



REPUBLIC OF KENYA



KENYA LAW
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**Musau v Oyugi & 2 others (Civil Appeal 146 of 2018)
[2022] KEHC 137 (KLR) (21 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 146 OF 2018
MW MUIGAI, J
FEBRUARY 21, 2022**

BETWEEN

BENJAMIN MUTUA MUSAU APPELLANT

AND

JOSEPH OGANDA OYUGI 1ST RESPONDENT

PATRICK MULEI MUSYOKA 2ND RESPONDENT

MICHAEL KIMANI KAMBI 3RD RESPONDENT

RULING

MEMORANDUM OF APPEAL

1. The learned Principal Magistrate erred in both law and fact in failing to note and to appreciate the fact that the law does not limit the number of times that a court of law can enter and/or extend validity of Summons to Enter Appearance.
2. The learned Principal Magistrate erred in both law and fact in failing to note and to appreciate the fact that the law does not limit the time within which applications for renewal and/or extension to Summons to Enter appearance can be made or ought to be made.

PLAINT

3. On or about the 5th day of November, 2002 at 10.00 a.m. or thereabouts along the Machakos – Kitui road at Kithangaini area, whilst the plaintiff was lawfully travelling as a fare – paying passenger in motor vehicle registration number KAN 931 W, the 2nd defendant in the course of his employment and/or agency to the 1st defendant drove the 1st defendant’s motor vehicle registration number KAN 071 K (Mitsubishi mini–bus) so carelessly and negligently that he caused the said motor vehicle to swerve out of its lawful course and to ram into motor vehicle registration number KAN 931 W, severely injuring the plaintiff.



4. The plaintiff prays that judgment be entered against the defendants for:-
 - (a) General damages,
 - (b) Special damages in the said sum of Kshs.86,470/-.
 - (c) Costs and interest at court rates

APPELLANTS SUBMISSIONS

5. That the validity of the summons to Enter Appearance issued herein as aforesaid lapsed; hence the application.
6. The Learned Principal Magistrate erred in both law and fact in refusing to extend summons to enter appearance for service on the defendants as sought by the plaintiff and thereby denying the appellant an opportunity to pursue his claim for damages against the Defendants.
7. The learned Principal Magistrate erred in both law and fact in failing to note and to appreciate the fact that the law does not limit the number of times that a Court of law can enter and/or extend validity of summons to enter appearance.
8. The learned principal magistrate erred in both law and fact in failing to note and to appreciate the fact that the law does not limit time within which applications for renewal and/or extensions to summons to enter appearance can be made or ought to be made.
9. The learned principal magistrate erred in both law and fact in failing to exercise her discretion judiciously, thereby denying the appellant access to justice.
10. The learned Principal Magistrate erred in both law and fact in failing to note and to appreciate the efforts previously made by the Appellant and his advocates in trying to trace the defendants for service.
11. Order 5 Rule 2 CPR 2010 provides:-
 - (i) 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 a 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.
 - (ii) 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.
 - (iii) 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.
12. In *Phillip Chemwolo & Another vs Augustine Kubede [1986] eKLR*, Apallo J (as he then was) posited as follows:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit, I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of cost. The court as it often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”



20. The Court finds the Appeal lacks merit in light of Article 159 CoK 2010 and Section 1A 1B & 3A CPA no reasons/grounds were presented before the Trial Court to satisfy it to consider extension of Summons again after extending in 2016. The matter had been pending in Court for an inordinate long time 18 years and there is no evidence the Defendant was/is traced.

DELIVERED SIGNED & DATED IN OPEN COURT ON 21ST FEBRUARY, 2022 (VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE

