



**Mogire v Ng'wono & 3 others (Appeal 12 of 2022)  
[2023] KEELC 17176 (KLR) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17176 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
APPEAL 12 OF 2022**

**M SILA, J  
MAY 3, 2023**

**BETWEEN**

**JOHN MOGIRE ..... APPELLANT**

**AND**

**JOEL NG'WONO ..... 1<sup>ST</sup> RESPONDENT**

**SAMSON NYANGOTO ..... 2<sup>ND</sup> RESPONDENT**

**OANGE NYANGOTO ..... 3<sup>RD</sup> RESPONDENT**

**NYAUNTU MACHORA ..... 4<sup>TH</sup> RESPONDENT**

*(Being judgment on an appeal against the ruling of the Hon. D. Mikoyan, Chief Magistrate, Ogembo Magistrates' Court, delivered on 25 June 2021, in the suit, Ogembo CMCC No. E056 of 2021)*

**JUDGMENT**

(Appellant having filed suit against respondents together with an application for injunction; respondents entering an unconditional appearance; application for injunction compromised with court issuing an order for status quo and giving a date for hearing of the main suit; no defence filed before the hearing date and counsel for the respondents applying for adjournment and time to file defence; subsequently application to strike out suit filed on the basis that no summons to enter appearance were served upon the respondents; appellant's response being that the summons were filed together with the plaint but were misplaced hence not served; appellant further urging that since an unconditional appearance was entered, no prejudice is caused to the respondents; trial court allowing the application and proceeding to dismiss suit hence this appeal; facts showing that the summons were indeed paid for thus were filed together with the plaint; there was however no service of the same; court of opinion that once an unconditional appearance was filed, the need to serve summons was spent and what ought to have followed was filing of defence if the respondents were



mind to oppose the suit; to dismiss the suit on account of non-service of summons when there has been an unconditional appearance was giving undue regard to a procedural technicality; appeal allowed and suit reinstated for hearing)

1. The appeal herein is against the ruling delivered on 25 June 2021 by the Chief Magistrate, Ogembo Law Courts, vide which the appellant's suit was dismissed. That ruling was in respect of an application dated 11 May 2021 which sought orders inter alia to have the appellant's suit struck out on grounds that no summons to enter appearance was extracted, signed and sealed, by the court, as required by law. The application was allowed hence this appeal. Before I delve into the merits or otherwise of the appeal, it is prudent to provide the background thereof.
2. The suit itself was commenced through a plaint filed by the appellant on 18 March 2021. In his plaint, the appellant pleaded to be the registered owner of the land parcel Bassi/Magige/16 having purchased it in the year 2003 from one Nyanchoka Bitengo Bwana (deceased) who had in turn purchased it from one Christopher Nyangoto Oange (deceased) (hereinafter referred to as Christopher). He pleaded that upon purchase he had been in quiet possession. He filed suit as the respondents intended to bury the remains of Christopher on the suit land and had moved into the land and constructed a temporary house for purposes of keeping night vigil in accordance with Abagusii customary law. In the suit, he sought orders for a declaration that he is the owner of the suit land, a permanent injunction to restrain the respondents from interring the remains of the late Christopher on the land, costs and interest.
3. Contemporaneously with the plaint, the appellant filed an application dated 18 March 2021 seeking interlocutory orders of injunction, inter alia to stop the burial of the late Christopher on the suit land, pending hearing and determination of the suit. Interim orders to stop the burial were granted on the same day and the court directed that the matter be mentioned the following day, i.e 19 March 2021. On 19 March 2021, the respondents lodged a Memorandum of Appearance through the law firm of M/s Maroko & Associates Advocates. In court, the application was mentioned and the court ordered that the status quo be maintained pending hearing of the suit, and hearing was fixed for 10 May 2021.
4. No defence was filed and on 3 May 2021, the appellant filed Request for Judgment. I have no evidence that interlocutory judgment was ever entered. On 10 May 2021, the day of the hearing of the main suit, Mr. Anyona, learned counsel, appeared in court holding brief for Mr. Maroko for the respondents. He applied for adjournment and for leave to file defence. He requested that the matter be heard on 17 May 2021. The application for adjournment was opposed but nevertheless granted. The court ordered the defendants to comply in seven (7) days and adjourned the hearing of the suit to 17 May 2021.
5. On 11 May 2021, on behalf of the respondents, a notice of change of advocates was filed, with the law firm of M/s Asati, Anyona & Company Advocates taking over the matter from the law firm of M/s Maroko & Company Advocates. On the same day, the application of even date was filed, which is the application that sought for the suit to be struck out. That application also sought orders that the body of the late Christopher, which was said to be lying at Lemeck Hospital Mortuary, be ordered released. That application was based on the following grounds :-
  1. That this case was commenced by filing of plaint and notice of motion on 18/3/2021 by the plaintiff herein.
  2. That no summons to enter appearance were extracted by and signed and sealed by the court as required by law.
  3. That the suit is incurably defective.



