



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E027 OF 2021

LETSHEGO KENYA LIMITED.....APPELLANT

VERSUS

TIMOTHY KIMENYI MUNGATHIA.....RESPONDENT

(Being an Appeal from the Ruling of Hon. C. N. Ndegwa (Senior Principal Magistrate) in CMCC No.1070 of 2019 Mombasa delivered on 11th November, 2020)

JUDGMENT

1. The Appeal herein arises from the **Ruling** of Hon. C. N. Ndegwa (SPM) dated **11th November, 2020** wherein he dismissed the Appellant's application seeking renewal of summons to enter appearance.

2. Being aggrieved by the said dismissal, the Appellant filed a **Memorandum of Appeal** in which it raised the following grounds:-

1. That the learned Trial Magistrate erred in law and in fact in failing to consider that the delay in making the application for extension of summons was inadvertent and unavoidable as the Mombasa Law Courts were closed indefinitely by the Chief Justice on 19th June, 2020, several weeks immediately preceding the expiry of the Summons to Enter Appearance, in response to Coronavirus among judicial staff at Mombasa Law Courts;

2. That the learned Trial Magistrate erred in law in failing to consider that time was frozen for purposes of computing the validity of the summons sought to be extended under Order 50 rule 3 as read with Order 50 rule 8 during the duration which the courts were closed hence the summons could not have been said to have elapsed;

3. That the learned Trial Magistrate erred in law and in fact by failing to appreciate that the orders sought were not so fundamentally prejudicial as to affect the rights of the intended Defendant whereas the denial of the orders will greatly prejudice the Appellant as it would have to pay a substantial sum of money towards filing a fresh suit against the intended Defendant;

4. That he learned Trial Magistrate erred in law and in fact in failing to consider that the delay in making the application for renewal of summons and extensions of their validity was nor inordinate;

5. That the learned Trial Magistrate erred in law and in fact by failing to appreciate the nature of the claim was a mandatory claim for substantive sum of money and refused to apply Section 3A of the Civil Procedure Act which underpins the court's inherent power to grant relief when the ends of justice and equity demands;

6. That the learned Trial Magistrate erred in law and in fact by failing to give the Plaintiff a chance to present its case on trial and in merit thereby defeating the overriding objective of facilitation of just, expeditious, proportionate and affordable resolution of civil disputes;

7. That the learned Trial Magistrate erred in law and in fact by visiting the mistake of the advocate in delaying to file the application but citing wrong provisions of the law upon the Plaintiff/Applicant thus disenfranchising the Plaintiff/ Appellant.

3. The Appellant has urged the court to allow the appeal, set aside the entire **Ruling** dated **11th November, 2020** and substitute the same with an Order enlarging the time for making an application for renewal of summons to enter appearance. Further, it has urged the court to renew the summons to enter appearance and extend the validity thereof for twelve months from the date of the order and to order for service of the renewed summons to enter appearance upon the Defendant by way of substituted service through a registered post of the Defendant's last known address P O Box 8032-80109, Mtwapa, Kenya. It also prays for costs to be awarded to the Appellant.

