REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL 236 OF 2006

BETWEEN

EQUATORIAL COMMERCIAL BANK LIMITED…...……APPELLANT

AND

MOHANSONS (K) LIMITED……..…….. RESPONDENT

(Being Appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Mwera, J.) dated 17th June, 2004

in
H.C.CC. No. 524 of 1998)
****

JUDGMENT OF THE COURT

This Appeal arises from the Ruling of the High Court***(Hon. Mwera J.)*** delivered on 17th June 2004 in the ***H.C.C.S.(Mombasa) No. 524 of 1998.***

We shall mention in brief the undisputed facts of the case before the High Court.

The appellant filed the suit to recover Shs.10,000,000/- from the respondent, being a guarantor against the credit facility offered to one Azania Hotels Limited by the appellant. The summons dated 4th January, 1999 issued by the court directed the respondent to enter appearance in the suit ***"WITHIN 10 DAYS FROM THE DATE OF SERVICE HEREOF".***The respondent,on service of the summons,filed Memorandum of Appearance on 5th February,1999 as well as statement of defence dated 18th February, 1999. The appellant filed reply to defence, and then filed an application dated 5th August 1999 seeking summary judgment as prayed in the plaint. The respondent filed grounds of opposition to the said application. The application was allowed. The respondent filed the notice of appeal against the said order. An application dated 20th September 2000, seeking stay of execution of order and decree of the court was also filed by the respondent

Before the said application could be heard, the parties sat on the negotiation table and recorded two consent orders. The first consent was dated 1st December, 2000 which stated:

"By consent Bill of Costs dated 29th September, 2000 is taxed at Kshs.277,175/=. By further consent, the parties to address court on issue of VAT on taxed award on 8th December, 2000."

A new firm of advocate then came on record and second consent order was recorded on 20th February 2002, which was:

"By consent:

1. ***Defendants' application for stay dated 20/9/2000 filed herein is hereby withdrawn.***

2. ***Notice of Appeal dated 12/9/2000 is hereby withdrawn.***

3. ***Judgment given on 7/9/2000 is hereby set aside.***

4. ***Judgment for Plaintiff against Defendant in the sum of Kshs.7,455,900/-***

(a) Principal 4,750,000/=

(b) Interest to date 2,375,500/=

(c) Costs 330,400/=

(d) The said sum to be paid before 28/3/2002 in default execution to issue. Orders accordingly."

In compliance to the said consent, a post-dated cheque in full and final settlement of the decretal sum with interest was sent vide letter of 28th March, 2002 through the then counsel of the respondent. The relevant parts of the letter are reproduced.

"I enclose with the hard copy of this letter the Defendant's cheque number 000006 for Kshs.7,549,099/= in full and final settlement of the above matter.

I would point out that the cheque has been post-dated for 29.4.2002 and one month's interest at 15% has been added to the agreed figure of Kshs.7,455,900/=

I trust this is in order."

Subsequently, a letter dated 5th April, 2002 was written by thecounsel of the respondent requesting the counsel for the appellant to refrain from banking the cheque as the respondent was awaiting some expected payment and we reproduce relevant parts of the letter.

"I refer to your letter dated 2nd April and to Mr.Mabeya's conversation with Mr. F. Anjarwalla on 25th April, 2002. As requested, please refrain from banking the cheque sent to you until 14th May, 2002 since my client is awaiting some payments which is expected but have not yet materialized.

If you let us know the extra interest incurred as a result of our request, we will arrange for it to be paid.

In view of the fact and since this office has taken over conduct of this matter there has been a consent recorded and the defendant has shown its good faith to you, we trust you will persuade your client to accept our request so that this matter can be finalized in an amicable and friendly fashion."

The payment was not received and the appellant made an application for execution butthe respondent once again made a request for extension of time to pay the decretal sum vide a letter dated 25th June, 2002.The relevant parts need to be reproduced.