4. That summons to enter appearance ought to be filed together with filing of the suit a mandatory requirement.
5. That the incompetence of the suit herein cannot allow the court to proceed on suits which are likely (sic) to proceed for hearing hence consuming the court's time.
6. That the application is highly merited and should be allowed as prayed.
6. The application was supported by the affidavit of Joel Ng'wono Oange, the 1<sup>st</sup> respondent. He deposed that after the suit was filed, the appellant, through the local administration, brought the suit documents and served him only. He deposed that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents were not served. He deposed that he took the plaint to his advocate who filed a Memorandum of Appearance though no defence was filed. He averred that on 10 May 2021, he appointed Mr. Anyona to represent them; that he perused the file and found the suit to be incompetent; that the plaintiff failed to file summons to enter appearance as required by law and this renders the suit incurably defective.
7. The appellant filed a replying affidavit to oppose the motion. He deposed that from information received from his counsel, his law firm drew the Summons to Enter Appearance, filed the same in court and paid for them. He annexed a copy of the receipt. He deposed that the registry later told his law firm that the summons are misplaced. He deposed that the plaint accompanied the summons as required by law, which his advocates complied with, but since they were misplaced, his advocates could not be able to collect them for service. He deposed that the summons have been traced and signed, ready for service. He added that the defendants have filed a Memorandum of Appearance and the purpose of summons was overtaken by events and the suit should be heard on merits. He deposed that this was a land matter and justice would not be done by dismissing the suit on a technicality. He also complained that the defendants had in disobedience of the orders of court proceeded to erect structures and damage his crops on the land.
8. Both counsel filed submissions before the trial Magistrate and ruling was delivered on 25 June 2021. In the ruling, the trial Magistrate held as follows :-

“It's not contested that as at 18<sup>th</sup> March 2021, when suit herein was filed no summons issued as required. And that the period of 30 days set for collection of summons long expired. And alone on that point, suit should be struck out.

Plaintiff/respondent relies on the case of Equitorial Commercial Bank Ltd vs Muhan Sons (K) Ltd (2012) eKLR for the preposition that a Defendant who has entered unconditional appearance in proceedings in court, cannot except in some circumstances recount said proceedings. It's instructive to note that in above cited case, summons had issued unlike in the present case.

It's the present motion that led the plaintiff/respondent to obtain summons well after 30 days as provided for in O. 5 Rule 1 (6) with (sic) commands that a suit shall stand abated. Defendant/Applicant submit that upon expiry of 30 days suit abated for lack of summons.

Plaintiff/Respondent controverts this and submits that, upon filing of memorandum of appearance, the very reason for service of summons been overtaken by events. The decision in Mutindi HCC Suit No. 13 of 2016 Abvulbaif Mohammed Ahmed Danham & Another vs Fidelity Commercial Bank Limited and Milimani Civil Case No. 532 of 2020 Ephantus Wachira Ngochi & Another vs Peter Omurwa Otolola apply with equal force (sic) to the present



case. Lack of summons to accompany the plaint is not a technicality that is curable under Article 159 of *the Constitution*.”

9. The trial court thus proceeded to strike out the suit with costs. Aggrieved, the appellant has preferred this appeal and eight grounds are raised. The grounds more or less assert that the trial court was wrong in striking out the suit and I see no need of setting them out seriatim. Through this appeal, the appellant wants his suit reinstated for hearing on merits.
10. I directed that the appeal be argued through written submissions and I have taken note of the submissions filed by Ms. Linnet Miencha, learned counsel for the appellant, and Mr. Anyona, learned counsel for the respondents. I have taken these into consideration before arriving at my decision.
11. In proceeding to strike out the suit, the learned trial Magistrate referred to the provisions of order 5 rule 1 (6) and held that the suit had abated. It is useful to set out the whole of order 5 rule 1 which is drawn as follows :

Order 5 rule 1: Issue of summons

- (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.
- (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, failing which the suit shall abate.

