



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCC NO 473 OF 2012

KRANTI ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

RAVS FASHIONS LIMITED.....DEFENDANT /RESPONDENT

RULING

By a Notice of Motion dated **26th February 2014**, the plaintiff filed an application under **Order 2 Rule 15(1) Order 13 Rule 2 Order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act** seeking for orders that the court be pleased to strike out the defendant's defence dated **21st November 2013** and sequentially enters judgment for the plaintiff in terms of the plaint dated **31st July 2012**.

The application is premised on the grounds stated on the face of the application and the supporting affidavit of **Sunil L Wanzah** a director of the plaintiff company who stated that the plaintiff is the registered proprietor and landlord of the suit premises known as **LR No 209/2063/2064 Keekorok Road, Nairobi** while the defendant is a tenant renting the said premises under a controlled tenancy regime. She averred that on or about **3rd December 2009**, the plaintiff filed a Notice to terminate tenancy in the Business Rent Tribunal dated **1st December 2009** and served it upon the defendant on the grounds that it intended to carry out intensive renovations and to reconstruct the premises and that it could not reasonably do so when the defendant was in occupation of the said premises. She added that the defendant in a letter dated **9th December 2009** objected to the termination notice but failed to file a reference as required under section 6 of the Landlord and Tenant (Shop, Hotel and Catering Establishment) Act a fact that is acknowledged in the defendant's defence. She further stated that since the defendant failed to file a reference at the Business Premises Rent Tribunal the notice was to take effect and the plaintiff was entitled to sue for termination. She believes that the defence raises not triable issue is scandalous, frivolous and vexatious and may delay the fair trial of the action.

This application is opposed. The Defendant's Director **Rajesh Ehaguanji Sumaria** filed its Replying Affidavit on **12th November 2014**. He stated that the suit as filed is incurably defective as it had abated under the provisions of **Order 5 Rule 1 (b) of the Civil Procedure Rules**. He averred that at the time of service, summons to enter appearance had already expired. He further stated that the defendant filed a reference on **19th June 2009** and also filed a Notice of Objection to alter terms of tenancy dated **9th December 2009** against the plaintiff pursuant to **Section 4(5) of CAP 301**. That this reference was allowed in its totality on **16th November 2009** and the ex parte orders granted on **23rd June 2009** were confirmed and in addition the plaintiff was ordered to pay for the costs assessed at **Ksh 14,095/=** therefore

the Plaintiffs application should be dismissed with costs.

In reply to the Defendant's claim, the plaintiff through its advocate **Mureithi Ndirangu** stated that this suit was filed on 3rd August 2012 together with the summons. He averred that the summons went missing in the file and that they had been checking to confirm that the same had been found and when it was found, it was brought to the attention of the Deputy Registrar who issued the summons for service upon the defendant.

Parties filed their written submissions as directed by the court. The plaintiff filed its submissions on **30th October 2014**. It reiterated the contents of its affidavit and added that the notice to terminate was properly served on the defendant and that the defendant's defence does not raise any triable issue which can go to full trial.

The defendant filed its written submissions on **12th November 2014**. It submitted that the suit that had been filed by the plaintiff had already abated and the summons to enter appearance had already lapsed at the time

of service and that the plaintiff did not make any effort to validate the summons. The defendant further added that the plaintiff had filed at the Business Premises Rent Tribunal a case **No 604 of 2009** on **19th June 2009** and they issued notice objection dated **9th December 2009** pursuant to section **4 (3) CAP 301** and orders were granted by the chairperson at the BPRT where she allowed the complaint, confirmed orders earlier granted and awarded the defendant costs assessed at **Ks 14,095**.

I have considered the affidavits and the submissions filed by the parties herein together with the case law relied upon. The issues that this court has found are as follows:

- 1. Whether the plaintiff's suit has abated for lack of proper service of summons to enter appearance.**
- 2. Whether the matter has been determined by the Business Premises Rent Tribunal.**

The defendant has claimed that the plaintiff served upon them an improper summons to enter appearance. I have perused the court record and note that the plaint was filed on **8th August 2012**, and summons to enter appearance is dated **16th September 2012**, and after waiting for a year the plaintiff serves the summons to enter appearance upon the defendant on **29th October 2013**. The plaintiff gave its explanation for the delay in the further affidavit by **Mureithi Ndirangu**. This summons I note had already expired as at the time it was being served upon the defendant. Order 5 Rule 1 states that when a suit has been filed a summons shall issue to the defendant ordering him to enter within the time specified. Order 5 Rule 2 provide that a summons shall be valid for a year beginning with the first date of its issue and where summons has not been served upon a defendant the court may extend the validity of the summons Sub rule 7 provides that where no application has been made for the extension of the summons the court may without notice dismiss the suit at the expiry of 24 months. In the case of **Lee Mwathi Kimani v National Social Security Fund & another [2014] eKLR** Mutungi J held that,;-

“Under order 5(1) sub rules 3, 5 and 6 reproduced above it is evident that the plaintiff has an obligation to ensure the summons are prepared and signed by the court to facilitate service on the defendant. In the present case it is apparent the plaintiff did not followup and /or collect the summons as envisaged under sub rule 6 of Rule 1 of Order 5. There is no indication that the plaintiff has applied for a re issue and/or extension of the original summons. It is my view that where no summons has been issued in accordance with order 5 of the Civil Procedure rules there cannot be a competent suit against a defendant. The provisions of order 5 Rule 1 are elaborate and comprehensive and we couched in mandatory terms and where for some reason a plaintiff has experienced difficulties in service of the summons Order 5 Rule 2 provides a reprieve in that a plaintiff can apply for the validity of the summons to be extended. Service of summons in my view is a vital step in initiating the litigation and thus until a 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 the service of summons on the Defendant is one of the primary requirements.”

The plaintiff attempted to remedy the situation by having the Deputy Registrar signing the summons long after the summons had expired. This raises the question as to whether the validity of the expired summons can be extended. I find that in view of the fact that summons were never taken out on time as required by ***Order 5 Rule 1 of the Civil Procedure Rules*** and the fact that the plaintiff served upon the defendant expired summons the whole exercise of serving the defendant the summons was a nullity and cannot alter the current position. The court of appeal in ***Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR*** put emphasis on the need of proper service of pleadings and Kiage J in the said decision held that states:

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

Having now carefully considered the facts of this case, I find that the suit herein has abated for lack of proper service of summons to enter appearance.

Consequently, the Court proceeds to strike out the suit herein with costs to the Defendant.

It is so ordered.

Dated, Signed and Delivered this 27th day of ***April, 2015***

L.GACHERU

JUDGE

Court:

Ruling Read in open Court in the presence of

Mr Mureithi for the Plaintiff/Applicant

Mr Waigi Kamau holding brief for Mr Kimeria for Defendant/Respondent

Hilda: Court Clerk

Court: Ruling read in open Court in the presence of the above counsels.

L.GACHERU

JUDGE