



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 10 OF 2015

TRIDENT INSURANCE CO. LTD.....PLAINTIFF

VERSUS

UNDERWRITING SERVICES & INSURANCE BROKERS LTD....DEFENDANT

RULING

1. The plaintiff has sought the re-issuance of Summons to Enter Appearance.
2. According to the plaintiff, although it had filed suit on 13th January 2015, it had not succeeded in locating the Defendant, **UNDERWRITING SERVICES & INSURANCE BROKERS LIMITED.**
3. The plaintiff has sent the original Summons through the defendant's postal address but the same was returned with the endorsement;

“Return to Sender”.

4. The plaintiff had also engaged a private investigator to search for the defendant. However, the said investigator did not manage to trace the defendant.
5. As it took a considerable length of time for the plaintiff to try and trace the defendant, the validity of the original summons lapsed.
6. It is for that reason that the plaintiff now sought the re-issuance of fresh Summons.
7. Pursuant to the provisions of Order 5 Rule 2 (1) of the Civil Procedure Rules;

“A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of 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”.

8. Although the original summons would be valid for 12 months from the date it is issued, Order 5 Rule 2 (2) says if the summons had not been served on a defendant, the court may extend the validity of the summons.
9. Before it can extend the validity of the summons, the court must be satisfied that it is just to do so.

10. In this case, there has not been any flagrant inactivity on the plaintiff's part. The plaintiff has actually shown the court the various step it was taking, in an endeavour to serve the defendant with summons.

11. Pursuant to Order 5 Rule 2 (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”.

12. It is therefore the function of the court which had extended the validity of summons to show the period for which the validity had been extended. In effect, there is no fixed period which the court was bound with when it was extending the validity of summons.

13. According to Order 5 Rule 2 (7);

“Where no application has been made under subrule (2) the court may without notice dismiss the suit on the expiry of twenty-four months from the issue of the original summons”.

14. In this case, the application for extension of the validity of summons was not made until after the period of 24 months had lapsed from the time the original summons was issued. In the circumstances, the court could have dismissed the suit. However, the court had not yet taken steps to dismiss the suit.

15. In effect, the suit itself would have remained alive until and unless it was dismissed by the court.

16. On the other hand, the original summons lapsed 12 months after it was issued. That would mean that the original summons lapsed on 18th January 2016.

17. If the plaintiff was going to apply to the court for the extension of the validity of the summons it should have done so before the validity had expired.

18. However, it is also recognized pursuant to Section 95 of the Civil Procedure Act that;

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed may have expired”.

19. In principle therefore, the court has the discretion to either extend the validity of summons or to order for the re-issue of summons even if the original summons had already expired.

20. But when the court was asked to either extend the validity of summons or to order for the re-issue of summons, it is imperative that the court exercises its discretion in a judicious manner.

21. A plaintiff who had not provided a reasonable explanation for his failure to serve the original summons within the duration of validity, should not be granted either the extension or re-issuance of the summons.

22. Similarly, if the result of either extending the validity of the summons or of ordering that the summons be re-issued would be a deprivation of a Defence which would have otherwise accrued to the defendant, it would be unjust to allow the application.

23. In this case, it does appear that the claim is founded on contract, and that it dates back to the year 2010. But there were also claims that appear to arise until the year 2013.

24. Therefore, whilst it might be possible that parts of the claim might be time-barred, I hold the considered view that the defendant would not be prejudiced if faced with the said claim. I say so because it would still be open to the defendant, if it was so minded, to put forward the Defence of limitation.

25. I also find that the plaintiff has provided an adequate and plausible explanation for the delay in serving the defendant with the original summons.

26. In the case of **DUNCAN MWANGI KIORA Vs VALLEY BAKERY LIMITED & OTHERS [2011] e KLR**, Dulu J. extended the validity of a summons which had expired for more than a year.

27. It is my considered opinion that although the period of over 2 years, since the original summons was issued, is long, it does not, of itself constitute a bar to the re-issuance of the summons.

28. In the result I allow the application and order that summons be re-issued forthwith.

29. I further direct that the re-issued summons shall be valid for a period of six (6) months from the date it is re-issued.

30. Finally, the costs of the plaintiff's application dated 2nd October 2017 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of December 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

M.J. Okumu for the Plaintiff

No appearance for the Defendant

Collins Odhiambo – Court clerk.