virtue of section 28 of the Cap, come into operation on the date of publication in the Kenya Gazette. Section 28 aforesaid provides as follows:

**Subsidiary legislation may be made to operate retrospectively**

**to any date, not being a date earlier than the commencement of the written law under which the subsidiary legislation is made, but no person shall be made or become liable to any penalty whatsoever in respect of an act committed or of the failure to do anything before the day on which that subsidiary legislation is published in the Gazette.**

In my view even in circumstances where the subsidiary legislation is to operate retrospectively, its application does not affect the acts or omissions which were committed or omitted before the same was published. It is therefore clear that the amendment of the Civil Procedure Rules vide Legal Notice No. 5 of 1996 could not apply to summons in this case which were issued on 15<sup>th</sup> March 1995. Accordingly the cases of **Ceneast Airlines Limited vs. Kenya Shell Limited; Erastus Adero Gogo vs. Nicodemus**

**Waite Muraguri & 2 Others; Church Commissioners of Kenya vs. Julia Ayengo & 4 Others** are distinguishable from the present case.

The above finding would have been sufficient to dispose of the present application. However, in fairness to counsel, I will deal with the other issues raised for completeness of the record.

First and foremost it must be kept in mind that the document that ordinarily initiates civil proceedings is the plaint and not the summons to enter appearance. Order 3 rule 1(1) (formerly Order IV rule 1) of the Civil Procedure Rules provides:

**Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.**

Apart from the foregoing the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to section 1A(2) “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In **Stephen Boro Gittha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009**, the Court of Appeal held *inter alia* that:

**“the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.**

The same Court in **Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010** held that:

**“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case”.**

In **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court expressed itself as follows:

***“the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act..The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”.***

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of

the said provisions. This does not mean that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective. However, it is important to point out that all the decisions relied upon by the defendant were delivered before the advent of the overriding objective. The overriding objective is aimed at *inter alia* the just determination of the proceedings. Can it be said that in a matter where has proceeded to full hearing and both parties have been afforded an opportunity to adduce evidence and a judgement is delivered on merits the Court would in setting aside the same proceedings on the grounds that the summons provide for fewer days than stipulated, be striving to attain the just determination of the said proceedings? In my view that argument would defeat the very spirit of the enactment of sections 1A and 1B aforesaid as well as Article 159(2)(d) of the Constitution under which the Court is enjoined in exercising judicial authority under the Constitution to be guided by the principles *inter alia* that justice shall be administered without undue regard to procedural technicalities. One of the reasons, in my considered view, that informed the decision to make the aforesaid Constitutional provision was the outcry by the Kenyan people that the Courts were deciding matters on technicalities rather than on substance. Therefore in light of the current constitutional dispensation as well as statutory provisions I would be reluctant to uphold decisions which clearly run contrary to the said overriding objective as well as the said Constitutional provision.

Apart from the foregoing the decision whether or not to set aside is purely discretionary, the main consideration being that of justice. The discretion, it is now trite, is intended to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. A person who sits back and participates in proceedings which in his view are irregular cannot be heard to complain after the determination of the said proceedings if the outcome is not in its favour. The reason for stipulation of a specific timeline within the summons to enter appearance is to ensure that a defendant has adequate time within which to enter appearance and hence ensure the realisation of the provisions of Article 50 Clause (1) of the Constitution under which every person's right to have any dispute that can be resolved by the application of law decided in a fair and public hearing is protected. Where the parties to a suit have been brought to court in such manner as to avoid any question that his right to a fair hearing was infringed, he cannot fall back on technicalities such as the one being raised herein to scuttle an otherwise properly conducted proceedings in which he freely participated. To set aside a judgement based on defects in summons which parties by the conduct decided not to take an issue with in the circumstances of this case would not, in my view, amount to a proper exercise of judicial discretion conferred upon the court under the Civil Procedure Rules. Although estoppel and waiver do not operate against the statutes since the former are principles of equity, looking at the statutory and Constitutional provisions relevant to this case, I am not prepared to sacrifice the said statutory and Constitutional provisions at the altar of the subsidiary legislation (the Rules).

It is therefore my view and I so hold that the defect, if there was any, was a mere irregularity which did not go to the jurisdiction of the Court and did not prejudice any of the parties to the suit and was waived by the conduct of the parties by the entry of an unconditional appearance and the inter parties hearing of the suit.

In the result amended Motion on Notice dated 23<sup>rd</sup> February 2005 and amended on 18<sup>th</sup> July 2005 fails and is dismissed with costs to the plaintiff.

Ruling read, signed and delivered in court this 5th day of October 2012.

**G.V. ODUNGA**  
**JUDGE**

In the absence of the parties