4. The Trial Magistrate while relying on the case of **Elegant Colour Labs Nairobi Limited –vs- Housing Finance Company (K) Limited & 2 Others [2010]eKLR**, dismissed the Appellant’s application dated **16th July 2020** and filed on **17th July, 2020** on the ground that the summons that were issued on **5th July, 2019** had expired on **5th July, 2020** and therefore the court could not extend the same under **Order 5 Rule 2(1) of the Civil Procedure Rules, 2010**. The trial court stated that it was illegal to extend the validity of the summons in the case herein as they had ceased to exist.
5. The Appeal was canvassed by way of written submissions and only the Appellant’s submissions dated **23rd February 2021** are on record.
6. The Appellant through the firm of **Oundo, Muriuki & Co. Advocates** submitted that upon the filing of a **Plaint** on the **5th July 2019**, summons to enter appearance were issued on an even date. He went on to submit that all efforts to locate the Respondent bore no fruits and thus personal service of the summons to enter appearance proved impossible.
7. It is the Appellant’s submissions that an application for extension of the summons to enter appearance issued on **5th July 2019** was prepared in June 2020, but the same proved impossible to file due to the extensive Covid-19 testing exercise for judicial staff at Mombasa Law Courts which led to its subsequent closure of the court by the Chief Justice Hon. David Maraga (retired) vide a statement dated the **19th June 2020**.
8. On **17th July, 2020** shortly after the resumption of the Mombasa Courts registry activities, the Appellant filed a **Chamber Summons** application seeking that time be enlarged for the renewal of summons to enter appearance and that summons issued on **5th July, 2019** be extended for a period of twelve (12) months.
9. According to the Appellant, the communication of the closure of the Mombasa Law Courts was done two and a half weeks preceding the expiry of the summons to enter appearance on the **5th July 2019** when they would have ordinarily expired. The Appellant submits that no amount of diligence could prepare them for the abrupt and indefinite closure of the court registry.
10. It is the Appellant’s averment that Order 50 Rule 3 and 8 of the Civil Procedure Rules provide for the clear guidelines on when time for doing any act or taking any proceedings starts and stops to run. The Appellant then calculated that from **19th June 2020** when the operations of the courts were slowed down, it had a total of sixteen (16) days to file for an application of extension of time. That further, the **5th July 2020** when the summons to enter appearance were to expire fell on a Sunday giving the Appellant up to **6th July 2020** to make the application for extension of time.
11. The Appellant further submitted that during the period when operations at the Mombasa Law Courts had been suspended, that is from **19th June, 2020**, time stopped running and the summons issued on **5th July, 2020** were still valid until such a time that the court operations would resume, which according to the Appellant was on **17th July, 2020** when the court resumed.
12. The appellant added that the Respondent was not likely to suffer any prejudice if the orders of enlargement of time and extension of the validity of the summons are granted since the actions of the trial court defeat the overriding objective of affordable resolution of civil disputes.
13. The Appellant does not hold the view that the application for enlargement of time and extension of summons was brought to court without undue delay. The summons expired on the **5th July, 2020** and the said application was placed before the trial court on **17th July, 2020** hence twelve (12) days do not amount to inordinate delay.
14. Further, it was the Appellant’s submission that **Section 3A** of the **Civil Procedure Act** clothes the trial court with unlimited inherent power to grant appropriate reliefs necessary for the ends of justice and the dismissal of its application put an end to any hopes that the suit would be heard and determined on its merits as required under **Article 25** of the **Constitution of Kenya**.
15. Lastly, the Appellant submitted that the mistake of counsel in delaying to file the application should not be visited on the Appellant.
16. The Appellant has placed reliance on the cases of **Judity Walekhwa –vs- Ronald Olunga & 2 Others [2020]eKLR** and **Super Metro Limited –vs- BHN [2020]eKLR** to show instances when the court took cognizance of the Covid-19 Pandemic and allowed applications for enlargement of time notwithstanding long periods of delay.
17. In the case of **Tropical food International & Another –vs- Eastern and Southern African Trade and Development Bank & Another[2017]eKLR**, the Court with an application to strike out a suit where summons to enter appearance were issued on **26th March, 2014** and had not been served after 3 years. The summons that had since expired were validated for a period of 30 days.
18. Lastly, the Appellant has cited the case of **Trident Insurance Co. Ltd v Underwriting Services & Insurance Brokers Ltd [2017]eKLR**, wherein the court interpreted the findings of the court to reaffirm the overriding principle that the extension of validity is a discretionary power of the courts.

Analysis and determination

19. I have carefully considered the appeal and the Appellant’s submissions filed herein, I find the following issues arise for determination: -

i. *Whether time stopped to run due to the closure of the law courts;*

ii. *Whether the court can enlarge time for renewal of Summons to Enter Appearance after expiry of the same.*

i) *Whether time stopped to run due to the closure of the Mombasa law courts*

20. The Appellant's case was that time stopped to run on the **19th June, 2020** after the issuance of a statement on the closure of the Mombasa law courts. The statement read (verbatim): -

“OFFICE OF THE CHIEF JUSTICE/PRESIDENT, SUPREME COURT OF KENYA

June 19, 2020

STATEMENT ON CLOSURE OF COURTS IN MOMBASA

Over the last 24 hours, 11 members of staff at our courts in Mombasa, out of a complement of 150 officers, have tested positive for COVID- 19. They include Judicial officers and registry staff.

Additionally, their primary contacts within the courts, totalling 118 officers, have been identified and must now go into self-quarantine with immediate effect as directed by Ministry of Health Officials.

The affected Courts are the Main Court Building, the City Court and the Tononoka Children's Court.

In view of these developments, we have suspended all open court activities in Mombasa until further notice. We shall, however, as much as possible, endeavour to offer online and other virtual services to court users.

HON. DAVID K. MARAGA, EGH

CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT OF KENYA”

21. According to the Appellant, the communication above was issued two and half weeks preceding the expiry of the Summons to enter appearance issued on the **5th July 2019** that were set to expire on the **5th July, 2020**. That further the time was frozen from **19th June 2020**, and to the appellant such summons was valid until such a date that the court would resume its functions which to them was **17th July, 2020**.

22. The Appellant states that the delay in making the application for renewal was due to unavoidable circumstance caused by the closure of the Mombasa Law Courts that resulted in the suspension of the court and registry activities.

23. The court is very alive to the current situation in world, that there is at present a Virus, **Covid-19** and that further it is true that the then Chief Justice suspended all open court activities in Mombasa.

24. The reading of the statement issued on the **19th June, 2020** holistically will show that litigants and Advocates had the option to use online services. I am aware that since outbreak of the virus, the courts have scaled down on open court activities and have encouraged litigants and advocate to take advantage of the online services offered by the Judiciary. I am aware that as at **June, 2020** Mombasa law courts had in place an online filing system.