12. From the above, it will be seen from sub-rule 5 that the summons are prepared by the plaintiff, or his advocate, and filed together with the plaint. Under sub-rule 2, within 30 days, the summons are to be signed and sealed by the judge or an officer appointed by the judge, who would ordinarily be the Court Administrator or the Deputy Registrar. Under sub-rule 6, the summons are to be collected for service within 30 days of the date of issue or notification failing which the suit shall abate.
13. It will be recalled that in his reply to the application, the appellant did state that his advocate lodged the plaint together the summons to enter appearance and these were paid for. That is indeed a reflection of what is on record, for I have seen a receipt dated 18 March 2021, which is the receipt issued after lodging the plaint, and therein is payment of Kshs. 200/- for summons. It cannot be that the plaint was lodged without summons otherwise there would have been no assessment for the same. It follows that there was therefore compliance on the part of the appellant with the provisions of sub-rule 5. What ought to follow is the signing and sealing of the summons. There is on record signed and sealed summons and the date indicated therein is that the same were signed and sealed on 18 March 2021 which is the same day that the plaint was lodged. There was therefore compliance with sub-rule 2 above.



14. In his replying affidavit, the appellant deposed that the summons were thereafter misplaced and he acknowledges that they were not served with the plaint. The plaint was however served promptly. Indeed, it needed to be served urgently because there was the application for injunction that was scheduled to be mentioned for directions the following day and time was therefore of essence. In response to service of the suit papers, the respondents filed an unconditional memorandum of appearance. They did not file defence within time, and when the matter came up for hearing, they sought additional time to do so, seven days to be precise, and their counsel submitted that they would be ready to proceed for hearing on 17 May 2021. Instead, what was filed was the application to strike out suit.
15. In opposing the application, counsel for the appellant did point out that an unconditional appearance was entered and the need to serve summons was spent. This was of course dismissed by the trial Magistrate, who relied on sub-rule 6 to hold that since the summons were not served within 30 days, then the suit abated.
16. My opinion is that the trial Magistrate mechanically applied the provisions of sub-rule 6 without looking at the rationale and reasoning behind it and fell into error. The whole purpose of serving summons is to notify the defendant that a suit has been filed and to inform him of the period that he has to lodge an appearance. There is no other purpose for having summons.
17. It is my view that once the defendant has entered an unconditional appearance to a suit, then the purpose of serving summons is spent, and any defect or technicality surrounding the summons is considered waived. What would be the point of insisting on serving summons when an unconditional appearance has already been entered? So what if the summons are subsequently served after an appearance has been entered? What the summons aim to achieve will have already been attained and no purpose will be served by serving the summons upon a party who has already entered appearance.
18. My opinion above has support in the case of *Equatorial Commercial Bank vs Mohansons (K) Limited*, Court of Appeal at Malindi, Civil Appeal No.236 of 2006, (2012) eKLR. The facts of the case were that the appellant filed suit to recover Shs.10,000,000/- from the respondent, being a guarantor against the credit facility offered to a third party. The summons dated 4th January, 1999 issued by the court directed the respondent to enter appearance in the suit within 10 days of service. On service of summons, the respondent filed a Memorandum of Appearance and a statement of defence. Subsequently the appellant filed an application for summary judgment which was allowed. The respondent filed a notice of appeal and an application for stay of execution pending appeal. Before the application could be heard, parties recorded two consent orders, the first being a consent on costs, and the second being a consent withdrawing the notice of appeal and the application for stay, and variation of the judgment so that judgment was entered by consent for the sum of Kshs. Kshs.7,455,900/= inclusive of costs. The said sum was to be paid within a period specified in the consent and in default, execution was to issue. Payment was not forthcoming and the respondent moved to execute. The appellant changed counsel and filed an application to set aside judgment and also have set aside the Memorandum of Appearance and Defence filed, on the basis that the summons were defective for providing for appearance “within 10 days of service” rather than providing for a period not less than ten days as required by the *Civil Procedure Rules*. The trial Court (Mwera J) allowed the application and held that the summons were a nullity. On appeal, the Court of Appeal agreed that there was a defect in the summons but found that the respondent had entered an unconditional appearance, filed



defence, and even entered into consents, without challenging the summons. The court pronounced itself as follows :-

“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 respondent either 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 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 of a statutory provision, 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 22<sup>nd</sup> May 2002 was regularly entered and is binding on the both parties.”

