



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 52 OF 2012

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

PATRICK NJUGUNA KUBAI.....DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 17th February 2014 and filed on 24th February 2014 was filed under the provision of Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules, Section 3A, 80 and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. The said application sought the following orders:-
 - a. **THAT this Honourable Court be pleased to review, set aside and/or vacate the orders issued on 24th January 2014 and all other consequential orders.**
 - b. **THAT the Plaintiff's application dated 13th March 2013 be allowed as prayed.**
 - c. **THAT the costs of the application be provided for.**
2. The grounds under which the said application was premised were:-
 - a. **THAT there was a mistake and an error apparent on the face of the court record when on 24th February 2014, this court dismissed the Plaintiff's Notice of Motion application dated 13th March 2013 which had sought time within which the validity of summons should have been extended.**
 - b. **THAT the Plaintiff's claim was for a substantial amount of money and it stood to suffer great loss, irreparable damages and prejudice if the court did not review its order and extend the validity of the summons herein.**

AFFIDAVIT EVIDENCE

3. The said application was supported by the affidavit of Margaret Kimani, an advocate in the firm of M/S Muriu Mungai & Co Advocates which had been instructed by the Plaintiff to file suit against the Defendant herein to recover a sum of Kshs 5,284,491.37 together with interest thereon. The said affidavit was sworn on 17th February 2014.
4. She deposed that the firm filed the Plaint dated 30th June 2011 on 1st February 2012 whereupon Summons to Enter Appearance were issued on 6th December 2012.
5. Further, she averred that the firm was granted leave to serve the Plaint and Summons to Enter Appearance upon the Defendant by way of registered mail which it did on 10th October 2012 and

- filed an Affidavit of Service confirming the said service.
6. It was her averment that when the firm requested for interlocutory judgment against the Defendant herein, it was discovered that the firm had erroneously posted the said Summons to Enter Appearance to Post Office Box Number 12213- 80100 Nairobi instead of Post Office Box Number 12213- 80100 Mombasa.
 7. She said that on 4th February 2013, they wrote to the Deputy Registrar for a re-issue of summons to enable them re-serve the same upon the Defendant but they were advised to move the court through the appropriate application which they filed on 13th March 2013 but the same was dismissed by this court.
 8. She stated that she had done more research on this matter and found judicial authorities which were contrary to the contents of the order issued by this court. It was her belief that if the said judicial authorities had been placed before the court at the time the application came up for hearing on 24th January 2014, it would have come to a different conclusion.
 9. It was therefore the Plaintiff's contention that there was an error on the face of the court record hence the need to review the said order and re-look the Plaintiff's Notice of Motion application dated 13th March 2013 on merit.

LEGAL SUBMISSIONS BY THE PLAINTIFF

10. The Plaintiff filed its written submissions dated 24th March 2014 on the same date. It had previously filed its List of Authorities dated 17th February 2014 on 24th February 2014.
11. It relied on the case of **Commercial Bank of Africa Limited vs David Njau Nduati [2013] eKLR** to urge this court to review its order of 24th February 2014 on account of the fact that there was an error on the face of the court. It also referred the court to the meaning of a mistake as defined in the Black's Law Dictionary.
12. This court agrees with the Plaintiff that this court has power to review orders and/or judgment under Order 45 Rule 1(b) of the Civil Procedure Rules, 2010 where there is a mistake or error on the face of the court and it will therefore not be necessary to engage in further discourse on this point of law.
13. This court will instead delve into considering the substantive issue of whether or not there was an error on the face of the court record with a view to establishing if indeed the validity of the summons issued herein could be extended.
14. The Plaintiff submitted that its Notice of Motion application of 13th March 2013 contained a prayer for **"time within which to file the application for extension of validity of summons be extended."**
15. It pointed out that the law was silent on whether a party could apply for extension before or after the summons had expired or when they were no longer valid. It was its contention that this court made an error and/or mistake in ordering that the summons had expired and could not be extended as there were clear legal provisions for extension of validity of summons. It referred the court to Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010 which provides as follows:-

" 2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning 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 the concurrent summons.

2 (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 it is satisfied it is just to do so."
16. As regards the issue of **"if it is just to do so"**, the Plaintiff submitted that courts consider attempts of service in the Affidavit of Service. It urged this court to look at the judicial authorities it had relied upon to see instances where courts have held that they have power to extend the validity of summons in addition to Article 159 (2) of the Constitution of Kenya, 2010 in order to administer justice without due regard to procedural technicalities as its claim was substantial.
17. It therefore prayed that its present application be allowed.

LEGAL ANALYSIS

18. The Plaintiff generally referred the court to several cases to buttress its argument that summons to enter appearance could be extended when they had expired but it did not draw the attention of the court to the specific *ratio decidendi* and/or holdings it was relying upon. This court will therefore consider each judicial authority to establish whether or not courts have power to extend summons which have expired.
19. In the case of **Mechanised Cargo Systems Limited vs Fina Bank Limited [2007] eKLR**, the Plaintiff therein had sought the extension of the summons which had expired and had not been served upon the Defendant due to inadvertence on its part. The Defendant opposed the application on the ground that the summons could not be extended beyond the period of twelve months. In that case, Lesiit J found that the court had power to re-issue summons as she was satisfied by the grounds that had been given for not effecting service of the summons upon the Defendant therein.
20. In the case of **James Muniu Muchere vs National Bank of Kenya Limited [2010] eKLR**, the Appellant therein, who was the Defendant in the suit in the lower court had argued that the Plaintiff was an abuse of the court process as he had been served with summons to enter appearance after the same had expired. Okwengu J (as she then was) distinguished between the extension of the validity of summons and re-issue of summons and found that a court could re-issue summons to enter appearance.
21. The case of **Kenya Commercial Bank Limited vs Ann Kajuju Magondu & Others [2012] eKLR** dealt with the question of extension of validity of summons and re-issue of summons. Leave to serve the said summons by substituted service by way of advertisement in the Daily Nation and the Standard Newspapers was granted. In that case, Mabeya J held that a court could extend such summons before or after the expiry of the summons as it had power to extend the time for doing something under Order 50 Rule 6 of the Civil Procedure Rules, 2010.
22. The last case that the Plaintiff relied on was **Duncan Mwangi Kiora v Valley Bakery Limited & 2 Others [2011] eKLR** where the court considered the question of extending the validity of the summons which had expired for more than a year and had not served upon the Defendant therein. While appreciating that the Plaintiff's advocate had been indolent, Dulu J nonetheless extended the validity of the summons by virtue of Article 159 (2) of the Constitution of Kenya, 2010.
23. This court has carefully considered the Plaintiff's submissions and the case law that it relied upon and wishes to state right at the outset that the decisions referred to hereinabove were issued by courts of equal jurisdiction as this one. They are therefore not binding on this court but are rather only persuasive in nature. The purport of this is that after reviewing the facts as given by the Plaintiff, this court will have to make an independent finding as to whether or not there was an error and/or mistake on the face of the court record to warrant it reviewing the order it made on 24th January 2014.
24. In giving its said order, this court did allow prayer number 1 essentially permitting the Plaintiff's counsel to argue prayer No 2 of the Notice of Motion application dated 13th March 2013. The court did not find the same to have been merited and therefore dismissed the said application.
25. Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitations have been given and to proceed to determine matters without undue regard to technicalities as provided for in Article 159 (2) (d) of the Constitution of Kenya, 2010. However, courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period in particular where there are express and clear provisions of the law regarding those time lines.
26. From the facts before this court, Summons to Enter Appearance were issued on 6th February 2012 and were served by registered mail, albeit to a wrong postal address on 30th July 2012. The Request for Judgment was made on 10th October 2012 and a letter to the Deputy Registrar to re-issue summons was filed on 4th February 2012. This was a day before the said Summons to Enter Appearance expired. The application to apply for the extension of the validity of the said summons was made over a month after the said summons had expired.
27. It is evident that there were a lot of delays in seeking to obtain the re-issue of the said Summons to Enter Appearance. Perusal of the Supporting Affidavit of Patrick Mutuma sworn on 8th March 2013 did not explain the cause of delay or inaction by the Plaintiff's firm of advocates between the

- times interlocutory judgment was sought, when the error of the Defendant's Postal Address was pointed out, when the letter was written to the Deputy Registrar and when the application of 13th March 2013 was filed. He merely contended that the error was regrettable and that the same should not be visited upon the Plaintiff who had a valid claim.
28. The Affidavit of Margaret Kimani is the one that sought to explain the sequence of events from the time the suit herein was filed to the date when the application of 13th March 2013 was filed. This, however, did not also explain the delays between the periods mentioned hereinabove.
29. Assuming that this court could extend time for the extension of the validity of the summons under Order 50 Rule 6 of the Civil Procedure Rules, 2010 and in particular because it can extend the validity of summons from time to time if it is just to do so under Order 5 Rule 2 of the Civil Procedure Rules, 2010, in the absence of any plausible explanation as to the cause of the delays in seeking extension of the said summons, this court finds that the Plaintiff could not have enjoyed the exercise of its wide and unfettered discretion, which must be exercised judiciously, to extend the validity of summons in its favour as it would not have found it just to extend the same.
30. It arriving at this finding, this court has had due regard to the case of **Arbuthnot Express Services Limited vs Manchester Outfitters Suiting Division Limited & Another [1989] LLR 5515 (HCK)** wherein the court therein observed as follows:-

“ The general principle of law is that as far as possible , the courts should lean in favour of the trial and determination of proceedings on merits. There are yet other principles viz that delay defeats equities and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts.”

31. Turning to the question as to whether the court has power to extend summons which have expired, the court has looked at Order 5 of the Civil Procedure Rules, 2010.
32. A plain reading of the said Order underpins the importance of validity of summons. In the first instance, the summons shall be **valid** for twelve months. Where a concurrent summons has been issued, it shall be **valid** in the first instance for the **period of validity** of the original summons which is **unexpired** (emphasis court) at the date of the issue of the concurrent summons. Where the **validity of the summons is extended**, it shall be **until the period specified in the order**. As many attempts may be made to serve the summons during the **period of the validity** of the summons.
33. The Summons to Enter Appearance herein were to expire on 5th February 2013. It is therefore not lost to the court that the Plaintiff's firm of advocates was aware of the importance of extending the validity of the summons before the same expired as its letter to the Deputy Registrar was written before the said Summons to Enter Appearance to wit on 1st February 2013.
34. This court was alive to the fact that the summons to enter appearance had expired and took the view that the same could not be extended as the same were dead. They were non-existent by the time the Notice of Motion application dated 13th March 2013 was filed and heard. This is still the same position taken by the court even when considering the present application to review its orders of 24th January 2014.
35. The court has, on its own motion, looked at the several cases which are on all fours with its decision of 24th January 2014. It hereby approves and adopts the same.
36. In the case of **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others [2010] eKLR**, where 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 ceased to exist...the summons under the said order which have capacity to be extended by the court on the application by the Plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 forecited or under any duration allowed in the extension of original summons...”

37. In the case of **Julius Njoroge Muira vs Harrison Kiambuthi Mburu [2011] eKLR**, Rawal J (as she then was) stated as follows:-

“...I shall thus without hesitation find that the Original Summons is not in existence and all the efforts to revive the same by reissuance were null and void. The Original Summons which has lost its life cannot be resurrected... I shall quote the passage by Lord Denning in the case of Macfoy vs United African Limited (1961) 3 ALL ER 1169 at 1172

““If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad...And every proceeding which it is founded on it is also bad and incurably bad. It will collapse.”” The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers.”

38. In the case of **Zakaria Somi Nganga vs Kenya Commercial Bank Limited & 3 Others [2008] eKLR**, Lesiit J had the following to say:-

“ The summons to enter appearance in this case expired 12 months from the date of issue... it was not possible to revive them. That therefore means that the Plaintiff’s suit lapsed for reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules...”

39. Finally, in the celebrated case of **Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others vs Charles Thaithi [1997] eKLR** which is binding on this court, the Court of Appeal 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....”

40. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- a. **There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**
- b. **There was a mistake or error apparent in the face of the record; or**
- c. **There were other sufficient reasons; and**
- d. **The application must have been made without undue delay.**

41. It is therefore clear from the foregoing cases referred to by the court that there was no mistake or error apparent on the face of the record which would warrant this court to review its order of 24th January 2014. This court reiterates that the summons could not be extended after 5th February 2013 and not even a prayer to extend time within which the application for extension of the validity of summons could be extended could save the Plaintiff.

42. The objective of Article 159 (2)(d) of the Constitution of Kenya, 2010 or Order 50 Rule 6 of the Civil Procedure Rules, 2010 cannot be extended to validate actions which are null and void but disguised as procedural technicalities. These particular provisions of the law cannot be invoked by a party who has been indolent and fails to comply with the laid down provisions of the law to ride on a ground of a mere irregularity or procedural technicality.

43. The failure to file an application to extend the summons by 5th February 2013 was a fundamental flaw that cannot be cured by any provisions of the law as it stands. The Plaintiff had an option of filing its application for extension of validity of summons under a Certificate of Urgency but it did not and opted to bring its application in the normal manner. Application of Article 159 (2) (d) of the Constitution of Kenya, 2010 in all situations would be a recipe for total chaos. It ought to be

used in cases where there are procedural technicalities only but not where there are substantive flaws.

DISPOSITON

44. For the foregoing reasons, the upshot of this court's ruling therefore is that the Plaintiff's Notice of Motion application dated 17th February 2014 and filed on 24th February 2014 is not merited and the same is hereby dismissed. As there has been no appearance by the Defendant herein, there will be no order as to costs.
45. Orders accordingly.

DATED and DELIVERED at NAIROBI this 22nd day of May 2014

J. KAMAU

JUDGE