**Kerai v Zahra Industries Ltd**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 3 June 1974

**Case Number:** 1703/1972 (116/74)

**Before:** Chesoni, J

**Sourced by:** LawAfrica

*[1] Civil Practice and Procedure – Summons for directions – Whether provisions retrospective – When*

*summons mandatory – Civil Procedure Rules, O.* 51 (*K.*)*.*

**Judgment**

**Chesoni J:** On 3 October 1972, the plaintiff, a building contractor, commenced an action against the defendant, a limited liability company, for the recovery of the sum of Shs. 8,811/25 which is alleged to be due and owing by defendant to the plaintiff as agreed charges for road construction work and materials sold and supplied on behalf and at the request of the defendant in 1972 at a plot in Nairobi. The defendant entered appearance on 24 November 1972 and on 6 December the same year a defence was filed, denying liability. There was no reply to the defence. On 16 January 1973, hearing of the suit was by consent fixed for 16 July 1973, at the registry. However, on 15 June 1973 at the call-over the case was taken out of the hearing list for July 1973. I understood from Mr. Joshi who appeared for the plaintiff that this was because it was thought the case would not be reached. On 9 August 1973 the plaintiff’s advocate fixed *ex parte* 13, 14 and 15 May 1974 as hearing dates. Mr. Joshi told the court that he fixed these dates *ex parte* because the defendant’s advocates would not agree to meet him at the registry to agree on hearing dates. When the case came up for hearing on 13 May 1974, Mr. Dhanji for the defendant served on Mr. Joshi notice of preliminary objection asking the court to dismiss the plaintiff’s suit with costs. The objection was based on the ground that the plaintiff had failed to comply with the provisions of O. 51 of the Civil Procedure Rules. R. 2

1) provides: 1) With a view to providing, in every suit to which this Order applies, an occasion for the consideration by the Court of the preparations for the trial of the suit, the plaintiff must, within one month after the close of the pleadings, take out a summons in this Order referred to as ‘the summons for directions’).

The form used for the purpose of making an application under the Order is provided in the appendix to the rules. The Order applies to all suits in the High Court which are commenced by the filing of a plaint or of an agreement under O. 34, but it does not apply to suits in which an order for the trial of an issue or for the taking of an account has been made. The Civil Procedure

Amendment) Rules 1973, which introduced the new O. 51 were made on 29 March 1973 and published on 14 April 1973, when they are deemed to have come into operation. After the above suit had been taken out of the hearing list on 15 June 1973, the defendant’s advocates on 23 June 1973 wrote to the plaintiff’s advocate, it appears in reply to the plaintiff’s advocate’s letter of 20 June 1973, as follows:

C. Joshi, Esq., Dear Sir, Re: H.C.C.C. No. 1703 of 1972 *Velji Dhanji Kerai t/a Taneebhai Home Repair Service v. Zahra Industries Ltd.* We thank you for your letter of 20 June 1973. We regret we cannot attend court on 9 July 1973 to fix a hearing date in the above case as you have not complied with the order for directions. Yours faithfully, *Shapley Barret Ennion Marsh & Co*.

On 27 June 1973 Mr. Joshi replied to this letter as follows:

Shapley Barret Ennion Marsh & Co., Dear Sirs, Re: H.C.C.C. No. 1703 of 1972 *Velji Dhanji Kerai t/a Taneebhai Home Repair Service v. Zahra Industries Ltd.* Reference your letter No. 16/46/1666/HAL dated 23 June 1973, in the above case, Order LI Rule 2 will not be applicable to the instant case as the Civil Procedure

Amendment) Rules, 1973 do not seem to apply retrospectively. On 16 January 1973, by consent the above case was fixed for hearing on 16 and 17 July 1973. At the callover meeting on 15 June 1973, the same was taken out from the hearing list of 16 and 17 July 1973, as the same could not be reached. Order LI rule 2 can be applicable to those cases where the same were not fixed for hearing when the Civil Procedure

Amendment) Rules 1973 came in force on 14 April 1973. In the circumstances, unless your representative attends court Registry on 9 July 1973 at 9.30 a.m. hearing will be fixed *ex parte*. Yours faithfully, *C.S. Joshi*.

On 2 August 1973, Mr. Joshi wrote a further letter to the defendant’s advocates requesting them to instruct their Court Clerk to meet his clerk at the High Court Civil Registry, on 9 August 1973 at 10.30 a.m. and fix an early hearing date. He warned that if the defendant’s advocates failed to attend as requested an *ex-parte* hearing date would be fixed. Events show that the defendant’s advocates did not send their representative and the plaintiff’s advocate fixed the hearing dates *ex parte* as stated herein above. On 9 August 1973, Mr. Joshi formally in a letter requested the deputy registrar to serve a hearing notice on the advocates for the defendant for hearing on 13, 14 and 15 May 1974, and the notice was issued on 24 August 1973. Mr. Dhanji argued that since the provisions of O. 51 are mandatory and the plaintiff had failed to comply with those provisions the defendant was entitled to ask for dismissal of the suit. The summons for directions had to be taken out after the close of the pleadings and the date the suit was filed was immaterial. He submitted that the issue for determination was what was the state of the pleadings when the said order came into force? He conceded that if the plaintiff does not take out a summons for directions the defendant may do so under r. 2

