



REPUBLIC OF KENYA



**Tawo (Suing as the legal representative of the Estate of Silvanus Tawo Onginjo-Deceased) v Odhiambo & 5 others (Environment & Land Case E008 of 2022) [2023] KEELC 22510 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22510 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE E008 OF 2022  
AY KOROSS, J  
DECEMBER 14, 2023**

**BETWEEN**

**KIZITO OTINGI TAWO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILVANUS TAWO ONGINJO-DECEASED) ..... PLAINTIFF**

**AND**

**JERUSHA NEREA ODHIAMBO ..... 1<sup>ST</sup> DEFENDANT  
EUGENE LESLEY ANTHONY OSEWE ..... 2<sup>ND</sup> DEFENDANT  
YASMIN EASLEY ..... 3<sup>RD</sup> DEFENDANT  
NOELA DOWNS ..... 4<sup>TH</sup> DEFENDANT  
JOSIAH AGAK ..... 5<sup>TH</sup> DEFENDANT  
SIAYA SUB-COUNTY REGISTRAR OF LANDS ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling seeks to determine the Notice of Motion dated 26/07/2023 filed by the Plaintiff in which he prays for extension of validity of summons against the Defendants for a period of 12 months.
2. The Motion is supported by grounds on its face together with depositions made in the Affidavit of Counsel on record for the Plaintiff Mr. Kevin Ochieng sworn on 26/07/2023.
3. According to Counsel, upon summons to enter appearance dated 19/05/2022 being issued to his law firm Mulinge & Ochieng Co. Advocates, they engaged the services of a process server Mr. Leonard Kimanzi Ndewa who informed them that his attempts to serve the Defendants were futile since the Defendants whereabouts or residence were unknown and avers the difficulties of service of summons was not foreseen.



4. Further, Counsel avers, the whereabouts of the Defendants have now been made known and considering the nature of the suit, the Court should exercise discretion in the Plaintiff's favour and allow the Motion.
5. The motion is canvassed by the oral submissions of Mr. Ochieng which he made on 18/10/2023. Counsel submits the 1<sup>st</sup> to 3<sup>rd</sup> Defendants reside outside the jurisdiction of the Court and some of the Co-defendants are relatives of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants.
6. Hence, having considered the Plaintiff's Motion, Affidavit and oral submissions, the single issue that arises for determination is whether the Motion has merits.
7. The legal provision that empowers courts to extend validity of summons is found in Order 5 Rule 2 (1) and (2) of the [Civil Procedure Rules](#). This provision stipulates thus: -

“(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.”

8. This provision of law has been the subject of interpretation and from jurisprudence, two schools of thought emerge. The first school of thought is of the view this provision of law is couched in mandatory terms and only applies to subsisting summons. In other words, once summons have expired as the case herein where summons expired on 22/05/2023, any attempt to extend such summons is otiose. The persuasive decision of [Brenda Karanja v Mweki Dominic](#) [2021] eKLR cited the Court of Appeal decision of Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others v Charles Thaithi [1997] eKLR which held as follows: -

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspect cause by failure to renew 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....”

[See also [Elegant Colone Labs Nairobi Limited v Housing Finance Company \(K\) Limited & 2 Others](#) (2010) e K.L.R and [Pauline Wanjiku Gatimu v James Kagunya Njoroge & another](#) [2021] eKLR.]

9. On the other hand, the 2<sup>nd</sup> school of thought is of the view that on conjunctive interpretation of this provision together with other Sub Rules as read together with Article 159(2) (d) of the [Constitution](#), Section 95 of the [Civil Procedure Act](#) and Order 50 Rule 1 of the [Civil Procedure Rules](#), it follows this Order 5 Rule 2 (1) and (2) of the [Civil Procedure Rules](#) are permissive and a Court has discretionary power to extend validity of summons. This is well analyzed in the case of [Kale Foundation v Alpharma Limited & another](#) [2021] e KLR as follows: -

“It appears to this court that the trial court read the provisions of Order 5 Rule 2 of the Civil Procedure Rules in a rather technical manner and applied them more strictly than the



language of the Rule itself anticipates. This court while hastening to affirm that the rules of procedure serve a purpose and ought to be complied with, agrees with the Appellant's assertion that such a technical approach appears to run afoul of the command in Article 159(2) (d) of the Constitution for courts to eschew undue regard to technicalities. In this instance, the lower court appears to have effectively constricted its otherwise wide discretion donated under Order 5 Rule 2."

[See also Letshego Kenya Limited v Timothy Kimenyi Mungathia [2021] eKLR which cited with approval Kenya Commercial Bank Limited –v- Ann Kajuju Charles [2012] eKLR and Ethics and Anti-Corruption Commission -v- Shaibu Hamisi Mgandi & Another; Commissioner of Lands (Interested Party) [2020] eKLR.

10. Bearing in mind Article 159 (2) (d) of the Constitution and Section 1A and 1B of the Civil Procedure Act which calls upon this Court to determine disputes in a just manner and Section 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules which empower this Court to extend time for the doing of any act notwithstanding that the application for extension is made after the time for the doing of the act has lapsed, this Court leans towards the 2<sup>nd</sup> school of thought.
11. Now, turning to the circumstances of this case, this court has to exercise its discretion judiciously and it will consider such factors such as length of delay from the date summons expired and circumstances of the case. This is highlighted by the case of Ethics and Anti-Corruption Commission -v- Shaibu Hamisi Mgandi (Supra) which is cited in Kale Foundation v Alpharma Limited (Supra) 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...”
12. Before I proceed with my analysis, it must be noted the suit against the 5<sup>th</sup> Defendant was struck out while the 6<sup>th</sup> Defendant has entered appearance and filed a Defence and the logical conclusion is that the reliefs being sought are against the 1<sup>st</sup> -4<sup>th</sup> Defendants.
13. In the circumstances obtaining to this case, this Court on 2/05/2023 informed Mr. Ochieng that summons would expire on 22/05/2023 however, despite such notice, the Plaintiff went to slumber before filing the instant Motion two months after the lapse.
14. Further, notwithstanding Counsel avers that effort to serve the 1<sup>st</sup> to 4<sup>th</sup> Defendants were futile, evidence has not been placed before this Court to support such exertions. In fact, all the Affidavits deposed by the process server Mr. Leonard Kimanzi Ndewa before this Court paint a contrary picture.
15. From the record, an Affidavit deposed on 10/12/2022 alleges the process server served the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants and another one he swore on 13/02/2023 depicts he served the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
16. I must mention the Affidavit deposed by the process server on 26/07/2023 is improperly on record since it is neither filed nor is it an annexure to any application and it is hereby expunged from the record.
17. Further, from the record, on two occasions, Mr. Ochieng informed this Court that summons had been served and it is only when this Court directed him to serve the 1<sup>st</sup> to 4<sup>th</sup> Defendants that it emerged



these 1<sup>st</sup> to 4<sup>th</sup> Defendants resided out of jurisdiction. Counsel intimated he would seek leave to serve them by substituted means however, such an application was never pursued by the Plaintiff.

18. Therefore, to my mind, this goes to show the conduct of the process server and Counsel in misleading this Court and I am not satisfied the Plaintiff is deserving of the orders he seeks. Consequently, I ultimately find and hold the Motion is not merited. The same is hereby dismissed with costs being in the cause. This matter shall be mentioned for directions on hearing of the main suit on 6/03/2024. Mention notice to be served.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 14<sup>TH</sup> DAY OF DECEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**14/12/2023**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

**In the Presence of**

Mr. Ochieng for the plaintiff

N/A for the defendants

Court assistant: Ishmael Orwa

