



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 118 OF 2015

MARGARET NJOKI MIGWI.....PLAINTIFF/RESPONDENT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

This ruling is in respect to the defendant's Notice of Motion dated 12th February 2016 and seeking the substantive order that the plaintiff's suit be struck out with costs.

The main ground upon which the order is sought is that whereas the plaintiff filed this suit on 17th October 2011 together with an application for injunction under certificate of urgency, the summons to enter appearance have never been taken out nor served upon the defendant as required in law and therefore this suit is an abuse of the Court process and should be struck out.

The application is supported by the affidavit of **CYRUS WAHOME** the defendant's Recovery Officer – Legal in which he had deponed, inter alia, that summons must be taken out within 30 days of filing and served within one year failure to which they are deemed to have expired. This suit has therefore abated and should be struck out as it is an attempt by the plaintiff to avoid her contractual obligations.

The application is opposed by the plaintiff **MARGARET NJOKI MIGWI** who has sworn a replying affidavit in which she has deponed, inter alia, that her advocate then on record, through an inadvertent mistake, failed to prepare the summons as envisaged under the provisions of ***Order 5 of the Civil Procedure Rules***. However this suit has been active with numerous applications including an appeal to the Court of Appeal in Nyeri. That having been aware of this fact, the plaintiff has since moved with speed and served the defendant's advocate with the summons. That it would be unfair to visit the mistake of her advocate on her. She therefore urges the Court to be guided by the greater interests of justice as envisaged under ***Articles 159 (d) and 50 (1) of the Constitution*** as well as ***Section 1A, 1B and 3A of the Civil Procedure Act***.

The application was canvassed by way of written submissions which have been filed by the firm of **WALKER KONTOS ADVOCATES** for the defendant and **MUTUA MATHUVA ADVOCATES** for the plaintiff.

I have considered the application, the rival affidavits and the submissions by counsel.

It is not in dispute that this suit was filed on 17th October 2011 through the firm of advocates **MUTUNGA & MUINDI** then acting for the plaintiff. Simultaneously with the filing of the plaint, an application seeking injunctive orders against the defendant was filed and served on 18th October 2011 together with a copy of the plaint. It is also not disputed that the plaintiff's then advocates did not prepare

the summons to enter appearance as required under **Order 5 (1) of the Civil Procedure Rules**.

The issue for my determination is whether this Court should strike out the plaintiff's suit.

Order 5 Rule 1 of the Civil Procedure Rules provides as follows:-

1 (1) "When a suit has been filed, summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the Judge or an officer appointed by the Judge and shall be sealed with the seal of the Court without delay, and in any event not more than thirty days from the date of filing suit.

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

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

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

(6) 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".

In arguing me to strike out this suit, counsel for the defendant has cited the following cases:-

1. LEE MWATHI KIMANI VS NATIONAL SOCIAL SECURITY FUND & ANOTHER 2014 e K.L.R (NBI ELC CASE No. 250 of 2010).

2. DINAH WASIKE TULINGE & TWO OTHERS VS CO-OPERATIVE BANK OF KENYA LTD & TWO OTHERS.

3. NATIONAL BANK OF KENYA LTD VS SYNTAX PRINTERS LTD.

4. TANA TRADING LTD VS NATIONAL CEREALS & PRODUCE BOARD (NBI H.C.C.C No. 406 of 2010).

5. GRACE WAIRIMU MUNGAI VS CATHERINE NJAMBI MUYA (NBI ELC CASE No. 584 of 2011).

The above cases were all decided by the High Court and the Environment and Land Court. What runs through all of them is that where the plaintiff has not taken out summons in accordance with the provisions of **Order 5 of the Civil Procedure Rules**, there can be no competent suit. In all those cases, therefore, the Courts proceeded to strike out the plaintiff's suit. Those cases are of only persuasive value to this Court and are not binding on me.

On the other hand, counsel for the plaintiff has referred me to the case of **TEJPRAKASHA SHEM VS PETROAFRIC COMPANY LTD & TWO OTHERS NBI ELC CASE No. 703 of 2011** where **Nyamweya J.** took the view that where a defendant gets notice of the suit against him through other means and participates in subsequent proceedings, no prejudice is caused and the delay in the issuance and service of summons should not warrant the dismissal of a suit. In my view, the position taken by **Nyamweya J.** is more in line with the provisions of **Article 159 (2) (d) of the Constitution** which obligates the Court to administer substantive justice without undue regard to procedural technicalities

especially in a case such as this where the plaintiff readily admits that the lapse in taking out the summons was due to the mistake of her then legal adviser. It would certainly be a drastic step to punish the plaintiff for the error of her advocate. I am also guided by the decision in **BOYES VS GATHURE 1969 E.A 385** where the Court held that:-

“Where summons to enter appearance though not filed with the plaintiff was subsequently filed and served and the defendant has not demonstrated any prejudice save for non-compliance with the rules, it cannot be said that the suit is invalid as Courts should not treat any incorrect act as a nullity with the consequences 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 Court of Appeal has also addressed itself on this issue in **INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION VS SUM MODEZ INDUSTRIES LTD C.A CIVIL APPEAL No. 229 of 2001** and said:-

“Service of summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on the circumstances of each case”.

That case is binding on this Court. I am not suggesting that rules of procedure should not be complied with. They were meant for a purpose and they should be complied with. However, where such rules are only directory, they should not result in proceedings being vitiated.

It is also on record that upon discovery of the lapse in the issuance of summons, the plaintiff moved with speed and applied for the summons which were then served upon the defendant. In paragraph 7 of her replying affidavit, the plaintiff has deposed as follows:-

“That I became aware of this fact when the defendant/applicant served my advocates on record with the present application. I moved with speed and applied to Court for issuance of summons which was done and I have since served the same on the defendant. Annexed hereto and marked “MNM 1” is a copy of the summons duly served on the defendant’s advocate pursuant to Order 5 Rule 8 of the Civil Procedure Rules 2010”

That has not been rebutted and indeed a stamped copy of the summons has been annexed issued by the Deputy Registrar of this Court on 4th May 2016 and served upon the defendant’s advocate though under protest on 18th May 2016. **Order 5 Rule 1 (6) of the Civil Procedure Rules** provides that a suit shall abate if the summons are not collected for service within 30 days of issuance. The Deputy Registrar having issued the summons on 4th May 2016 which were then served on 18th May 2016, albeit under protest, this suit cannot be said to have abated.

It must also be remembered that following the promulgation of the 2010 Constitution, the Courts have now taken a paradigm shift and the focus now is on doing substantive justice to the parties rather than striking out suits on the basis of reliance on forms and procedures which do not occasion prejudice to the other party nor amount to a miscarriage of justice. In the circumstances of this case, and bearing in mind that the plaintiff has not slept on her case which has been vigorously prosecuted through various interlocutory applications, it would be a draconian step to strike out this suit more so considering that the lapse to take out the summons and which she readily concedes, was caused by her advocate.

Ultimately therefore and upon considering all the matters herein, I make the following orders:-

- 1. The defendant’s Notice of Motion dated 12th February 2016 is dismissed.***
- 2. The plaintiff will however meet the defendant’s costs occasioned by the said application.***
- 3. The defendant to file and serve its defence within 15 days of this ruling.***

4. The parties to expedite compliance with pre-trial procedures so that this suit which has been pending since 2011 can be heard and finalized.

It is so ordered.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016

Ruling delivered, dated and signed in open Court this 4th day of November 2016.

Mr. Ombachi for Mr. Mutua for the Plaintiff/Respondent present

Mr. Kimani for the Defendant/Applicant absent.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016