3), but argued that the defendant had been prevented from taking out summons for directions by the plaintiff’s conduct in that the plaintiff had all along led the defendant to believe that there was going to be a settlement. The impossibility of a settlement was communicated to the defendant only on 11 May 1974. He added that when the case was taken out of the hearing list on 15 June 1973, it was reduced to the stage where the pleadings were deemed to have closed and at that stage O. 51 r. 2 was applicable. Although Mr. Dhanji alleged that the defendant had been greatly prejudiced by the plaintiff’s failure to take out the summons for directions he did not satisfy me that that was the case and I was unable to see in any other way how the defendant was prejudiced. In concluding his submission Mr. Dhanji, however, asked that if the court did not dismiss the suit it should direct that O. 51 be complied with. On his part Mr. Joshi maintained his stand that the Civil Procedure

Amendment) Rules 1973 came into force on 14 April 1973 and they were not intended to apply retrospectively. He contended that the parties having agreed before and fixed a hearing date by consent they cannot change or the defendant apply for dismissal of the suit for want of prosecution. He further argued that if the Order were applicable retrospectively the hearing dates should have been disturbed when the Civil Procedure

Amendment) Rules 1973, came into operation on 14 April 1973, and that cases whose hearing dates had been fixed before 14 April 1973 and in respect of which summons for directions had not been taken out were not taken out of the hearing list. He submitted that in H.C.C.C. 1833/71 which he cited no hearing date had been fixed for 19 months since closing of the pleadings and the court instead of dismissing the suit dealt with the application for dismissal as if it were a summons for directions. He argued that nothing stopped the defendant from making use of O. 51 r. 2

3) and apply for summons for directions. He also argued that under O. 51 the defendant had to apply by chamber summons for dismissal of the suit and not by way of preliminary objection. An application under O. 16 r. 5 had to be by notice of motion. There was therefore no proper application before the court for consideration. I shall first deal with the defence counsel’s suggestion that the procedure adopted by the plaintiff’s counsel is wrong in that he should have raised the matter by way of chamber summons under O. 51 r. 2

3) or notice of motion under O. 16 r. 5 and not by way of preliminary objection. Order 51 r. 2

3) provides as follows:

If the plaintiff does not take out a summons for directions the defendant may apply by summons for directions or for the dismissal of the suit.

Thus a defendant who wishes to proceed under O. 51 r. 2

3) may do so by way of chamber summons. The word used is may

, which in my view leaves room for a defendant to make an application under the said sub-rule in court by any other way than by summons at the time of hearing if he had not made such prior application by summons, and, it would be at the discretion of the judge sitting to entertain or refuse to hear an application, which is not made by summons. It is therefore not necessary that an application under O. 51 r. 2

3) be by summons. Furthermore although O. 51 lays down a procedure to be followed an objection that the provisions of that order have not been complied with is a point of law, and it is an accepted principle that objection on a point of law may be raised at any stage of the proceedings and it may be raised orally. In this case the preliminary objection was in writing, although it did not state under what provisions of the Civil Procedure

Revised) Rules it was made. If that were necessary then it is cured by O. 50 r. 12 which provides:

Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

There was therefore nothing wrong in asking for dismissal of the suit in the preliminary objection as that was one of the results of the preliminary objection if it is upheld. I must, nevertheless, point out that where the Civil Procedure Rules have laid down the procedure to be followed in making an application to the court as the case is with O. 51 the procedure so laid down by the rules should be followed unless there be good cause for departure. In this case the defendant having desired as early as 23 June 1973, that summons for directions should be taken out, and knowing that the plaintiff was reluctant to take out such summons the defendant should have taken steps under r. 2

3) of the order and applied to the court by summons for directions rather than waiting to raise the matter by way of notice of objection on the hearing day. Having held that the defendant’s preliminary objection was properly made I must now consider the following issues:

*a*) Was the plaintiff required to comply with the provisions of O. 51 r. 2

1) and take out summons for directions?

*b*) If he was, what is the outcome of his failure to do so? The Civil Procedure

Amendment) Rules 1973, which introduced the new provisions of O. 51 in respect of summons for directions came into operation on 14 April 1973. In all suits in the High Court begun by the filing of a plaint or of an agreement under O. 34, except suits in which there has been made an order for the trial of an issue or for the taking of an account the plaintiff must within one month after the close of pleadings take out a summons for directions. If the plaintiff fails to comply with this mandatory requirement the defendant may apply to the court for dismissal of the suit or for directions. The court has discretion on the defendant’s application either to dismiss the suit or deal with it as if it were a summons for directions. Thus in all suits in respect of which pleadings had not closed by 14 April 1973, the plaintiff is under an obligation after close of the pleadings to take out a summons for directions. In terms of O. 8 r. 17 of the Civil Procedure Rules, pleadings between parties are deemed to be closed as soon as any party has joined issue upon the preceding pleading of the opposite party simply without adding any further or other pleading thereto; or where a pleading subsequent to a reply has not been ordered then at the expiration of seven days from the filing of reply, or where a reply has not been filed within the time fixed by or in accordance with the Civil Procedure Rules, or subsequent pleading has been ordered and has not been filed within the time fixed by the order or such extended time as may be fixed in accordance with the Civil Procedure Rules, then at the expiration of the time so fixed. Mr. Joshi referred to the case of *In re Kely, Son & Verden*, [1901] 1 Ch. 467. With respect that case is not relevant here as it mainly dealt with the relationship between a solicitor and his client. As regards the H.C.C.C. No. 1833 of 1971, although Miller, J., dealt with the notice of motion as if it were a summons for directions and I would have done the same, that case was mainly concerned with O. 16 r. 5 and the hearing date of the suit which had been fixed for the 11 and 12 November 1974 had not been disturbed. That case is therefore not of much help to the present application. In the instant case the defence was filed on 6 December 1972. There was no reply filed. The pleadings in this case were therefore deemed to be closed on 6 December 1972, after filing of the statement of defence. The pleadings thus closed before the Civil Procedure

Amendment) Rules 1973, came into operation. As stated herein earlier on 16 January 1973 hearing dates were fixed by consent of the parties and those dates were undisturbed until 15 June 1973, when the case was at the callover taken out of the hearing list. In my opinion it would have been proper for either the plaintiff or the defendant to take out summons for directions between the period 14 April 1973 when the rules became operative and 15 June 1973, the date the case was taken out of the hearing list for July 1973. When the case was removed from the hearing list it reverted to the state of a suit in respect of which the pleadings had closed and no more. What is the purpose of O. 51 that is, why should the plaintiff take out summons for directions? The said order itself answers this question when it states as follows in r. 2

1): With a view to providing, in every suit to which this Order applies, an occasion for the consideration by the Court of the preparations for the trial of the suit, so that–

*a*) all matters concerning the preparations for the trial of the suit which can be dealt with on interlocutory applications and have not already been dealt with shall so far as possible be dealt with; and

*b*) such directions may be given as to the future course of the suit as appear best adapted to secure the just, expeditious and economical disposal thereof; and

*c*) a proper estimate of the length of time required for the hearing of the suit may be settled by the judge, the plaintiff must, within one month after the close of pleadings take out the summons for directions.

Our O, 51 is taken from the English O. 25 and as stated in the Annual Practice

1973 Edition) p. 413, and, as it can be observed from the above provisions of our O. 51, the main intention of O. 51 is that there should be a thorough stocktaking on the issues in a suit to which the Order applies and the manner in which the evidence should be presented at the trial with a view to shortening the length of the trial and thus saving on costs generally. During hearing of the summons for directions is the time interlocutory applications like better and further particulars, discovery, interrogatories and inspection are dealt with. That is the time admissions are made. The disposal of these matters before the actual trial of the suit makes it possible for the court to dispose of the suit itself expeditiously and thereby save on the costs to the parties. Thus for actions the pleadings of which closed after 14 April 1973, taking out of summons for directions is mandatory. If the principal intention of this order is to provide a way whereby there is stocktaking of the issues relating to an action in order that time and costs are saved I can see no reason why the order should not apply to actions the pleadings of which closed before 14 April 1973, when O. 51 came into force, provided that the hearing dates for such actions have not been fixed for or if fixed such cases have been taken out of the hearing list. In other words in my opinion, and, taking into account the intention of O. 51, a plaintiff to a suit the pleadings of which closed before 14 April 1973, and, which suit the date of hearing has not been fixed or if fixed such date has been cancelled may take out the summons for directions. It is however not obligatory on such plaintiff to take out the summons for directions, and, if he does not comply with the said O. 51 his suit should not be dismissed under the provisions of O. 51 r. 2

3) as the case would have been had the pleadings closed after 14 April 1973. In such cases the court has a discretion and it may either accept an application for directions or order that the suit goes to hearing without a summons for directions being taken out by either party. In the instant case the plaintiff could have taken out a summons for directions if he wished, but it was not obligatory on him to do so. His failure to do so does not, therefore, entitle the defendant to apply for dismissal of the suit, but the defendant may apply by summons for directions. For the reasons stated above I shall deal with the defendant’s applications as if it were a summons for directions in terms of O. 51 r. 2

4) and order as follows:

1) The trial be at Nairobi for 3 days. (2) Costs in the cause.

Leave to appeal.

*Order accordingly.*

For the plaintiff:

*CS Joshi*

For the defendant:

*SS Dhanji* (instructed by *Shapley Barret & Co*, Nairobi)