Diamond Trust Bank Kenya Limited v Maingi & another (Civil Appeal 58 of 2016) [2023] KECA 712 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 712 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 58 OF 2016

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JUNE 9, 2023

BETWEEN

DIAMOND TRUST BANK KENYA LIMITED ..... APPELLANT

AND

PAULINA WANZA MAINGI ..... 1ST RESPONDENT

FRANCIS KOMU GITAU T/A BOMAS MOTOR MART ..... 2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Aburili, J.) delivered on 10th November 2015 in HCCC No. 603 of 2009)

JUDGMENT

1. Before this Court is an appeal from the ruling and order of the High Court dated 10th November 2015 in HCCC No. 603 of 2009.

2. The genesis of the dispute that gave rise to the appeal is a sale transaction involving motor vehicle registration number KAW 790L, Toyota Prado, (hereinafter referred to as "the motor vehicle"). On 15th September 2006, the 1st respondent agreed to purchase the motor vehicle from the 2nd respondent at a consideration of Kshs. 2,600,000/=. Upon payment of the full purchase price, the 2nd respondent delivered the motor vehicle to the 1st respondent together with the relevant completion documents, which included the logbook. However, and unbeknown to the 1st respondent, the motor vehicle had been purchased by the 2nd respondent on a financing arrangement with the appellant. The 2nd respondent did not make good the repayment terms in the financing arrangement, and, on 29th October 2009, the appellant repossessed and seized the motor vehicle from the 1st respondent.

3. By a plaint dated 5th November 2009, the 1st respondent instituted suit, to wit, HCCC No. 603 of 2009 against the appellant. She claimed that, on 29th October 2009, the appellant unlawfully and without justification seized her motor vehicle and took it to its yard. She pleaded that, from the date of seizure

of the motor vehicle, she was incurring a cost of Kshs.9,000/= per day to hire alternative means of transport. Her prayers in the plaint were for a declaration that she was the lawful owner of the motor vehicle; return of the same to her; and cost of hiring alternative means of transport at Kshs.9,000/= per day from 29th October 2009 until the day when the motor vehicle will be released to her.

4. Contemporaneously, the 1st respondent also filed an application seeking to restrain the appellant from alienating, disposing of, transferring and/or in any other manner interfering with the motor vehicle until final determination of the suit.

5. The appellant, through the firm of Mohamed Madhani & Company Advocates, filed a Notice of Appointment dated 10th November 2009. The appellant opposed the application by the 1st respondent through a replying affidavit, and a further affidavit sworn by Elizabeth Hinga, its Head of Debt Recovery Unit, on 18th November 2009 and 27th November 2009 respectively.

6. The trial court (H. P. G. Waweru, J.) vide a ruling delivered on 20th September 2021 held that the 1st respondent had not demonstrated a prima facie case with the probability of success, or that she would suffer irreparable loss if the interim orders were not granted. Accordingly, the 1st respondent's application was dismissed with costs.

7. Upon delivery of the ruling, the 1st respondent sought and obtained leave to join the 2nd respondent as a defendant. An amended plaint dated 29th May 2013 was served upon the appellant, who again instructed the firm of Mohamed Madhani & Co. Advocates to enter appearance and defend the suit. Accordingly, the advocates filed a Memorandum of Appearance, a Statement of Defence and a List of Witnesses. The appellant also filed a Notice of Claim against the 2nd respondent.

8. However, despite entering an appearance and filing a defence, the appellant filed a Notice of Motion dated 11th June 2013 under Order 5 rule 2(7) of the *Civil Procedure Rules*, 2010 and sections 1A, 1B and 3A of the *Civil Procedure* Act, seeking orders for dismissal of the 1st respondent's suit for failure to issue and serve summons to enter appearance on the appellant, and costs of the application and the suit.

9. The grounds for the application were that over 24 months had lapsed since the suit was filed, and no summons had been issued and or served upon the appellant; that the delay was inordinate, inexcusable and was an abuse of the court process; that the suit had abated; that the 1st respondent's indolence was prejudicial to the appellant as its employees who had necessary knowledge of the case had left employment; and that the pendency of the suit against the appellant would lead to an injustice.

10. The 1st respondent opposed the application vide a replying affidavit sworn by Monica Mwongeli Nzive, her advocate on record, who deponed that she filed the suit in 2009 on behalf of the 1st respondent under a certificate of urgency together with an application for interim orders; that they served the appellant with the application and the plaint; that the application was heard on 25th November 2009, and a ruling was scheduled for 18th February 2010; that, on 18th February 2010, the judge who was hearing the matter was transferred to Machakos; that, since the file was pending ruling, and was with the judge at his chambers, they were unable to extract the summons to enter appearance; that the judge delivered his ruling on 20th September 2012, and that was when they were able to access the file; that the long delay by the judge in delivering the ruling caused inconvenience to the 1st respondent, making it hard for her to extract and serve the summons; and that the judge acknowledged the delay in delivering the ruling.

11. She further deponed that when the ruling was delivered, the 1st respondent sought leave to amend her plaint; that after amending the plaint, the 1st respondent was then able to extract the summons and serve them on the appellant; that the appellant was aware of the existence of the suit as they

were already served with the application and the plaint, and actively participated in the hearing of the 1st respondent's application; that the appellant had already filed a memorandum of appearance and defence; that no prejudice would be occasioned to the appellant; and that, under the overriding objective, justice should be administered without due regard to procedural technicalities.

12. Vide a ruling dated 10th November 2015, the trial (Aburili, J.) made the following key findings:

    a. The 1st respondent undoubtedly complied with the provisions of Order 5 rule 3(5), as she prepared and filed together with the plaint, summons to enter appearance.

    b. The summons to enter appearance were filed with the plaint but they have not been signed/ issued or served upon the appellant. Nonetheless, the appellant filed a notice of appointment of advocates and proceeded to file a statement of defence, prompted by the application for injunction that was served on the appellant together with the plaint.

    c. Order 5 rule 1 of the *Civil Procedure Rules* provides that whereas it is the duty of the plaintiff to file summons together with the plaint at the time of instituting suit, the issuance /signing of summons is the duty of the court.

    d. Order 5 rule 1(6) is clear that every summons, except where the court is to effect service, shall be collected for service within 30 days of issue for notification, whichever is later, failing which the suit shall abate. In this case, there was no issue/notification for collection of the summons, which had been filed together with the plaint and, therefore, the suit could not have abated as summons only become valid for service upon signing and issuance.

    e. The applicable provision was Order 5 rule 2(2) which provides that, where a summons has not been served on a defendant, the court may extend the validity of the summons from time to time if satisfied it is just to do so.

    f. While it is the obligation of the plaintiff to ensure that the summons is prepared and signed by the court to facilitate service upon the defendant, the circumstances of this case did not warrant dismissal of this suit for want of summons to enter appearance being issued/collected and or served upon the appellant.

    g. The purpose of issuance of summons to enter appearance had been overtaken by events, considering that the appellant had acknowledged existence of the suit by filling a notice of appointment of advocates, a statement of defence, a list of witnesses and a Notice of Claim against the 2nd respondent. The appellant had submitted itself to the jurisdiction of the court by its full and active participation in the proceedings.

    h. To dismiss the suit in the circumstances would be unforgivable and would be a denial of justice to the 1st respondent contrary to Articles 48 and 50 of the *Constitution*. The balance of convenience tilted in favour of the 1st respondent.

13. The court therefore dismissed the application by the appellant with costs to the 1st respondent.

14. Dissatisfied, the appellant lodged this appeal on grounds that the learned judge erred in law in failing to find that it was the duty of the 1st respondent to ensure that summons were prepared and signed by the court and subsequently collected and served within 30 days of issuance; in failing to find that the suit abated automatically after the lapse of the 30 days due to the 1st respondent's failure to collect the summons within the stipulated period; failing to find that the 1st respondent had sufficient time from 5th November 2009 to 16th December 2009 to extract and serve the summons before the Honourable judge retired to prepare his ruling; in failing to find that the suit abated automatically after the lapse

of 24 months due to the 1st respondent's failure to issue and serve the summons within the stipulated period; in finding that, even the appellant's filing of a Statement of Defence 6 years after the suit was instituted had the effect of reviving the suit which had effectively abated after 2 years; in finding that, even though the rules were couched in mandatory terms, each case ought to be considered on its merits; in effectively finding that the application of the mandatory provisions of a statute can be circumvented by common law estoppel; by finding that the provisions of Order 5 of the *Civil Procedure Rules* were mere technicalities that can be disregarded by the Court; by applying the principles set out in Order 17 of the *Civil Procedure Rules* relating to dismissal of suits for want of prosecution which were not pertinent to the said application; and by finding that the overriding objectives of the *Civil Procedure Rules* and Article 159(2) of the *Constitution* effectively allowed the Court to disregard rules of procedure.

15. At the hearing of this appeal, learned counsel Mr. Kisinga appeared for the appellant while learned counsel Mr. Michuki was present for the 1st respondent. There was no appearance for the 2nd respondent. Both counsel highlighted their respective written submissions. Mr. Kisinga stated that the rules of procedure are meant to safeguard the parties and the sanctity of court proceedings. He contended that the 1st respondent was the author of her own misfortunes for failing to take out and serve summons within 2 years of filing her suit.

16. On his part, Mr. Michuki submitted that the reasons why summons were not taken out were reasonably explained to the trial court, and that the trial judge correctly exercised her discretion in declining to allow the application to have the suit dismissed for want of service of summons.

