



REPUBLIC OF KENYA



**Macharia (Suing as Administrator of the Estate of the late Grace Priscillah
Wawuda -Deceased) v Salaja & another (Civil Appeal 197 of 2021)
[2022] KEHC 17081 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEHC 17081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 197 OF 2021
MN MWANGI, J
SEPTEMBER 30, 2022**

BETWEEN

**BENJAMIN KILUGHA MACHARIA (SUING AS ADMINISTRATOR OF
THE ESTATE OF THE LATE GRACE PRISCILLAH WAWUDA -
DECEASED) APPELLANT**

AND

**SALAJA DANIEL SALAJA 1ST RESPONDENT
GASPER IKUTWA 2ND RESPONDENT**

*(An Appeal from the ruling and order of Hon. G. Kiage, Senior Resident Magistrate, delivered
on 9th April, 2021 in Mombasa Chief Magistrate's Court Civil Cause No. 2152 of 2018)*

JUDGMENT

1. In the lower Court, the appellant sued the respondents on behalf of the estate of the deceased, as the legal administrator of the estate of Grace Priscillah Wawuda (deceased), seeking recovery of special damages, general damages under the *Fatal Accidents Act* and the *Law Reform Act*, costs of the suit and interest at Court rates through a plaint dated October 18, 2018. The appellant averred that on or about October 21, 2017, the deceased was walking on the pavement along Plaza Road within Mikindani area when the 1st respondent drove, controlled and/or managed motor vehicle registration number KBC 435C Nissan Matatu so negligently, carelessly and recklessly by permitting it to veer off the road and knock down the deceased and as a direct consequence thereof, the deceased sustained fatal injuries leading to his death.
2. The appellant averred that the 2nd respondent was the registered owner of motor vehicle registration number KBC 435C Nissan Matatu, whereas the 1st respondent was the driver, agent, servant and/or employee of the 2nd respondent as a result of which, the 2nd respondent was vicariously liable for the



negligent acts and/or omissions of the 1st respondent. The appellant averred that the doctrine of res ipsa loquitor as well as the provisions of the highway code are applicable herein. The appellant further averred that the Trial Court issued summons to enter appearance for the respondents on October 22, 2018 but all efforts by the Process Server to effect service upon the respondents were futile. He further averred that the said summons expired and were mistakenly forgotten till August 31, 2020 when the Process Server swore an affidavit of non-service.

3. On September 8, 2020, the appellant filed in the lower Court a Notice of Motion application dated September 7, 2020, brought under the provisions of Order 5 Rule 2(2) and Order 50 Rule 6 of the [Civil Procedure Rules, 2010](#), as well as Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#), Cap 21 Laws of Kenya. The appellant sought for the Trial Court to enlarge the time within which the summons to enter appearance against the respondents could be re-issued, to order the re-issuance of summons to enter appearance for the respondents, and for the summons to enter appearance to be served upon the respondents by way of substituted service by registered post through their last known address which is PO Box 95023, Mombasa. The appellant also prayed for the respondents be given twenty-one (21) days within which to enter appearance.
4. In the lower Court, a ruling was delivered on April 9, 2021, where the Court dismissed the appellant's application dated September 7, 2020 with no order as to costs. The appellant being dissatisfied by the decision of the Trial Court on October 29, 2021, filed a Memorandum of Appeal raising the following grounds of appeal-
 - i. That the learned Trial Magistrate erred in law and fact in failing to exercise his discretion judiciously thus dismissing the appellant's application;
 - ii. That the learned Trial Magistrate erred in law and fact in failing to consider the submissions filed by the appellant/applicant thus arriving at a wrong decision;
 - iii. That the learned Trial Magistrate erred in law and fact in failing to note that the appellant had tried to trace the whereabouts of the respondent for purposes of effecting service but the same proved futile thus the initial summons expired in the circumstances; and
 - iv. That the learned Trial Magistrate erred in law and fact by holding that the appellant's application lacked merits thus dismissing the same.
5. The appellant's prayer is for the appeal herein to be allowed with costs and for the ruling delivered on 9th April, 2021 to be set aside and/or overturned and for the same be substituted with an order that the Notice of Motion application dated September 7, 2020 be allowed.
6. This appeal was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Apollo Muinde & Partners Advocates on April 21, 2022.
7. Mr Muinde, learned Counsel for the appellant relied on the provisions of Order 5 Rule 2 of the Civil Procedure Rules, 2010 and submitted that Order 5 Rule 2(1) provides that a plaintiff is supposed to apply for concurrent summons before the expiration of twelve months. He further submitted that there is no provision under Order 5 Rule 2(2) of the [Civil Procedure Rules](#) for a specified period of time within which a Court can extend validity of summons. He urged that whereas the summons to enter appearance herein expired on October 22, 2019, the Court is empowered pursuant to the provisions of Order 50 Rule 6 of the Civil Procedure Rules to extend the validity of the summons. He relied on the case of [Kenya Commercial Bank Limited v Ann Kajuju Charles](#) [2012] eKLR and [Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another](#) [2017] eKLR.



8. In citing the case of *Benjamin Mutua Muema v Kalusi Komu* [2018] eKLR, Mr Muinde submitted that other judicial pronouncements have gone in favour of re-issuing of fresh summons instead of extending the validity of expired summons. He stated that a Court can exercise its discretion by extending the validity of summons from time to time upon application of a party and/or it may re-issue fresh summons.
9. Mr Muinde relied on the case of *Attorney General v Law Society of Kenya & 5 others* [2018] eKLR and submitted that the reason for delay in applying for extension of summons to enter appearance was that they expired in the process of tracing the respondents and the same were mistakenly forgotten until August 31, 2020 when the Process Server swore an affidavit of non-service. He stated that the said mistake was not deliberately done to delay justice as this is the appellant's case and he would benefit from justice being served in a timely manner.
10. Mr Muinde contended that the appellant should not suffer injustice on account of a mistake not of his own making but rather one which was occasioned by the gaps that frequently occur in any ordinary busy law firm. He submitted that extension of validity of summons or re-issuing of fresh summons would promote the overriding objective under the *Civil Procedure Act*, Cap 21 Laws of Kenya and Article 159(d) of the *Constitution of Kenya, 2010* and also prevent the appellant's case from being thrown out at a preliminary stage.

Analysis And Determination.

11. This Court being the 1st appellate Court, it has a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. See *Williamsons Diamonds Ltd v Brown* (1970) EA 1 and *Ramji Ratna and Company Limited v Wood Products (Kenya) Limited*, Civil Appeal No 117 of 2001.
12. An appellate Court will only interfere with a lower Court's judgment if the same is founded on wrong principles or a misapprehension of the law. This was the holding by the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR, 403-415, at 403 where JA, Kneller & Hannon Ag JJA held that;

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
13. The application before the Trial Magistrate was brought under the provisions of Order 50 Rule 6 and Order 5 Rule 2(2) of the *Civil Procedure Rules, 2010* which provide as hereunder-

Order 50 Rule 6

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed...”

Order 5 Rule 2(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.”



14. It is evident that the original summons to enter appearance were issued on October 22, 2018. Pursuant to the provisions of Order 5 Rule 2(1) of the *Civil Procedure Rules, 2010*, the said summons were valid for a period of twelve (12) months. The appellant averred that the said summons were not served upon the respondents since they could not be traced. As such, the summons to enter appearance issued on October 22, 2018 expired on October 21, 2019. It is noteworthy that prior to the expiry of the summons to enter appearance issued on October 22, 2018 no application was made before the Trial Court to extend their validity.
15. As correctly submitted by the appellant, this Court has the discretion pursuant to the provisions of Order 50 Rule 6 of the *Civil Procedure Rules, 2010* to enlarge time within which an application to extend the validity of summons may be made. In the case of *Kenya Commercial Bank Limited v Ann Kajuju Magondi & others* [2012] eKLR, the Court held that the provisions of Order 50 Rule 6 of the *Civil Procedure Rules, 2010* empowered the Court to enlarge time to extend summons before and after their expiry.
16. It is evident that the application before the Trial Court was filed approximately one year after the summons herein had expired. The appellant submitted that failure to renew the summons in good time was occasioned by lack of supervision of service of the summons which fact was only discovered on the August 31, 2020 when the Court Process Server swore an affidavit of non-service. I have gone through the affidavit of non-service sworn by a duly licensed Court Process Server by the name Justus Mulwa Ngula on August 31, 2020, and it is evident that he received summons to enter appearance issued in the suit herein on October 22, 2018 and before the expiry of the said summons, he tried on several occasions to investigate the respondents' whereabouts but his efforts were all in vain.
17. It is noteworthy that the application to re-issue summons to enter appearance was filed almost immediately after the Process Server swore the affidavit of non-service. The appellant relied to the case of *James Muniu Muchere v National Bank of Kenya* [2010] eKLR, where Okwengu J (as she then was) stated that the Court has powers under Order IV Rule 3 of the *Civil Procedure Rules* to issue summons to enter appearance, which power extends to re-issue summons to enter appearance, where it is necessary for the ends of justice to be met and that re-issue simply means to issue the summons to enter appearance again.
18. In *Mechanised Cargo Systems Limited v Fina Bank Limited* [2007] eKLR, the Court in allowing an application to re-issue summons to enter appearance held that-

“The application involved the courts inherent jurisdiction together with Order V rule 1(2) of the *Civil Procedure Rules*. I am satisfied that this court has power to re-issue the summons as sought and having been satisfied by the explanations given why the original summons were not served in time proceed to validate the summons issued in this case by ordering a re-issue and service of summons within 14 days from date herein.”
19. It is this Court's view that the explanation given by the appellant is forthright, satisfactory and acceptable. It is evident that the appellant's Counsel is to blame for the failure to ensure that the summons in question were served upon the respondents and/or renewed in good time. It is therefore in the interest of justice for this Court to allow the appellant's suit to proceed to hearing on its merits and to give an opportunity to the respondents to bring forth their side of the story so that justice can be served by determination of the suit between the parties.
20. This Court's finding is that the appeal is merited and the same is allowed in the following terms-
 - i. That the ruling delivered on April 9, 2021 by the lower Court is hereby set aside;



- ii. The appellant shall prepare fresh summons within 14 days and present the same to Court for the purposes of being signed by the Deputy Registrar;
- iii. Upon being so signed, the summons must be collected and service effected to the respondents by way of substituted service by registered post through their last known address which is PO Box 95023, Mombasa, within 21 days of the execution of the summons by the Deputy Registrar; and
- iv. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER, 2022.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr P. Magolo h/b for Mr A. Muinde for the appellant

No appearance for the respondents

Mr Oliver Musundi – Court Assistant.

