



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Suit 349 of 2009**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**VERSUS**

**ANN KAJUJU CHARLES alias  
ANN KAJUJU MAGONDU & OTHERS ..... DEFENDANTS**

**RULING**

1. Before me is a Notice of Motion dated 2<sup>nd</sup> March, 2012 by the Plaintiff brought under Sections 1A, 1B and 3A of the Civil Procedure Act. Order 50 Rule 6 and Order 5 Rule 2(2) of the Civil Procedure Rules. The same seeks that time for applying for the extension of the validity of summonses to enter appearance against certain Defendants be enlarged and the Validity of those summons be extended for a further 12 months. There is also a prayer for re-issuance of summons to enter appearance against the 15 named Defendants. The application was supported by the Affidavit of Alloys Okari Ombui sworn on 2<sup>nd</sup> March, 2012.

2. The Plaintiff contended that the suit was filed on 19<sup>th</sup> May, 2009 and leave to serve by substituted service by way of advertisement granted, that the notice was advertised on 22<sup>nd</sup> May, 2009 and 25<sup>th</sup> May, 2009 in the Standard and Nation Newspapers, respectively, that whilst the rest of the Defendants entered appearance and filed their Defences, the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 26<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> Defendants did not either appear or file any defence, that their summons were never served as the Plaintiff had first pursued an interlocutory application for the preservation of the funds the subject of this suit which was determined on 9<sup>th</sup> July, 2010, that had those proceeds not been conserved the claim for restitution could not be maintained, that the said application had a bearing on the suit and there was no need to incur costs if the application was not successful, that there had been negotiations in **CM Cr. Case No. 865 of 2009** which have however collapsed with the transfer of Hon. Warsame J to the Judicial Review Division and that due to the collapse of those negotiations it was imperative that the present application be made.

3. Mr. Mutua, learned Counsel for the Plaintiff submitted that the initial life of a summons is 24 months but the court has power under Order 50 Rule 6 to enlarge the same even if the application is made outside the time allowed to make such an application. Counsel relied on the cases of **Holman –vs- George Elliot & Co. (1944) 1 KB 591**, **Kenya Shell –vs- Gaitho Oil Ltd HCCC No. 116 of 2003 (UR)** **Peter Fredrick Mbugua –vs- East Africa Building Society HCCC No.490 of 2003 (UR)** in support of the application.

4. I have considered the Affidavit on record, submissions of Counsel and the authorities relied on.

5. Under Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules, the life of a summons is twelve months from the date of issue but the same can be extended from time to time. There is no time limit given when the application for extension of the validity of the summons is to be made. Rule 2(7) of Order 5 provides that if no application is made for extension of the validity of summons, at the expiry of 24 months of the date of the original summons then the suit may be dismissed. The original summons were issued on 21<sup>st</sup> May, 2009. Accordingly, their validity expired on or about 20<sup>th</sup> May, 2010. Can their validity be extended when it is long gone. I believe so. Order 50 Rule 6 of the Civil Procedure Rules provides:-

***“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.”***

My reading of Order 5 Rule 2(2) is that the validity of a summons to enter appearance may be extended on application. The rules do not specify at what time such an application may be made. Whether it is before or after the validity has expired does not make any difference since under the above provision time may be extended for making such an application if good reasons are advanced.

6. In the case of **Holme –vs- George Eliot & Co. (1944) KB 591** the English Court of Appeal upheld the decision Stable J extending the validity of a summons that had been served one day after expiring. The Court of Appeal (Mackinnon L J) held at page 594 that:-

***“In my opinion, there is no rule that the court or a judge is deprived of any discretion to allow such an extension of time as is involved in this case, but there has been an accepted practice for a long time not to exercise that discretion in such circumstances as were dealt with in Doyle v. Kaujman (I). In the present case, as I have said, the obligation under Lord Campbell’s Act is to issue the writ within twelve months of the date of the accident had been complied with, and by that issue of the writ, if it had been served in proper time, the Defendants would have ceased to be in a position to rely on that limitation. All that has happened is that, owing to lamentable neglect on the part of the managing clerk of the solicitors then acting for the Plaintiff, a day over the twelve months was allowed to elapse before he served the writ. In those circumstances, I think, there was a discretion on the part of the learned judge to make the order extending the time, and, in all the circumstances of the case, that is an exercise of his discretion which I think was perfectly right and proper and with which I certainly should not interfere.”***

7. In the present case, I have considered the reasons advanced for the failure to serve the summons and the delay in applying for the extension of validity and I am satisfied with the same. The Plaintiff did not want to incur unnecessary costs when there was alternative dispute resolution efforts going on in the criminal case by Hon. Warsame J. Indeed, under the Constitution of Kenya 2010 Article 159(2), courts are supposed to encourage alternative resolution of disputes. If the court declines the application, it would be sending a wrong signal that parties should be strictly held to the litigation procedures and should not be encouraged to pursue other modes of dispute resolution.

8. For the foregoing reasons, I am satisfied that the Plaintiff’s application is meritorious and I allow the same in terms of Prayers 1, 2 and 4.

Orders accordingly.

DATED and Delivered at Nairobi this 21<sup>st</sup> day of September, 2012.

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**A. MABEYA**

**JUDGE**