25. The argument by the Appellant that time stopped to run is misguided as there is no formal communication to show that courts opened on the **17th July, 2020**. Further, it had an opportunity to file its documentation in court through the online process but did not do the same, hence **Order 50 Rule 3** of the **Civil Procedure Rules** does not apply.

26. **Order 50 Rule 3** of the **Civil Procedure Rules** provides for the instances that time stops to run and it states as follows: -

Time expiring on Sunday or day offices closed [Order 50, rule 3.]

“Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open”.

27. It is therefore true that the **5th July 2020** having been a Sunday, the Appellant had up to the **6th July, 2020** to file the application for renewal of summons to enter appearance.

ii) *Whether the court can enlarge time for renewal of Summons to Enter Appearance after expiry of the same.*

28. The issue that was before the trial court was in regard to the validity of summons and the expiry thereof which is provided under **Order 5 Rule 2 of the Civil Procedure Rules, 2010**, which provides:-

2. (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 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.

29. I understand the above provisions of the law, specifically Order 5 Rule 2(1) of the Civil Procedure Rules to mean that; summons shall be **valid** for twelve months and where a concurrent summons is issued, the same shall be done in a period of validity of the original summons to mean the same should not be expired.

30. The Appellant has sought refuge under **Section 3A** of the **Civil Procedure Act** and stated that the trial court had unlimited inherent power to grant orders of renewal as an appropriate relief necessary for the ends of justice.

31. **Order 5 Rule 2 (2)** as read with **sub rule (7)** allows one to bring an application to renew and extend summons. It is clear that the said rule allows the court to extend the validity of summons from time to time if satisfied that it is just to do so. The law does not say that expired summons cannot be extended.

32. The law under **Order 5 Rule 2(1)** of the **Civil Procedure Rules**, that once a summon is expired, it cannot be extended. But under **Order 50 Rule 6** of the **Civil Procedure Rules**, nothing stops this court from reviving what has expired, and giving life to it, where the law does not explicitly bar such action. **Order 50 Rule 6** provides: -

Power to enlarge time [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:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

33. I, therefore find that a party can apply for enlargement of time, if the original duration given has already expired. In the case of summons, I do not agree with the trial court, that one must apply for their extension only when the summons are still valid. There is nothing in the law that bars the court from extending the validity of summons because such application is made after the original summons have expired. The court therefore has discretion to consider an application for extension of validity of summons even where the said summons have expired. See **Kenya Commercial Bank Limited –vs- Ann Kajuju Charles [2012]eKLR**, where Mabeya J stated: -

“...My reading of Order 5 Rule 2(2) is that the validity of a summons to enter appearance may be extended on application. The rules do not specify at what time such an application may be made. Whether it is before or after the validity has expired does not make any difference since under the above provision time may be extended for making such an application if good reasons are advanced...”

34. The court in the case of **Ethics and Anti-Corruption Commission -vs- Shaibu Hamisi Mgandi & Another; Commissioner of Lands (Interested Party) [2020] eKLR**, Justice Munyao stated as follows: -

“...The court will of course consider all the surrounding circumstances of the case and make a decision whether or not to exercise its discretion in favour of the applicant. It is of course certainly prudent to apply for extension before the summons have expired, or shortly thereafter, for as more time lapses, the more difficult it will be to convince the court to extend the validity of summons, because avenues such as an application for substituted service can be explored, and further, the plaintiff runs the risk of having his suit dismissed if no application for extension is made 24 months after the issuance of the first summons...”

35. Therefore, the Court can grant any such enlargement of summons, but it is called upon to consider all the surrounding circumstances of

the case and decide whether or not to exercise its discretion in favour of the Applicant.

36. In this case, the Appellant explained that the reasons for not making a timely application was that the Mombasa law courts were closed and it believed that time had stopped running and there was no urgency in filing their application for renewal of Summons to enter appearance. According to the Appellant the court were opened around **6th July, 2020**. The application for extension was filed on the **17th July, 2020**, thirteen (13) days later after the expiry of the Summons.

37. It is evident that the Appellant did not take advantage of the online services (e-filing system) offered by the court, but nonetheless I find that a delay of thirteen (13) days in filing an application for extension is excusable due to the Notice issued on **19th June, 2020** whereby the Mombasa Law Courts and the Registry were closed. I am thus, persuaded to exercise my discretion in favour of the Applicant.

38. In view of the above, the following orders issue:-

a. The Appeal dated 2nd December, 2020 and filed on 15th December, 2020 be and is hereby allowed.

b. The Ruling dated 11th November, 2020 be and is hereby set aside.

c. The Summons to enter Appearance be and are hereby extended for a period of 90 days for the Applicant/Plaintiff to serve the same upon the Respondents/Defendants.

d. The Applicant/Plaintiff be and is hereby granted leave to serve the defendants/Respondents by way of substituted service through registered post by their last known address P. O. Box 8032-80109, Mtwapa, Kenya.

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30th DAY OF JUNE, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. June counsel for Appellant

No appearance for respondent

Court Assistant - Bancy