



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 27 OF 2018

NATIONAL OIL CORPORATION OF

KENYA LIMITED ::: PLAINTIFF

VERSUS

SOMKEN PETROLEUM COMPANY LIMITED :::::::::::::::1ST DEFENDANT

JULIA MUTUMBI ::::::::::::::::::::::::::::::::::::::: 2ND DEFENDANT

FABIAN LIJOODI (*sued as legal representative*

***of the late Isaac Mutumbi Lijoodi*) ::::::::::::::::::::::: 3RD DEFENDANT**

BRIAN LIJOODI ::::::::::::::::::::::::::::::: 4TH DEFENDANT

RULING

The first application is dated 25th July 2014 for an order that:-

1. The plaint herein as against the first defendant be struck out with costs to the first defendant.
2. Alternatively, the plaintiff do show cause why the suit as against the first defendant should not be dismissed for want of prosecution.
3. The plaintiff do pay to the first defendant the costs of this application.

The grounds are that no summons was served on the first defendant with the plaint and hence the suit against the first defendant has abated. The first defendant cannot take any steps in this suit as it has not been served with the summons. The plaintiff has for over one year and 2 months not taken any steps to prosecute this case. This matter was last in court on 18th April, 2013 when Mr. Justice Saidi Juma Chitembwe delivered the ruling in respect of the plaintiff's application dated 7th December, 2010 on behalf of Mr. Justice Thurairaja Jaden. The delay in prosecuting this case is inordinate and incalculable.

The second application is the plaintiff's application dated 17th November 2014 and it seeks an extension of time to extend the validity of the summons to enter appearance. The plaintiff submitted that, the Plaintiffs suit was filed on 8th December, 2010 by way of a Plaint dated 7th December, 2010 together with a Chamber Summons Application dated 7th December, 2010. That the said Application was served on the Defendant's Advocates on 9th December, 2010. That thereafter summons to enter appearance were issued by this Honourable Court on 17th December, 2010. The same were subsequently served on all the 2nd, 3rd and 4th Defendants by one Wycliff Okutoyi Omukuba. He annexed thereto true copies of the Summons to Enter Appearance and Affidavits of Service thereof marked "HN-1".

That following service, the 4th Defendant entered appearance and filed its Statement of Defence in the matter. He annexed thereto a true copy of the Memorandum of Appearance and Statement of Defence filed by the 4th Defendant marked "HN-2". That the Plaintiffs Counsel on record took out summons to enter appearance against the Defendant. Inadvertently the same were not served on the Defendant as they were overlooked by mistake. He annexed thereto a true copy of summons to enter appearance and a forwarding letter marked that in any event, the 1st Defendant's Advocates upon being served the Chamber Summons Application on 9th December, 2010, the said Advocates filed a Notice of Appointment on 21st December, 2010 both for purposes of the chamber summons and "of this suit" (emphasis supplied). That subsequently the 1st Defendant filed a Chamber Summons Application dated 16th December, 2010 seeking to stay the suit pending the

reference of the dispute arising between the Plaintiff and the 1st Defendant to arbitration. He annexed thereto a true copy of the Chamber Summons Application marked “HN-5”. That the said Chamber Summons Application was argued and in a ruling delivered on 4th July, 2011, the said Application was dismissed with costs. He attached thereto a true copy of the ruling of this Honourable Court marked “HN-6”. That subsequently, the Plaintiffs Application was canvassed on 11th June, 2012 and on 26th September, 2012. The ruling was reserved for 22nd November, 2012. The ruling was not delivered until 18th April, 2013. He annexed thereto a true copy of the ruling and order of this Honourable Court marked “HN-7”.

That subsequently the Plaintiff took time to ensure service of the court orders and commenced the process of enforcement of the orders of this Honourable Court. He annexed thereto a bundle of correspondence in respect thereof marked “HN-8”. That before the orders issued by this Honourable Court could be executed, the 4th Defendant filed a Notice of Motion Application dated 26th February, 2014 and filed on 13th March, 2014 seeking to review, vary and/or set aside the orders of this Honourable Court made on 18th April, 2013. That the 4th Defendant's Application aforesaid was slated for hearing on 3rd June, 2014. On the said date, the hearing of the said Application was adjourned to 6th October, 2014 on the grounds that the 4th Defendant had not filed a complete set of the Application, Supporting Affidavit and Annexures. That on 6th October, 2014, the said Application could not proceed as the learned trial Judge was on transfer. The 4th Defendant's Application was subsequently fixed for hearing on 2nd December, 2014. That the 1st Defendant's Application herein was filed while the Application by the 4th Defendant was pending for hearing and determination. In view of the foregoing, the allegation that the last time this matter was last in court was 18th April, 2013 is not correct. That in view of the foregoing, it is also not true that no steps have been taken in this matter to prosecute this case as alleged because the Plaintiff cannot set down the suit for hearing before the determination of the 4th Defendant's Application which is scheduled for hearing on 2nd December, 2014. That the 1st Defendant having been served with a Complaint and Chamber Summons Application in this matter, nothing stopped the 1st Defendant from proceeding to file and serve its Statement of defence in the matter. That the true purpose of the summons to enter appearance is to notify parties of the existence of the suit and invite them to participate and in view of the fact that the 1st Defendant had notice of this suit and had participated in the proceedings, the Plaintiff's failure to effect service of summons to enter appearance ought not to render the suit a nullity.

The 1st defendant submitted that if the summons were issued on 17th December 2010, the summons were valid for a period of 12 months as provided for under order 5 Rule 2 of the Civil Procedure Rules, 2010. The validity of the summons lapsed on 16th December, 2011. The plaintiff did not serve the summons as required and neither did it make any application to have the summons extended within the first twelve months. At the time of the filing of the first defendant's application, almost four years had passed since the issuance of the summons but no application for extension had been made. The failure by the plaintiff to serve summons or renew their validity within the prescribed period is fatal to a suit. The provisions of the Civil Procedure Rule, 2010 are very clear. Unless summons are renewed within the first twelve months, they expire. A court cannot therefore be called upon to extend what has since expired. They on the case of National Bank of Kenya Ltd, v. Syntax Printers Limited & 2 Others [2006] eKLR where the court held that; guidelines in this country are very well laid down in the aforementioned Rule and in my mind, our legal provisions are very clear in that unless summons are renewed within the first twelve months, they expire. A party who does not seek to have the validity of his summons extended within those first twelve months does so at his peril, and it is his humble opinion no court would have discretion what is no longer alive.”

Under Order 5 Rule 2(7) of the Civil Procedure Rules, 2010 where no application for extension has been made in the 24 months following the issuance of summons, the court may without notice dismiss the suit.

In the present case, the plaintiff only made an application for extension of the validity of the summons after the first defendant had filed its application to strike out the suit. This is after a period of about three years and eight months since the summons were issued. This is a clear indication that the application was made only as an afterthought. The first defendant submits that the application for extension of the validity of the summons is incompetent for the reason that the court does not have power to extend expired summons. There are no valid summons capable of extension.

The first defendant relies on the case of Erastus K Wameya & 4 Others v. Jotham Wabomba & another [2008] eKLR, where it was held that;

“In my understanding of that quotation, a summons may only have its validity extended whilst it was still valid. Therefore, if a plaintiff failed to seek the extension of the validity before the summons expired, he could not do so thereafter in my considered opinion, that issue is well settled. However, it must be appreciated that all those authorities make reference to the issue of extension of validity of summons. That must surely presuppose that summons were valid in the first instance. It is only then that the validity thereof could be extended. ”

They also rely on the case of John Mwangi Kigotho v. Moses Waswa [2009] eKLR. The failure by the plaintiff to effect service of the summons is a fundamental defect that cannot be cured by section 1 A, IB and 3 A of the Civil Procedure Act. In the case of Udaykumar Chandulal Rajani & 3 Other v. Charles Thaithi (1971) eKLR, the court held as follows;

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure. ”

Whether the Notice of appointment filed by the first defendant's advocates is an appearance.

1. It has been stated by the plaintiff's advocate that the notice of appointment that was filed by the advocates by the first defendant was for purposes of the application for injunction dated 7th December 2010 and the suit. For this reason, the plaintiff alleges that nothing stopped the first defendant from filing its defence. According to the defendant, the only purpose of the summons is to notify a defendant of the

plaintiff's suit and no prejudice is suffered by failure to serve the summons. This is not true.

A notice of appointment cannot be deemed to constitute appearance as contemplated under Order 6 rule 2 of the Civil Procedure Rules, 2010. An appearance is in a prescribed form which is provided for in the Act. The first defendant only filed a notice of appointment together with an application seeking to stay the proceedings in this matter and refer the matter to arbitration. This was not done in error. The first defendant, being conscious of the provisions of the law did not intend to appear in the matter unless properly invited.

In the case of *Lee Mwathi Kimani v. National Social Security Fund & Another* [2014] eKLR it was held that;

“..... Service of summons is a vital step in initiating litigation and thus until summons is properly served the defendant has no valid invitation to defend the suit. Besides, the plaintiff in initiating and commencing the suit ought to be prepared and ready to abide with the rules of engagement and service of summons on the defendant is one of the primary requirements.”

The notice of appointment was filed in order to protect the interests of the first defendant and opposing the plaintiff's chamber summons dated 17th December 2010. (*Lee Mwathi Kimani vs. National Social Security Fund & Another supra*). It cannot be argued that the first defendant entered appearance by virtue of filing a notice of appointment. If the plaintiff was satisfied that the notice of appointment was a sufficient form of an appearance for purposes of defending the suit, why has it not applied for interlocutory judgment? The first defendant submits that an interlocutory judgment could not have been entered without proof of service of summons to enter appearance. The suit should be dismissed for want of prosecution. They refer the court to the following decision on dismissal for want of prosecution. *Nilani versus Patel & others* [1969] E.A 340, the court held that:

“Delay in these cases is much to be deplored. It is the duty of the Plaintiff's advisors to get on the case. Every year that passes prejudices a fair trial. That is so. Witness may have died where a period of over nine years have elapsed (as in the case here), documents may have mislaid, lost or destroyed and memory tends to fade...”

This court has considered both the applications and the submissions herein. The first defendant's application dated 25th July 2014 seeks to strike out the plaint against the first defendant or alternatively to dismiss the suit for want of prosecution. The plaintiff's application dated 17th November 2014 seeks an extension of time to extend the validity of the summons to enter appearance.

The plaintiff has admitted in the replying affidavit of Hiram Nyaburi, advocate filed on 24th November, 2014 that the summons were not served upon the first defendant inadvertently by mistake. In the affidavit of Shirley Gulenywa, advocate filed in support of the application to strike out the suit, the first defendant's position is that no summons were issued as against the first defendant. It took the plaintiff over four years to take out summons which had been submitted to court on 8th December 2010. The result of this omission on the part of the plaintiff that the plaintiff's suit against the first defendant has abated.

The plaintiff has admitted through its advocates that it took out summons against the first defendant. The summons were issued on 17th December 2010 (exhibit HN3). The plaintiff's advocate has admitted that the summons were mistakenly not served. It is on record that the 1st Defendant did file a notice of appointment of advocates in court on the 21st December 2010 together with an application to staying these proceedings pending arbitration. In view of the fact that the 1st Defendant had notice of this suit and had participated in the proceedings, the Plaintiff's failure to effect service of summons to enter appearance ought not to render the suit a nullity.

Order 5 rule 1 provides thus:-

Where a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.

Order 5 rule 1(3) provides Rule 1 (3) provides

Every summons shall be accompanied by a copy of the plaint.

Order 5 Rule 1 (5) provides:-

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

Order 5 Rule 1(6) provides:-

Every summons except where the court is to effect service shall be collected for service, within thirty days of issue or within thirty days of issue or notification, whichever is later failing which the suit shall abate.

The significance of service of summons to enter appearance on a defendant is clear on review of order 6 rule (1) and order 7 rule 1.

Order 6 (1) provides:-

Where a Defendant has been served with summons to appear he shall unless some order be made by the court file his appearance within the time prescribed in the summons.

Order 7 (1) provides:-

Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service .

In the case of **Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009** the Court of Appeal 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”*

In a similar case the Court of Appeal ruling in the case of **Kihonge Nganga & 2 others – vs- Kenya Commercial Finance Company Ltd C.A N. NAI 309 OF 1997** where the court of Appeal in exercise of its discretion granted the Applicant an extension of time to serve the record of Appeal on the Respondent where owing to an oversight, service of the record of appeal was out of time by a period of 7 days.

The overriding objectives under Section 1A and 3A of the Civil Procedure Act and principles set out in by Article 159 (1) of the Constitution of Kenya to administer justice to the parties in this matter without undue regard to procedural technicalities, justice demands that this matter be determined on its merits. It follows then that all the overriding objective decisions must now be looked at in the light of the said provisions. This is not to say that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective. I find that the application dated 25th July 2014 has no merit and I dismiss it with no orders as to costs. In the exercise of my discretion I find the application dated 17th November 2014 has merit and I grant the following orders;

1. That summons to enter appearance against the 1st Defendant to be reissued and served within the next 14 days
2. Costs of this application to the 1st Defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE