

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO 415 OF 2010

CHARLES NJUGUNA MWITAPLAINTIFF

VERSUS

**1. JOHN NDUNGU MAINA
2. EDWARD CHEBA NGANGA.....DEFENDANTS**

RULING

1. By a **ruling dated 25th and delivered on 26th July 2013** the court herein (Waweru, J) extended the validity of summons to enter appearance in this suit by 12 months from 3rd September 2012 to 2nd September 2013. The summons subsequently expired before service, and the Plaintiff has come back to court by **notice of motion dated 27th November 2013** for a further extension. The explanation given for failure to serve the extended summons is that the Plaintiff's advocate forgot to diarize the date for the aforesaid ruling, 26th July 2013, and that it was not until 26th November 2013 that they remembered the aforesaid date for ruling. They then filed the present application.

2. Under **Order 5, rule 2(2)** of the **Civil Procedure Rules, 2010** (the **Rules**), where 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. Under **subrule (5)** of the same rule an application for an order under **subrule (2)** shall be made by filing an affidavit setting out the attempts made at service and their results. It is thus apparent that the court's discretion under subrule (2) is not unfettered. That discretion appears to be exercisable within the confines of such attempts as may have been made to serve the summons upon the Defendant. In the present case there was no attempt at all to serve the extended summons. The explanation for failure to do so appears neither here nor there...; but that is argument for another day!

3. For now I will allow the application in the interests of justice. The summons to enter appearance are hereby **further extended until 31st December 2014** with no orders as to costs. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 12th DAY OF JUNE 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 13TH DAY OF JUNE 2014