



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO.545 OF 2014**

**KOILEKEN OLE KIOLONKA ORUMOI .....PLAINTIFF**

**VERSUS**

**MELLECH ENGINEERING & CONSTRUCTION LTD.....1<sup>ST</sup> DEFENDANT**

**AFRICAN BANKING CORPORATION LTD.....2<sup>ND</sup> DEFENDANT**

**S.M GATHOGO t/a VALLEY AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

(1) Before court is the Notice of Motion dated **6<sup>th</sup> June 2018** by seeking Orders:-

**“1. THAT this court be pleased to issue or re-issue summons to enter appearance valid for another 12 months.**

**2. THAT costs of this application be provided for.”**

The application which was premised upon **Order 5 Rule 2(1)** and (2) Civil Procedure Rules together with all other enabling provisions of the law and was supported by the Affidavit dated **6<sup>th</sup> June 2018** sworn by **MOSES LONKISA OLENKINYA** (the Plaintiff/Applicant herein).

(2) The Defendant/Respondent filed Grounds of Opposition dated **10<sup>th</sup> May 2018** and filed in court on **11<sup>th</sup> July 2018**.

(3) The Applicant herein has sought to have the summons in this matter issued or re-issued. The Applicant avers that having filed an Amended Plaintiff, witness statement and other pleadings he applied to the court for issuance of the summons to enter appearance. The summons were duly signed and were sent to the High Court Registry to await collection. The Applicant alleges that despite their efforts they were unable to trace the signed summons at the Registry. On **8<sup>th</sup> November 2017** the Applicant’s lawyer wrote to the Deputy Registrar seeking a duplicate of the summons. However said letter received no response. Hence the present application seeking for a re-issuance of the summons to enter appearance.

(4) The Respondent opposed the application contending that this is not a case of a failure to serve the summons to enter appearance but rather it is a case of **failure to collect** the Summons for service. The Respondent further contends that as at **November 2017** the suit having abated, there exist no valid summons capable of re-issuance. They urge the court to dismiss the application with costs.

(5) **Order 5 Rule 2(1)** of the Civil Procedure Rules 2010 provides that a summon to enter appearance shall be valid for twelve (12) months from the date of issue in the first instance. **Order 5 Rule 2(7)** provides:-

**“Where no application has been made under subrule 2 [for extension of summons] the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons.”**

(6) In this case the Amended Plaintiff dated **3<sup>rd</sup> October 2016** was filed in Court on **6<sup>th</sup> October 2016**. Summons to enter appearance were duly signed by the Deputy Registrar and were issued on **2<sup>nd</sup> December 2014** and delivered to the High Court Registry for collection by the

Applicant or his agent. Those summons were **never** collected. The Applicant avers that the summons went missing and were not available for collection at the Registry Counter. However it was not until **8<sup>th</sup> November 2017**, thirteen (13) months later that the Applicant lawyers wrote to the Deputy Registrar forwarding a fresh set of summons for signature. The Applicant took no action within the 12 months of issuance of the summons to apply under Order 5 Rule 2(b) for an extension of the summonses. In the meantime the summons issued on **2<sup>nd</sup> December 2014** had already expired within 30 days of issue. **Order 5 Rule 1(b)** of the Civil Procedure Rules provides:-

**“(6) Every summons, except where the court is to effect service shall be collected for service within thirty days of issue or notification whichever is later, failing which the suit shall abate.”**

The use of the word “**shall**” makes this a mandatory provision. Failure by the Applicant to collect the summons within thirty(30) days of issue meant that this suit abated by operation of law. Accordingly there exist no valid summons capable of re-issue. By **8<sup>th</sup> November 2017** when counsel for the Applicant was writing there existed no summons capable of re-issuance and/or extension.

(7) It is clear that the Applicants were only galvanized into action by the application dated **14<sup>th</sup> November 2016** made by the Respondents seeking to have the suit struck out for failure to collect the summons within 30 days of issuance.

Accordingly the present application is a non-starter the same has no merit and is hereby dismissed in its entirety with costs to the Respondent.

Dated, Signed and Delivered in **Nairobi** this 31st day of **January, 2019**.

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**Justice Maureen A. Odera**

Ruling read out and delivered in open Court this **31<sup>st</sup>** day of **January 2019**.

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Judge