"I refer to the meeting at your office with Mr.Mabeya on 24th June, 2002 and, as discussed, write to request an extension of time to pay the judgment monies.

As indicated my client requests that it pay the amount shown on the Warrant of Attachment dated 3rd June 2002 (Kshs.7,634,544/90) plus interest and auctioneers charges to scale on or before close of business on 12th July, 2002.

Please note that as a gesture of goodwill, we are prepared to pay the auctioneers charges despite the Warrant of Attachment and Proclamation of Attachment never actually being served on my client."

The promise was not kept by the respondent.

In the meantime, the respondent changed the counsel once again and ***M/s. A.B. Patel &PatelAdvocates*** came on board. They filed a Notice of Motion dated 29th March, 2004 under ***Sections 3A and 63 of the Civil Procedure Act*** and sought following prayers:

1. That this application be certified as urgent;

2. That the judgment entered herein on 20th February, 2002 and all proceedings from the date of inception of this suit be set aside;

3. That the Memorandum of Appearance and the Written Statement of Defence filed by Messrs Atkinson Cleasby&Satchu on behalf of the Defendant be struck out;

4. That a valid Summons to Enter Appearance be served on the Defendant;

5. That the costs of this application be provided for.

The High Court***(Mwera, J.)***vide his Ruling dated 17th June, 2004 allowed the application and found that the summons failed to adhere to the mandatory provisions of ***Order 4 Rule 3 (4) of the Civil Procedure Rules*** (applicable as on the relevant period) and thus it was a nullity in law. The High Court relied on this Court's finding in the case of***Ceneast Airlines Ltd –vs- Kenya Shell Ltd.C.A. No. 174 of 1999 [2002] E.A.C.A.K***,where the Court noted:-

"This provision means that the time for entering appearance cannot be less than 10 days or within 10 days of the service of summons. It must atleast be on the 10th day of service or any day thereafter,as may be specified in the summons"

and

"This is a clear breach of Order 4 Rule 3(4) and makes the summons invalid and of no effect."

The appellant has challenged the said Ruling on 12 grounds, which are:

1. The learned Judge erred in law in setting aside the judgment entered on 20th February, 2002 and all proceedings in the suit whilst there was no fraud whatsoever.

2. The learned Judge erred in law in holding that the Memorandum of Appearance, Defence and Consent Judgment were irregular and a nullity.

3. The learned Judge erred in law in holding that the court was not seized of the case and could not entertain issues thereon and in particular to record a consent Judgment.

4. The learned Judge erred in law in striking out the Memorandum of Appearance and the Defence legally filed in court on behalf of the Respondent by Ms.AtkisonCleasby and Satchu,

Advocates.

5. The learned Judge erred in law and fact in failing to find that in the circumstances of the case before the court, the summons to enter appearance (sic) were a mere irregularity that had been waived by the Defendant.

6. The learned Judge erred in law and in fact in failing to find that by entering appearance, filing a Defence and subsequently recording a consent judgment, the defendant had waived the irregularity, if any, in the summons to enter appearance.

7. The learned Judge wrongly exercised his discretion in failing to find that:-

(a) if any irregularity existed in the summons to enter appearance, the same was waived by the respondent by entering appearance, filing a Defence, and recording a Consent Judgment;

(b) the summons to enter appearance were a mere irregularity which could be waived and was indeed waived by the respondent in the circumstances of the case before the court;

(c) the irregularity or otherwise of the summons to enter appearance did not go to the jurisdiction of the court;

(d) the memorandum of appearance, the Defence and the consent judgment on record were regular and valid;

(e) the court had jurisdiction and seized of the case and could entertain issues thereon;

whereby he reached a wrong decision in setting aside the consent judgment entered on 20/2/2002 and all other proceedings thereafter.

8. The learned Judge erred in law and in fact in failing to direct his mind properly and to consider and apply the correct principles of law whereby he reached a wrong decision thereby occasioning extreme injustice.

9. The learned Judge erred in law and in fact in failing to appreciate the purpose and intendment of summons to enter appearance and further erred in law in holding that the same were null and void thereby occasioning extreme injustice to the appellant.

10. The learned Judge erred in law and fact in failing to appreciate the facts and circumstances of the case before the court and the submissions made on behalf of the appellant and therefore exercised his discretion on wrong principles whereby he reached a wrong decision.

11. The learned Judge exercised his discretion wrongly when he failed to consider that the summons to enter appearance as served did not cause the respondent any prejudice.

12. The learned Judge misapprehended the provisions of Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya which occasioned an injustice.

Mr. O. D. Odera, the learned counsel for the appellant, took us through the facts of the matter, which we have stated herein before. He raised the issue that considering the facts and circumstances of this case which he reiterated, the summons issued in the suit was not a nullity but an irregularity which is voidable and which,in fact,was avoided by the respondent. He further emphasized that the main aim of the summons is to notify the adverse party of the action taken by the plaintiff, to require it to appear before the Court and thereafter to elect further process. This aim was in the circumstances achieved as is apparent from the record of the case. It was stressed that the appearance was unconditional. The learned counsel urged that this fact coupled with recording of consents, tendering of post-dated cheque, requests for extension of time after payments before and after the execution, constituted a voluntary and complete

waiver of any defect that could have affected the summons.

In support of his submissions, the learned counsel relied on ***Code of Civil Procedure by Mulla (16th Edition) Vol. 2***and in particular page 1702 on the scope of the rule on issue of summons where the author observed *inter alia*that:-

"….the entire scheme of the rule in this regard aims at obtaining the presence of the defendant and provide full information about the case…"

At page 1711, under the Sub-Title ***'Object of Service'*** it is stated that:-

"The object of service of a summons ……. is that the defendant may be informed of the institution of the suit in due time before the date fixed for hearing".

We may, however, point out that the Indian Civil Procedure does not have a provision similar to our ***Order 4 Rule 3(4) of Civil Procedure Rules***. We definitely appreciate and agree that the object and scope of summons 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.It was re-emphasized by Mr.Oderathat the purpose in this case was adequately and sufficiently achieved and the defect or the irregularity, if any, was waived. The case of ***NanjibhaiPrabhudas& Co. Ltd Vs. Standard Bank Ltd.[1968] E.A.(K) 670*** was relied upon wherein the Court of Appeal held that:-

(i) Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.

(ii) Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;

Sir Charles Newbold at page 681 and 683of ***Nanjibhai's case*** *(supra)*observed as under:-

"The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant."

"The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."*(emphasis given)*

Mr.Odera expanded his submissions by contending that the respondent filed an unconditional appearance without any reservation and this act could not unilaterally raise an issue on the jurisdiction of the High Court. Moreover, the issue of jurisdiction was not even raised as per the pleadings in the case.The following observations from ***Prabhudas' case****(supra)* at page 684 were relied upon:-

"In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken, save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MACDUFF, J., in the Jethalal case (supra) is an incorrect statement of the law and should not be followed."

"I consider that the defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred. I also consider that inasmuch as these two irregularities have clearly not prejudiced the defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of these irregularities and, accordingly, I

would not set it aside"

The case of***Ceneast****(supra)* was distinguished in that the facts thereof were totally different to those before us. In the said case, the issuebefore the Court was dismissal of anex-parte judgment on grounds that the summons were not served on the appellant and that the amount claimed was not owed by the appellant as shown by affidavits on record. The defect in the summons was detected by the Court itself and then considering the provision of ***Order 4 Rule 3(4) of Civil Procedure Rules,*** the Court observed that the summons issued, in any way, was invalid and of no effect.

Mr.Odera further contended that the general principle of estoppel comes into play in this case as per ***Section 120 of the Evidence Act (Cap 80),*** which provides:-

"***When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."***

The respondentwas represented throughout. It appeared and unconditionally, filed the defence, recorded the consent judgment which is not challenged on any of the grounds available in law, tendered the payment as specified and requested the extension of time of payment pleading that it had shown good faith in the matter. It cannot now be allowed to recant and challenge the whole process on the ground of an irregularity in procedurallaw. The famous passage from the case of ***GithereVs. Kimunge [1976-1985]EACAK 101 at 103*** was cited in support, namely:

"That the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress, and that the court should not be so bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case, and this is a principle which a court must remember when judicially exercising its discretion (sic) powers."

Lastly, Mr.Odera stressed that the Court's hands to do justice cannot be tied up by wrong interpretation of the wide powers conferred on this Court pursuant to***Section 3A.*** In counsel's view the section was wrongly applied by the court in favour of the party which should have been estopped from recanting from all the actions lawfully and voluntarily taken by it.

Mr. S. Khagram, the learned counsel for the respondent, supported the ruling and submitted that if the summons was a nullity, which he asserted it was, the court had to follow and observe all the consequences arising from a null and void action. He submitted that the proviso of ***Order 4 Rule 3(4)*** is couched in mandatory language and relied completely on the case of ***Ceneast****(supra).* He further contended that the word ***"invalid"*** used in the case to describe the summons means it is null and void and that it cannot mean ***"irregular."*** The invalidity of summons nullifies everything which occurred thereafter. Mr.Khagram relied in the case of ***Macfoy–Vs- United Africa Co. Ltd[1961] All. E. R. (Vol.3)1169*** where at page 1172 the court observed:-

"If an act is void, then it is in law a nullity. It is not bad but incurably bad.There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have thecourt declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put anything on nothing and expect it to stay there."

He cited the case of ***UdaykumarChabdulalRajani&others –vs- Charles Thaithi(C.A. No. 85 of 1996) [U.R.]*** to show that when there Is no valid summons in existence, the alleged serviceof thatsummons upon the defendant was ineffective.

Mr.Khagram added that the summons being null and void, the Court had no jurisdiction to take an action, and the consent or acquiesce of parties cannot confer such jurisdiction which it did not have.

Lastly,the respondent's counsel submitted that the High Court exercised its wide discretion conferred by ***Section 3A of Civil Procedure Rules*** and this Court cannot interfere with the same as the discretion was soundly embedded on legal principles.

We were thus urged to dismiss the appeal.

We have anxiously considered the rival submissions admirably made before us and we are live to the fact that the appeal pauses serious legalissues for consideration by the court.

We begin by stating that in our judicial system issuance and service of summons is an important procedural regime which has animpart onjustice. Ours is an adversial system of law. A notice of the claim *("Plaint" as is called in our system)* is prescribed to be served on the defendant by way of summons which is a document issued by the court to call upon the defendant to submit to the jurisdiction of the court and bring forth his side of the case, so that the court, after hearing both sides, can determine the matter.The salient principle of law that ***"No one shall be punished or prejudiced unheard"*** has led the Rules Committee to make comprehensive provisions vide***Order 5 of Civil Procedure Rules.***No doubt that those provisions are worded in mandatory language by using the word ***"Shall"*** and in normal circumstances the court shall give it a strict Interpretation.

In view of the above we are faced with following issues:

1.Whether the summons issued in this matter was null and void?

2.If not, whether the defect in summons was waived by the respondent and whetherthe respondentshould beestopped from refusing to abide by the consent orders and subsequent orders of the court?

3.*Whether the judgment entered in the suit was regular?*

We shall have to start with the fact that the summons which was issued and servedon the respondent wasstrictly not as per the provisions of ***Order 5 Rule 3(4) of the Civil Procedure Rules.***

The respondent not only did not challenge it but kept quiet on the defect and participated in the legal process by unconditional appearance, filing of defence and then recorded consent judgment, made payment by a post-dated cheque with interest, applied for extension of time for payment etc. The appellant relied on the consents recorded before the court and thus agreed to vary the summary judgment and to give extensions of time requested by the respondent.

In none of the correspondence exchanged between the parties hasthe respondent raised any question on the validity or otherwise of the summons till it filed notice of motion dated 29th March, 2004 under ***Section 3A of Civil Procedure Act***to seek discretionary relief. This was done when the appellant's application for execution was pending before the High court. It may be noted that during the whole process the respondent was represented by respected firms of the advocates. We specifically note that in the said application there is no averment that it has faced any prejudice as a result of service of the summon in question.

Considering the facts and circumstances before us can summons be treated as void though because it has not complied strictly with the statutory provisions? Can a litigant after having fully participated in the legal process on service of such summons, resile on all the actions taken by him openly and voluntarily? We may add that there is no allegation that such actions have caused any prejudice to the respondenteither in law or in equity. We shall emphatically decline to find so. We shall find that the respondent, having openly and unconditionally followed the process in the manner in which it did, specially prompting the appellant to believe in the actions taken by both parties.

We have support in our above observation from the case of ***Macfoy****(supra)*itself.At page 1173 of the said judgment Lord Denning had observed:

"No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to dismiss the action for want of prosecution, asserting that no statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in the long vacation is only voidable. It is not void. It is only in irregularity and not a nullity. It is good until avoided. In this case, the statement of claim not being avoided, it took effect at the end of the long vacation and the time for defence then began to run. Likewise, when the plaintiffs signed judgment in default of defence that too was voidable but not void. It was not a nullity. It was therefore a matter for the discretion of the court whether it should be set aside or not.

Once this stage is reached, it becomes plain that there is no ground for interfering with the decision of the West African Court of Appeal. As they pointed out:

"The defendant knew when the statement of claim was delivered to him, and he knew it was then vacation. He made no application in the court below to set aside the statement of claim as having been delivered irregularly; he did not raise the point in any way until he appeared in this court to argue the appeal, over eight months after the statement of claim had been delivered. Instead of applying to have the statement of claim set aside, he allowed judgment to go against him by default and then moved to have the judgment set aside. In that application, he proceeded on the basis that the judgment was a regular and subsisting one. In support of the application, he made an affidavit with the object of showing that the he (sic) a defence on the merits, and set out certain averments intended to establish a basis of fact for that contention. At the hearing of the application he appeared by counsel, and the application was argued on the merits of the defence.""

Similar observation were made by Lord Denning in the Case of ***Combe –vs-Combe[1951] 1All. ER 767 at 769 C.A.***

"In its inception the equitable principle was that if parties who had entered into definite legal relations afterwards entered "upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties" *(emphasis given)*

We have also looked at and considered the other authorities of this Court as well as those of the High Court cited by Mr.Khagram and discern that facts of those cases were different to the ones before us. The courts in those cases were dealing with the issues of extension of the expired summons wrongly made and on the basis of those summons further actions and orders were taken by the plaintiff in absence of the defendant, which were declared unlawful by the courts.

We shall further point out that the facts of the case of ***Udaykumar*** are starkly distinguishable from those of the present one. In the cited case of Udaykumar, the summons had expired and accordingly it was not in existence, nay it was lifeless.

We find therefore, that the respondent by its overt acts waived its right to challenge the validity or otherwise of the summons issued in the matter. The following passages from the ***Halsbury's Laws of England, Vol. 16(2)*** at Paragraph 907 on page 390 stipulate the meaning of 'waiver' and we reproduce it:-

"***The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct."***

"A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or <u>of a statutory provision</u>, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist."*(emphasis given)*

Lastly we find that the defect in the summons was an irregularity and that the same was waived by the respondent. Hence the consent judgment recorded on 22nd May 2002 was regularly entered and is binding on the both parties.

The upshot is that the appeal is allowed with costs to the appellant.

Dated and delivered at Nairobi this 16th day of March, 2012.

R.S.C. OMOLO

……..
JUDGE OF APPEAL

J. G. NYAMU

…….
JUDGE OF APPEAL

K. H. RAWAL

……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

<u>DEPUTY REGISTRAR</u>