



## REPUBLIC OF KENYA

**ORESTE MAINA MITAMBO ::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**SAMUEL OCHILO SUJI ::::::::::::::::::::::::::::::: 1<sup>ST</sup> DEFENDANT**

**CROWN CORK COMPAY (E.A) LTD ::::::::::::::::::::::: 2<sup>ND</sup> DEFENDANT**

## RULING

The plaintiff/respondent moved to this court by way of plaint dated 30<sup>th</sup> day of December 1998 and the same was filed on 31.12.1998

The copy of the summons on the Court record reveals that the same were sealed and issued by the Deputy Registrar on 4<sup>th</sup> January 1999.

The defendant was served and entered appearance on the 8<sup>th</sup> day of March 2005 and filed the same on 9<sup>th</sup> March 2005 simultaneously with the filing of the defence also dated 8<sup>th</sup> March 2005 and filed the same on 9<sup>th</sup> March 2005.

Shortly thereafter the defendant moved to the court vide an application dated 8<sup>th</sup> June 2005 and filed on 9<sup>th</sup> June 2005. It is brought by way of chamber summons brought under Order V rule 1 and 32, order VI rule 13(1)(d) and 10 of the Civil Procedure Rules and all enabling provisions of the law. The application seeks two orders namely:-

- (1) the plaint filed in this case be and is hereby struck out.
- (2) The cost of the suit and the application be awarded to the defendants.

The grounds in support are in the body of the application, supporting affidavit and oral submissions in court. The major ones are that:-

- (1) the summons were served upon the defendant 6 years after their issuance.
- (2) By reason of what is stated in number 1 above, there is no proper service.
- (3) By reason of there being no proper service and since the summons were served 6 years later, the said service was not proper as the summons had expired.
- (4) By reason of what is stated in number 3 above, the suit should be deemed to have abated and therefore its continued existence is an abuse of the due process of the court, and is therefore a proper candidate for striking out and it should be so struck out.

- (5) The life span of summons is 12 months and as that period expires, the applicant is obligated to apply for extension of that period before service of the same can be effected.
- (6) They seek that the court, should proceed to strike out the said suit which exists only on papers as the same has abated.
- (7) Their allegations have not been controverted

In response thereof the respondent/plaintiff put in grounds of opposition dated 19<sup>th</sup> day of October 2006 and filed on 19<sup>th</sup> October 2006. 7 (seven) grounds are listed namely:-

- (i) the application lacks merit
- (ii) the application does not lie in law
- (iii) the application is misplaced
- (iv) the application has been overtaken by events
- (v) the application is fatally defective
- (vi) the application has no legal basis
- (vii) the application is frivolous, vexatious and/or otherwise an abuse of the process of the court.

In their submission in court they reiterated the grounds of opposition and they stressed the following:-

- (1) That since the defendants filed a notice of appearance and defence, the filing of those processes puts to rest the issue of summons.
- (2) The defendants did not enter appearance nor filed defence under protest, and as such since issues of summons were not raised then, they cannot be vested now.
- (3) The defendants are estopped from trying to dig up any problems they may have had with the summons.
- (4) They contend a plaint is distinct from the summons and any invalidity of the summons should not affect the plaint.
- (5) They assert the application has been overtaken by events by the applicant's own conduct as they should have raised objection before the filing of the memo of appearance and defence.

In reply, counsel for the applicant reiterated that from the submissions, it is clear that there is no doubt that the summons expired before service.

- (ii) There is no cure for such summons if they were not extended before service.
- (iii) They entered appearance and filed defence because they wanted to prevent entry of judgment against them and also to gain locus standi to object.

On the courts assessment of the facts herein, there seems to be a consensus side, that summons to enter appearance were not served within the 12 months stipulated in the rules. They were therefore stale and invalid and as such the suit stands faulted.

The defendant on the other hand does not appear to contest the fact that summons were served while beyond their 12 months life span period, and without an extension. They have contended that the

applicant's entry of appearance without protest cured that defect.

In response counsel for the applicant stated that they entered appearance in order to gain locus standi to object them and the serve of an invalid summons.

To resolve this the court has no alternative but to go to the rules. Order V rule 1(1) specifies clearly that the life span of any summons issued by court, is 12 months. Sub rule 2 gives power to the court, to extend the summons from time to time if the court, is satisfied that it is just to do so under sub rule 7, where no application has been made under sub rule (2), the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.

Herein the court did not move on its own to strike out the said plaint after expiry of 24 months, upon the lapse of the summons. It is the defendant/applicant who has moved the court under order VI rule 13(1) (d) of the Civil Procedure Rules. These provides:-

*"13(1)(d) At any stage of the proceedings, the court, may order to be struck out or amended any pleading on the ground that:- (d) it is otherwise an abuse of the process of the court".*

The court having agreed with the assertion of the applicant that service of summons were invalid and the plaintiff/respondent not denying this fact, but saying that it is excusable, in this court's opinion, his pleading can only escape the axe, if it can be demonstrated that the law allows such an error to be excused. No provision of law was cited by the respondent nor case law to show that the defaults herein is excusable. The court, agrees with the contention of the applicant/defendant that the only cure to an invalid summons is an extension of time within which to serve the same which action was not complied with.

The respondent has submitted that the principle of estoppel applies but no authority was cited. This court doubts if this principle can apply to shield an illegality and nullity.

It is against the above set out background information that the defendant/applicant has moved the Court to strike out the plaint for being an otherwise abuse of the due process. They have contended that indeed they realized that summons served on them were invalid nonetheless, they entered appearance and filed defence solely to gain locus standi in the matter so as to object and also to prevent entry of judgment against them. In this court's opinion this is a reasonable explanation indeed the papers were not filed under protest, but they fact that the papers were filed in March 2005 and 3 months later an application was filed is sufficient point of protest. They swift action taken negatives acquiesce. In any case this court has judicial notice of the fact that it is now trite law that parties cannot excuse illegalities and confer jurisdiction where non exists.

In the circumstances of this case a pleadings of a party who has served summons out of time, and upon that fact is brought to his attention, takes no steps to rectify the error, and instead purports to rely on the doctrine of estoppel which is not even available, goes even further to aggravate the matter by filing grounds of opposition, instead of filing an affidavit explaining the default, and making suggestions of how the default can be remedied, such a litigant does not warrant to receive mercy from the seat of justice. The only appropriate order is to strike out the plaint with costs to the defendant/applicant both for the suit and the application Ruling otherwise would be tantamount to condoning and naturing illegalities and nullities, more so when the respondent has shown no remorse, neither is he making amends by promising to take appropriate steps to rectify the default so as to regularize the pleading and have the matter disposed off on merit.

The defendants application dated 8.6.2005 and filed on 09.06.05 be and is hereby allowed with costs as prayed.

Dated, read and delivered at Nairobi this 3<sup>rd</sup> day of October 2008.

**R. N. NAMBUYE**

**JUDGE**