19. On account of the above, the appeal was allowed.
20. I observe that in his judgment, the trial Magistrate declined to follow the reasoning in the above case, holding that in the Equatorial Commercial Bank case, summons had issued unlike the case at hand. Instead, the court opted to be guided by the decisions in the case of *Abdulbasit Mohamed Ahmed Dahman & Another vs Fidelity Commercial Bank Limited*, High Court at Malindi, Civil Suit No. 13 of 2016, (2016) eKLR and the case of *Ephantus Wachira Ngochi vs The Cooperative Bank of Kenya Limited*, High Court at Nairobi, Milimani Law Court, Civil Case No. 532 of 2010 (2012) eKLR which authorities had been cited by the respondents. In the first of the two suits, a preliminary objection was raised by the defendant, that the plaintiff had failed to file and serve summons to enter appearance and thus the suit abated pursuant to order 5 rule 6 of the Civil Procedure Rules. It would appear that no appearance was ever entered though a defence was filed. The court allowed the application though it is instructive to observe that the said application was never opposed as counsel for the respondent withdrew before the application could be heard. In the case of Ephantus Wachira Ngochi, the plaint was filed on 4 December 2009 though no summons were issued. On 26 April 2012, the defendant filed an application to have the suit dismissed on the ground that it has abated. The application was allowed. The court reasoned that the rules require that the plaint be accompanied by summons but in this instance, none were prepared by the plaintiff. It is however not clear from the ruling whether or not there had been an unconditional appearance.



21. The two authorities above do not bind this court. As I earlier stated, it is my view that once a party has entered an unconditional appearance, what should follow is filing a defence, if the defendant is minded to oppose the suit as provided for under order 7 rule 1 which provides as follows :-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

22. In the case at hand, the respondents were very much alive to this provision for their counsel did apply to file defence out of time when the matter came up for hearing on 10 May 2021. At no time did the respondents contend that the failure to serve summons upon them prejudiced them in any way, and indeed, you will not find any prejudice against them however hard you look.

23. Thus, if the trial Magistrate was of the view that there was a procedure that was not followed, but which led to no prejudice to the respondents, he ought to have applied the provisions of Article 159 (2) (d) of *the Constitution*, 2010, which provides that in exercising judicial authority courts shall be guided by the principle that “justice shall be administered without undue regard to procedural technicalities.” To insist that the summons needed to be served after the defendants had already entered appearance was clearly giving unnecessary regard to a procedure technicality.

24. My view is not novel. In the case of *Sealink Holdings vs Barclays Bank of Kenya Limited*, High Court at Nairobi, Commercial and Tax Division, Civil Suit No. E100 of 2019, (2021) eKLR, an application was filed for dismissal of suit for want of service of summons. The facts demonstrated that no summons had been issued thus none served. However, the defendant had actively participated in the suit and had responded to an application filed by the plaintiff. The court (Tuiyott J as he then was) declined to dismiss the suit. He reasoned as follows :-

“While in this matter the Defendant never entered appearance, still its active and unconditional participation in the proceedings can be construed to be that it waived its right to insist on the strict compliance of the provisions of order 5 rule 1(6) CPR. The dictates of justice does not allow the Defendant to use the failure of issuance and service of summons as a reason to have the matter dismissed.”

25. I also hold the view that the dictates of justice, in the circumstances of the case at hand, did not merit the dismissal of the suit for want of service of summons. I am therefore persuaded to set aside the ruling of 25 June 2021. I substitute the order of the trial Magistrate by an order that the application dated 11 May 2021 is dismissed with costs. I reinstate the suit of the appellant and direct the same to proceed for full hearing on its merits. The appellant shall also have the costs of this appeal.

26. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 3<sup>RD</sup> DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

