



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC NO. 64 OF 2016**

**NGUGI GATIMU.....PLAINTIFF**

**VERSUS**

**STEPHEN MWANGI MWAURA.....1<sup>ST</sup> DEFENDANT**

**MWINJI NDWIGA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Honourable Court has been invited to determine the Notice of Motion dated 2<sup>nd</sup> July, 2019 whereby the Applicant is seeking the following orders: -

- a. That the validity of the summons issued on 10<sup>th</sup> May, 2019 be extended for a period of 12 months.
- b. That the costs be in the cause.

2. The applicant's application is premised on the grounds set out on the face of the application and on the affidavit of his advocate sworn on 2<sup>nd</sup> July, 2019.

3. The respondents did not oppose the application as provided under *Order 51 Rule of the Civil Procedure Rules*.

4. When the application came up for hearing on 2<sup>nd</sup> June, 2021, the parties through their advocates on record agreed to dispose it off by way of written submissions.

**APPLICANT'S CASE AND SUBMISSIONS: -**

5. The applicant's case is that the summons in this matter was issued on 10<sup>th</sup> May, 2016.

6. Service was effected upon the 2<sup>nd</sup> Defendant on 25<sup>th</sup> May, 2017 however the court made observations that the said service was not proper.

7. The period of 12 months had already elapsed and thus they prayed that validity of the said summons be extended so that the service can be effected upon the 2<sup>nd</sup> defendant.

8. The applicant submitted that based on Order 5 Rule 2 (1) of the Civil Procedure Rules, the said law does not talk about whether the summons have expired or not and that issue herein is to seek the extension of the same so that service can be effected.

9. He submitted that he had already served both defendants and it was the court that indicated that the service had to be effected again.

10. He also submitted that it was in the interest of justice that matters be canvassed fully and urged this Honourable Court to extend the summons.

**1<sup>ST</sup> DEFENDANT'S SUBMISSIONS: -**

11. He submitted that the court cannot extend validity of already expired summons as *Order 5 Rule 2 (7) of the Civil Procedure Rules* provides that summons expire after the lapse of 24 months from the date of issue and there's no provision for revival of the same.

12. They relied on the cases of *Zakaria Sommi Nganga vs Kenya Commercial Bank LTD & 2 Others*, *Barclays Bank of Kenya Ltd vs Patrick Njuguna Kubai*, *Udaykumar Chandulal Rahami and 4 others v Charles Thaithi (1997) e KLR* and *Julius Njoroge Muira v Harrison Kiambuthi Mburu (2011)*.

13. He submitted that there are no valid summons capable of having its life extended and prayed that the application be dismissed with costs.

**ANALYSIS: -**

14. I have considered the application and rival submissions of the parties herein.

15. The Applicant brought the application under **Order 5 Rule 2 of the Civil Procedure Rules** which provides that: -

*(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.*

*(2) 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.*

*(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.*

*(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.*

*(5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.*

*(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.*

*(7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.*

16. The bone of contention in this matter is on whether a court can extend validity of summons after they have expired.

17. In determining a similar matter in the case of **John Chigoya Njogu & another v James Fredrick Muriuki & 3 others [2021] e KLR**, this Honourable Court held that: -

*“The literal interpretation of the law as regards summons to enter appearance is that summons are only valid for 12 months from the date of issue. However, the Courts have been granted discretion to extend the validity of summons from time to time if satisfied that sufficient reasons have been given. The extension of summons can only be done before the expiry of the original summons. There is no reason for a Court to extend summons which have lapsed. Extension of summons can only be made during the life of the original summons. Once the life of the original summons lapse, the Courts have no discretion to enlarge time where time limitation have been given either by the Constitution or statute.”*

18. It is evident from the above authority that, extension of validity of summons can only be done before the expiry of the original summons or concurrent summons before its lapse.

19. The summons in this matter were issued on 10<sup>th</sup> May, 2016 when this suit was filed, however the application to have the same extended was made on 2<sup>nd</sup> July, 2019.

20. By the time the said application was made, validity of the summons had already expired.

21. The applicant has explained the anomaly by urging that service had been effected upon the 2<sup>nd</sup> Defendant, however the court observed that the same was improper and directed that the same be effected again. If that be the case, the applicant ought to have filed the application before expiry of original summons.

22. It is important to note that the burden to ensure proper service as provided under the rules of procedure rests solely on the plaintiff, and thus the attempt to justify revival of expired summons by blaming the court is untenable.

**CONCLUSION: -**

23. In view of the foregoing, I find that the applicant’s application dated 2<sup>nd</sup> July 2019 does not have merit and the same is hereby dismissed with costs.

**RULING READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21<sup>ST</sup> DAY OF JANUARY, 2022.**

.....

**HON. E. C. CHERONO**

**ELC JUDGE**

***In the presence of:***

1. Ms Wambui holding brief for Maina Kagio for Respondent
2. Applicant/Advocate – absent
3. Kabuta, Court Assistant.