



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 460 OF 2001

JOHN OCHIENG.....PLAINTIFF

VERSUS

GEOFFREY O. NYANGI.....DEFENDANT

R U L I N G

1). The application dated 4-4-2012 by the applicant prays for the following reliefs:

1. That the interlocutory judgment entered against the defendants on 7-2-2006 be set aside, revised or otherwise vacated.
2. That the final judgment entered against the defendant on 26-6-2006 be set aside renewed or otherwise vacated.
3. That the court does issue a declaration that the plaintiff suit died, abated and ceased to be valid or to exist or to be of any legal effect upon the expiry of the unserved summons to enter appearance on or about 9th December, 2002.
4. A declaration that there was no valid or existing summons capable of being served upon the defendant on 11-7-2005 by any means.

2). The issues in this matter are clear and rather straight forward. The plaintiff filed his plaint on 19-12-2001 seeking damages as a result of a road traffic accident that occurred on 31-7-2000 along Ahero Kisumu road at Miti Mbili. Simultaneously with filing the plaint summons to enter appearance were issued on the same day.

3). Apparently, the plaintiff was unable to trace and serve the defendant till he was forced to make an application dated 18-6-2003 to serve him by way of substituted service. On 11-7-2005 the said summons were advertised in the Standard Newspaper. Apparently, when the plaintiff made the application to advertise the summons he did not sought extension of the said summons.

However, interlocutory judgment was entered on 7-2-2006 courtesy of the advertisement. Therefore the suit proceeded for formal proof and judgment delivered on 26-6-2006 where he was awarded damages.

4). The argument therefore by the applicant is simple; namely whether there were valid summons to be served after the expiry of the original summons issued on 19-12-2001. If this answer is to the affirmative, whether there was any suit existing then or the same had died.

5). I have perused the pleadings as well as the parties submissions and the courts record. From the plaintiff/respondents point of view it is not in dispute that the summons had expired and the same were not extended. Their basic argument is that it would be crossly unjust and unfair to set aside the orders issued by the court including the judgment taking into account the steps undertaken by the plaintiff to

have this matter heard and determined. He argued that the rules of procedure are simply handmaidens of justice. That the failure to extend the summons were merely procedural technicality and that the court should concern itself with substantial justice.

6). Before going far it is ideal at this juncture to reproduce the then provision of order V rule I of the Civil Procedure Rules which this application hinges on; the same provides:

“1 (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 of 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 by order extend the validity of the summons from time to time for some period not exceeding in all twenty four months from the date of its issue if satisfied that it is just so to do.

(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.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) Application for an order under sub rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result and the order may be made without the advocate or the plaintiff in person being heard.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under sub rule (2) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the ongoing summons” (Emphasises mine).

7). Clearly therefore the life span of summons is 12 months and the same can be extended for a further 12 months. The extension can only be made by way of an application to the court stating why the plaintiff has been unable to serve. The said application ought to be made during and before the lapse of the initial 12 months. My understanding therefore is that no application for extension of time can be made after 12 months have elapsed. It must be within 12 months.

8). The *locus classicus* case in this field is the Court of Appeal decision in **Uday Kumar Chandilal Rajani and Others -VS- Charles Thaithi C.A No. 85 of 1996 (Nairobi)** where the learned Judges said as follows:

“Order V Rule 1 provides comprehensive code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3 A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances reissue fresh summons after the expiry of the aforesaid 24 months period neither did the entry of appearance by the defendants revive the summons which had expired. The original summons in an action is only valid for the purpose of service for 12 months from the date of its reissue. The court before 1996, could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case neither the

plaintiff nor his advocate did exhaust the provisions of order V rule 1 (5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when infact there was no valid summons in existence. It follows, therefore, that the alleged service upon defendants was ineffective and invalid and so were the summons issued on 28-8-1992.

Accordingly, and for the reasons above stated, the learned judge was plainly wrong in the decision to which he came”.

9). From the above observation by the Court of Appeal its plainly clear that summons can only be extended for 12 months after that the same becomes redundant or null and void. It is the summons that breaths life to the suit and without it the defendants cannot do anything. Summons therefore is an integral part of the plaint and they go hand in hand.

10). In the scenario at hand it is clear that by 19-12-2002 the summons ought to have expired and that the only window remaining was for the plaintiff to apply for its extension. The same was not done. The only thing done by the applicant was to apply to serve the same by way of advertisement which application was made on 18-6-2013 and the order given on 9-12-2006. Clearly, there were no summons alive by that time. The period had hopelessly expired. No attempt was made to extend. It follows that even the advertisement in the newspaper was inconsequential as there were no summons which were raised.

11). Where then does this leave the suit. As stated above it is the summons that causes the defendants to respond to the suit. In the absence of valid summons there is no suit. In the Uday Kumar Rajani (Supra) the court found that even the entry of appearance pursuant to the stale summons would not revive the summons which had expired.

In Macfoy -VS- United African Ltd [1961] 3 All ER 1169 at 1172 Lord Denning stated as follows:

“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 is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.

13). The situation herein is to say the least true. Had the registrar been aware of the invalidity of the summons then it would not have entered an interlocutory judgment on 7-2-2006 and by extension the court delivering its judgment on 26-6-2006. This is in my opinion a matter that merits review. There was an error apparent on the face of record. The provisions of Article 159 of our current constitution does not apply in this regard. This is not a procedural technicality but a fundamental error that goes to the root of the case.

14). I think I have said enough to order that the application by the defendant is meritorious. I have as well perused the authorities which were cited by the parties and am grateful. In the premises I do order that:

- a. **The interlocutory judgment against the defendant dated 7-2-2006 and the final judgment issued on 26-6-2006 is hereby reviewed and set aside.**
- b. **The plaintiff suit herein has abated for want of unserved summons.**
- c. **Each party shall bear their own costs.**

Dated, signed and delivered at Kisumu this 17th day of November, 2014.

**H.K.
JUDGE**

CHEMITEI