



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO. 5 OF 2016

INOI FARMERS CO-OPERATIVE SOCIETY LTD.....PLAINTIFF/APPLICANT

VERSUS

NYAMBENE COFFEE MILLERS LTD.....DEFENDANT/RESPONDENT

RULING

1. This suit was filed on the 9/9/2016. Summons to enter appearance were issued for service upon the Defendant on the 13/9/2016.

To date the summons are still in the court file, albeit expired.

A notice to show cause why the suit should not be dismissed under **Order 17 rule 2 of the Civil Procedure Rules** was issued and served upon the Plaintiff.

2. In response the Plaintiff filed an affidavit explaining that the defendant could not be traced for service, and sought extension of the validity of the summons by an application filed on the 30/11/2020, under provisions of **Order 5 Rule 1 Civil Procedure Rules**, and tendered oral submissions to support the application.

I have considered the application.

3. **Order 5 rule 2** states the duration and renewal of summons.

A summons to enter appearance is valid in the first instance for twelve months from date of issue, while a renewed or concurrent summons' validity is also twelve months, if its validity is extended before expiry.

Rule 2 states that a summons that has not been served on a defendant the court may extend the validity from time to time if it is satisfied that it is just to do so. **Rule 2 (5) and (6)** provides that an affidavit ought to be filed in support of extension of the summons stating the attempts the plaintiff has made to serve the defendant.

Rule 2 (7) provides that where no application has been made under **Sub rule (2)** the Court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.

From the above, it is evident that an original summons, and a concurrent summons validity is limited to twenty four months.

4. The summons in this matter were issued on the 13/9/2016. They were not extended in terms of **Order 2(2) Civil Procedure Rules**. The Plaintiff literally went to sleep. It was awakened from the slumber by the NTSC served on the 27/10/2020. I have considered the affidavit stating attempts made to serve the defendant. It shows that the only attempt made was on the 15/9/2020. At the time there were no valid summons to serve. They had expired on the 13/9/2017, and their validity had not been extended.

5. In light of the provisions of **Order 5 (1) and (2)** summons can only be valid for a period of 12 months and upon extension by a court for a further 12 months, thus a total of 24 months.

The present application in my view does not meet the legal threshold for extension of unserved and or re-issued summons after a period of over four years. There is nothing to extend or renew.

The inordinate delay has not been explained in the affidavit filed in support of the application, to support any other good reason for the court to consider.

6. The court may however order Re-issue of expired summons under **Order 50 Rule 6 Civil Procedure Rules** from time to time if it deems it proper to do so, but upon plausible reasons, in exercise of its fettered discretion. No other reasons have been stated for this court to consider.

In the **Elegant Colour Labs Nauli Limited –v- Housing Finance Company (K) Ltd & 2 Others (2010) eKLR** - Onyancha J held that

“It seems to me proper and correct to say that extension of summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire in my view it would be legally impossible to extend it when it has so expired and therefore ceases to exist. The summons under the said order which have capacity to be extended by the court on the application by the plaintiff, are summons that are still valid -----“

7. The same sentiments were expressed in the case **Julius Njoroge Muira –vs- Harrison Kiambuthi Mburu (2011) eKLR**.

The **Court of Appeal in Civil Appeal No. 82 of 1996-Udaykumar Chandulal Rajani & 4 Others -vs-Charles Tahithi (1997)eKLR** held that –

“ -----Order –v- Rule 1 provides a comprehensive code for the duration and reviewal of summons and therefore non-compliance with the procedural aspect caused by failure to review the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons ---- the court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence -----“

8. The above is evidently clear that summons that has expired and therefore not valid cannot be renewed or extended, as there would be nothing valid to extend or renew for service.

The upshot is that the Plaintiff’s application dated 27/11/2020 for re-issue of summons to enter appearance whose validity expired on the 13/9/2017 cannot be entertained.

It is dismissed.

Delivered, Dated and Signed at Kerugoya this 25th Day of January, 2021.

J. N. MULWA

JUDGE