



## **CIVIL PRACTICE AND PROCEDURE**

- **The effect on a suit where summons expire.**

### **REPUBLIC OF KENYA**

### **IN THE HIGH COURT OF KENYA**

### **AT MERU**

### **MISC. CIVIL APPL. 147 OF 2010**

**JOSE MIRITI MBORUA.....APPLICANT**

**VERSUS**

**JOCYLINE NTUURE M.  
MUTHURE.....RESPONDENT**

### **JUDGMENT**

The applicant filed a Notice of Motion dated 15<sup>th</sup> October 2010. It is brought under section 18 (1) of the Civil Procedure Act. The applicant by that application seeks that this court would withdraw CMCC Meru 452 of 2008 from the Chief Magistrate's Court to this court for trial. It is based on the ground that the case before the Chief Magistrate was filed through an oversight. It is also based on the basis that the defendant has not been served with the summons and will therefore not be prejudiced by such transfer. The applicant deponed that the Chief Magistrate Court has no jurisdiction to entertain the action before it. As can be seen from the plaint annexed to the application, the applicant who is the plaintiff before the lower court seeks prayers for permanent injunction restraining the defendant from interfering or entering on L.R. No. *Kiera/E-Magutuni/888* and an order that the defendant be evicted from that land. The applicants deponed that the magistrate's court has no jurisdiction to hear and determine that action because of section 3 of the Land Dispute Tribunal Act. That section gives the Land Dispute Tribunal jurisdiction to adjudicate on disputes relating to agricultural land in respect of trespass, use of the land. That section provides as follows:-

***“3. (1) Subject to this Act, all cases of a civil nature involving a dispute as to-***

***(a) the division of or the determination of boundaries to land, including land held in common;***

**(b) A claim to occupy or work land: or**

**(C) Trespass to land**

**shall be heard and determined by a Tribunal established under section 4”.**

When the matter came before me off the record, I inquired why the defendant had not been served with the application and why the applicant was before me *ex parte*. The learned counsel for the applicant Mr. B.G. Kariuki informed me that the defendant had not been served with the summons in the lower court case. It is for that reason that I requested as I was considering this judgment that the lower court file be brought to me for perusal. I have examined that lower court file and what I found was that the plaint was filed by the applicant on 23<sup>rd</sup> October 2008. The summons were issued by the executive officer of that court on 31<sup>st</sup> October 2008. If it is correct that the defendant has not been served with the summons then it follows that the summons that were issued on 31<sup>st</sup> October 2008 have expired. This is the provision of order V rule 1 (1) of the former Civil Procedure Rules. That rule provides as follows:-

**“A summons (other than a concurrent summons) shall be varied in the first instance for 12 months beginning from the date of its issue and a concurrent summons shall be varied in the first instance for the period of validity of the original summons which is an expired at the date of issue of the concurrent summons.”**

From my perusal of the lower court file there is no evidence that the summons that were issued on 31<sup>st</sup> October 2008 were renewed. That being so, by virtue of that rule, the summons issued in the lower court expired on 1<sup>st</sup> November 2009. It should be noted that the plaint on its own is impotent. It is given life by the summons that accompanied it. It is those summons that require a defendant to defend the suit. That is the definition of summons in the Black Law Diction. Summons is defined in that dictionary as:-

**“Formerly, a writ directing sheiriff to summon a defendant to appear in court. A writ or process commencing the plaintiff’s action and requiring the defendant to appear and answer (cases) .....**”

From that definition, it follows that the summons in the lower court having expired there is no existing action against the defendant. This was clearly stated in the case **RAJANI & OTHERS VRS. THAITHI** [1996] LLR 443, where the court stated thus:-

**“Non compliance with the procedural aspect of order V, which provides a comprehensive code for the duration and renewal of summons, in a fundamental defect that cannot be cured under section 3A Civil Procedure Act,” the Court of Appeal proceeded to dismiss the suit.”**

Order VIII of the former Civil Procedure Rules, rule 1 (1) also provided that it is summons that require a defendant to defend an action. It provides:-

**“The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at all before the first hearing or within such time as the court may prescribe, file his**

*defence.”*

It is clear then from the Civil Procedure Rules and from definition of summons that it is the summons that invite the defendant to appear in an action filed against him and to file a defence. Since the summons in the lower court have expired and the plaintiff failed to extend them before their expiry, then it follows that there is no suit in the lower court capable of being transferred to this court for trial. It is for that reason that the Notice of Motion dated 15<sup>th</sup> October 2010 is dismissed with no orders as to costs.

*Dated, signed and delivered at Meru this 17<sup>th</sup> day of February 2011.*

**MARY KASANGO**  
**JUDGE**