



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL SUIT NO. 13 OF 2016**

**(FORMERLY MOMBASA HCCS. NO. 157 OF 2014)**

**ABDULBASIT MOHAMED AHMED DAHMAN.....1<sup>ST</sup> PLAINTIFF**

**SAFIYYA MOHAMED SAID.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FIDELITY COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

The defendant herein raised a preliminary objection to the plaintiff's suit. The objection is contained in the defence which states in its paragraph 3 as follows: -

**The defendant avers that the plaintiffs have failed to file and serve summons to enter appearance under Order 5 rule 1 Civil Procedure Rules. The suit having been filed on 14.12.2016 and summons having not ever issued and the same having not been served, the suit abated pursuant to Order 5 Rule 6 Civil Procedure Rules.**

Miss Ruto who was holding brief for Mr. Gikandi for the plaintiff informed the court that Mr. Gikandi had filed an application dated 1.11.2016 seeking to cease from acting for the plaintiff. The plaintiff was served through his brother but no reply to the application was filed. The application by Mr. Gikandi was allowed.

Mr. Ole Kina, counsel for the defendant maintains that the suit has abated in view of the provisions of Order 5 of the Civil Procedure Rules. Counsel further contend that this suit was filed with the intention of restraining the defendant from selling the plaintiff's mortgaged property. The property has already been sold and the plaintiff has vacated the premises. Counsel relies on the cases of **EPHANTUS WACHIRA NGOCHI V THE CO-OPERATIVE BANK OF KENYA LTD, Milimani Civil Case No. 532 of 2010, PETER OWUOR OTULA V ECO BANK KENYA LIMITED & 3 OTHERS [2014] eKLR** and that of **BARCLAYS BANK OF KENYA LTD V PATRICK NJUGUNA KUBAI [2014] eKLR**.

Order 5 rule 2 states that summons shall be valid in the first instance for twelve months from the date of

its issue. The court may extend the validity of the summons from time to time as provided under Order 5 rule 2 (2). In the current suit, the objection is that no summons were issued at all. The defendants argue that the suit has now abated.

Order 5 rule 6 states as follows: -

**Every summons, except where the court is to effect service, shall be collected for service within thirty (30) days of issue or notification whichever is later, failing which the suit shall abate.**

The Black's Law Dictionary defines "**summons**" as a writ or process commencing the plaintiff's action and requiring the defendant to appear and answer or a notice requiring a person to appear in court.

From the civil dispute perspectives, it is clear that without being served with the summons, one need not enter appearance or file a defence. That is why Order 5 rule 3 provides that every summons shall be accompanied by a copy of the plaint. It is the summons which calls upon the defendant or defendants to enter appearance and not the plaint. The plaint simply states a party's case. The summons calls upon the cited party to enter appearance within the period stated in the summons. If summons are not served within thirty (30) days of issue or notification, the suit stands abated. The Collins English Dictionary indicate that if a writ abates, it is null and void.

In the current case, the summons were signed by the court on 15.7.2015 but were not served. The suit itself was filed on 18.12.2014. The plaint was not served with the summons. There is an affidavit of Rashid Jeneby, a manager with the defendant company, who avers that he was served with the pleadings but was not served with summons to enter appearance. No appearance was filed. The defence was filed way back on 6.5.2016. The plaintiff could not request judgement for non-appearance as no appearance was called upon by way of service of summon. The summons issued by the court on 15.7.2015 have since lapsed. There is no application for extension of the summons.

Taking into account the fact that the suit property has already been sold and there has been no objection to the sale and noting that no summons were served upon the defendant which makes the suit herein to have abated, I find no reason to have this matter hanging over the defendant. The suit has abated for lack of service of summons. In law the suit is null and void as it has terminated on its own. I will add that the suit abated thirty (30) days after the suit was filed. Order 5 rule 1 calls for the signing of the summons not more than thirty (30) days after the date of filing the suit. Order 5 rule (5) calls upon a plaintiff or his advocate to prepare and file summons together with the plaint. No summons seems to have been filed with the suit. The summons issued on 15.7.2015 were therefore of no consequence.

In the end, I do find that the preliminary objection is merited and is hereby allowed. The plaintiffs' suit has abated for lack of service of summons upon the defendant. There shall be no orders as to costs.

**Dated and delivered in Malindi this 8<sup>th</sup> day of December, 2016.**

**S.J. CHITEMBWE**

**JUDGE**



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