17. In its written submissions dated 16th April 2017, the appellant contends that the learned judge erred in law in finding that the provisions of Order 5 of the *Civil Procedure Rules* were mandatory in nature and are effectively mere technicalities that can be disregarded. It is contended that rules of procedure are integral to carrying out substantive justice. Reliance was placed on the decision of this Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR where the Court held thus:

> "In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act (Cap 21) and section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

18. The appellant relies on the decisions of the High Court in *Tana Trading Limited v National Cereals and Produce Board* [2014] eKLR; *Antony Wechuli Odwisa v Alfred Khisa Munyanganyi* [2006] eKLR; *Alfred Makhongo & 2 Others v Zablon Nthamburi & Another* [2010] eKLR in support of the argument that the mandatory provisions of Order 5 of the *Civil Procedure Rules* cannot be disregarded as mere technicalities.

19. The appellant also relies on the case of *Firenze Investments Ltd v Kenya Way Ltd* [2001] eKLR where Waki, J. (as he then was), held that summons was a necessary and vital document governing the timetable of pleadings, and that the issuance and service thereof must comply with the rules for the pleadings to acquire legitimacy. It was further submitted that failure by the 1st respondent to obtain and serve summons upon the appellant for a period of over six years was not a mere technicality, it went to the root of the jurisdiction of the court and that, therefore, the suit ought to have been dismissed.

20. On the issue as to whether the learned judge erred in law in finding that the mandatory provisions of a statute can be circumvented by common law estoppel, it was submitted that failure to issue and

serve summons is a fundamental error, and that the provisions of section 3A of the *Civil Procedure* Act cannot cure this error; the fact that a defendant has entered appearance and filed a defence cannot be used to cure the malady; and that it is trite law that there can be no estoppel against the provisions of statute. The appellant cited *Republic v The Public Procurement Complaints, Review and Appeals Board & Another ex parte Kenya Airports Authority* [2005] eKLR to buttress that submission.

21. In sum, the appellant contends that the learned judge relied on bad law, proceeded on wrong principles, and failed to consider relevant factors, thus rendering the trial court's decision amenable to setting aside.

22. The 1st respondent filed her written submissions dated 11th May 2017. She argued that the overriding objective of the *Civil Procedure* Act and the rules made thereunder is to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes governed by the Act, and that under Article 159 (2)(d) of the *Constitution*, justice shall be administered without undue regard to technicalities. The respondent cited the decision in *Leonard Njogu v Barclays Bank of Kenya & Another* [2014] eKLR where it was held that the court should be focused on substantive justice as opposed to concentrating on technicalities that may vitiate the course of justice.

23. She further contended that failure by the court to issue summons was not intentional, but that it was occasioned by the explained delay in writing and delivery of the ruling by Waweru, J. This delay was for a period of 3 years during which the file was in the custody of the judge, and not accessible to the parties.

24. According to the 1st respondent, service of summons to enter appearance, though important, failure to do so within the stipulated period does not necessarily render proceedings null and void, it will largely depend on the circumstances of the case. Reliance on this argument was placed on *Republic v Senior Principal Magistrate, Limuru Law Court & Another Ex parte Board of Governors Gituamba Secondary School* [2015] eKLR.

25. Lastly, the 1st respondent contends that the appellant was well aware of the suit filed against it, having instructed an advocate to defend it; that the purpose of summons is to inform a defendant that a suit has been filed against it, see *Fredrick Kibet Chesire v Raymond W. Bomet & 3 others* [2006] eKLR. Therefore, the fact that the appellant entered appearance and filed a defence implies that it had submitted itself to the jurisdiction of the court whether summons to enter appearance was served or not.

26. We have considered the appeal, the rival submissions and the applicable law. Our mandate on a first appeal as set out in rule 31 (1)(a) of the *Court of Appeal Rules* is to reappraise the evidence tendered before the trial court and to draw our own conclusions. In *Peters v Sunday Post Limited* [1958] EA 424, the predecessor of this Court, the Court of Appeal for Eastern Africa, stated that:

> "Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

27. This appeal turns on the question as to whether the learned judge erred by declining to dismiss the 1st respondent's suit for want of service of summons to enter appearance upon the appellant.

28. The provisions of Order 5 rule 1 upon which the application by the appellant to have the suit by the 1st respondent dismissed for want of service of summons to enter appearance was predicated provides as follows:

> 1. When a suit has been filed a 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.
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> 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 subrule (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.

29. The provisions of Order 5 rule 1 are elaborate. Service of summons upon a defendant is a pre-requisite to entering of appearance and defence of a suit. It is the responsibility of the plaintiff or his advocate to prepare the summons and file them together with the plaint. The summons are then signed by a judge or an officer appointed by the judge, and are to be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate. These provisions are, in our view, couched in mandatory terms. The defendant's invitation to defend a suit arises only upon proper service of summons, failing which a defendant may seek to have the suit dismissed for want of service of summons.

30. However, the circumstances of this case are however distinguishable from a situation where the summons to enter appearance are not filed, collected or not served upon the defendant. At the time of filing the plaint dated 5th November 2009, the 1st respondent herein filed summons to enter appearance in compliance with the requirements of sub-rule (5) of Order 5 rule 1. The judge handling the matter was transferred to a different station and took away the court file to his new station. This happened before the summons could be signed and sealed. While addressing the issue as to whether the suit had abated, the trial court held as follows:

> "On the other hand, sub rule 6 is clear that every summons except where the court is to effect service, shall be collected for service within 30 days of issue or notification, whichever is later, failing which the suit shall abate. In my understanding, the summons can only be collected for service if they are issued or a notification made to the plaintiff. In this case, there was no issue/notification of the summons which was filed together with the plaint. In my view, therefore, this suit could not have abated since the summons has not been issued for collection for service. A summons only becomes valid for service when it is signed or issued."

31. We fully associate ourselves with the findings of the learned judge on this issue. As per the provisions of Order 5 rule 1(2), it is the duty of the court where the summons are filed to sign and seal them.

The summons cannot become ready for collection by the plaintiff before they are signed and sealed. It is only after they have been signed and sealed that the thirty days' period contemplated under Order 5 rule 1(6) can begin to run. The trial court did not issue summons to the 1st respondent for service upon the appellant. The trial judge left with the file to his new station to attend to the pending ruling on the 1st respondent's application for issuance of interim conservatory orders and, as a result, the file was unavailable to the 1st respondent. Therefore, no summons were issued by the trial court which the 1st respondent could collect for service. For reason of want of issuance of summons by the trial court, the suit by the 1st respondent could not be said to have abated pursuant to the provisions of Order 5 rule 1(6).

32. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. This Court in *Equatorial Commercial Bank Limited v Mohansons (K) Limited* [2012] eKLR stated thus:

> " We definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law."

33. Upon service of the plaint and the application dated 5th November 2009, the appellant instructed an advocate, who filed a Notice of Appointment of Advocates and affidavits in response to the application by the 1st respondent. Subsequently, having been served with the amended Plaint, the appellant instructed its advocate to come on record on its behalf. The appellant also filed a Statement of Defence, List of Witnesses and a Notice of Claim against the 2nd respondent. The logical conclusion to be made from the said events is that the appellant was made aware and/or was at all times aware of the suit by the 1st respondent, non-service of summons to enter appearance notwithstanding.

34. The appellant did not enter a conditional appearance and/or file defence "under protest". The appellant, in our view, waived the requirement of service of summons and/or acquiesced to the non-service of the same. The appellant's active participation as far as the 1st respondent's application dated 5th November 2009 is concerned could only be construed to mean that it was fully informed of the suit against it and was ready to proceed with the same.

35. In *Industrial and Commercial Development Corporation v Sum Model Industries Limited* [2007] eKLR, the Court held:

> " ...whether or not a valid summons to enter appearance was served on the appellant does not, on the facts and circumstances of this case, vitiate the proceedings subsequent to such service. The appellant without any hesitation or protestation filed a written statement of defence and participated in the proceedings of the case without any complaint."

36. It is our considered view that, where a defendant has entered appearance or appointed counsel, and has proceeded to file a defence to the suit without protest, the purpose of the summons is spent or considerably diminished, and that any defect in the summons must be considered as having been waived or acquiesced by the defendant. Subsequently, the defendant cannot be heard to complain about delay or failure by the plaintiff to serve summons to enter appearance. It is vain pedantry to do so.

37. We agree with the 1st respondent that rules of procedure are the hand maidens of justice. This Court in *Peter Obwogo O. & 2 Others v H. O. Suing as Next Friend of P. O. (Minor) & Another* [2017] eKLR while dealing with an application brought under rule 84 of the Rules of this Court stated thus:

> "Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the

administration of substantial justice. Article 159(2) (d) of the Constitution}} of Kenya 2010, now requires that: "justice shall be administered without undue regard to procedural technicalities." The Court has a discretion under Rule 84 to strike out a notice of appeal or appeal where an essential step has not been taken in the proceeding or has not been taken within a prescribed time. However, the discretion should be exercised judicially having regard to all the circumstances of the case." [Emphasis added]

38. The circumstances of this case, in our view, did not favour the dismissal of the 1st respondent's suit for want of service of summons to enter appearance. The learned judge exercised her discretion correctly by declining to allow the application by the appellant.

39. In the upshot, we find no good grounds for interfering with the decision of the trial court. Accordingly, this appeal is without merit, and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY JUNE, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR