



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 1051 OF 1998

JULIUS NJOROGE

MUIRA.....PLAINTIFF/RESPONDENT

-VERSES-

HARRISON KIAMBUTHI MBURU

.....DEFENDANT/APPLICANT

RULING

I have before me a Notice of Motion dated 13th April, 2011 seeking orders to strike out the suit with costs to the Defendant.

The application is supported by grounds set forth on its face and affidavit in support sworn by the Defendant on 13th April, 2011. Before that, the Defendant had also filed a Notice of Preliminary Objections dated 5th April, 2011 filed on 6th April, 2011.

The Plaintiff filed the suit against the Defendant claiming general damages, lost years and lost earnings and special damages as a result of injuries suffered by him from an accident averred to have occurred on 6th May, 1995. The suit was filed on 6th May, 1998, a day after the limitation period expired. Be that as it may, the Summons was issued on 7th May, 1998. It was not served. I do note that another summons was issued on 17th September, 2001 but without any application or any affidavit. However, that summon was also issued after the expiry of 24 months from the date of issuance of the Original Summons. This Summons also remained unserved.

Thereafter, the Plaintiff filed a Chamber Summons dated 10th February, 2003 seeking the re-issue of Summons and on 3rd April, 2003 the letter of request of reissue the summons was filed as the said application was allowed on 2nd April, 2003. This summons was served and the Defendant filed Memorandum of Appearance and Defence. In paragraph 9 thereof, it is averred that the suit is fatally incompetent and that the Defendant shall raise preliminary objection, which was raised as stated hereinbefore. Thereafter, the present application was filed.

The application is opposed by filing grounds of opposition dated 26th April, 2011. The grounds contend that the Plaintiff has always applied for re-issue of summons and that they were granted, that the suit is not dismissed and that the provisions of Sec. 1A and 1B of Civil Procedure Act militate against striking out of the Plaintiff.

Mr. Gitonga in support of the application relied on the facts that the validity of the Original Summons had expired around 6th May, 1999, that there is no provisions for re-issue of summons and that all the actions made in this suit after the expiry of the validity of the Original Summons are nullity, including filing of Memorandum of Appearance and Defence by the Defendant.

The reliance was placed on the case of ***Chesoni & Another –vs- Silverstein & Another HCCC No. 1444/02 EA*** Law Reports 2006, 39.

Order 5 of the Civil Procedure Rules, 2010 combines both the provisions of Order IV and V of the repealed Civil Procedure Rules.

Order 5 Rule (3) and (5) in short stipulate that every summons shall be accompanied by a copy of the Plaintiff and that every summons prepared by the Plaintiff or his advocate ***shall be filed with the Plaintiff***. The repealed Civil Procedure Rules also stipulated similar provisions. (See Order IV Rule 3 (3) and (5)).

Order 5 Rule 2 of the Civil Procedure Rules 2010 as well as the earlier Order V Rule 1 (1) to (7) are in similar terms. The said provisions provide only for the applications to extend the validity of summons issued and Rule 7 thereof provides that when no application for such extension is made within 24 months, the court may without notice dismiss the suit.

In Chesoni's case, (*supra*) the High Court relied on Court of Appeal case of ***Uday Kumar Chandulal Rajani-vs- Charles Thaithi*** (1996) LLR 443 (CAK) and held that once the summons had expired, there was nothing to extend and reissuance therefore of the summons was invalid. In the case of ***UdayKumar***, (*supra*) Court of Appeal interpreted, as it was before 1996, order V of Civil Procedure Rules. The Limitation of extension of validity of Summons upto 24th months was thereafter removed by Legal Notice No. 84 of 96. However, the process of extension of validity of Summons was kept the same which only dealt with the extensions of validity.

It is pertinent that Rule 2 of Order 5 be interpreted without the limitation as well as Rule 7 thereof which permits the court to dismiss the suit after expiry of 24 months from the issuance of Original Summons.

At the relevant time of this suit, the court under Order V Rule 2 was empowered to extend the validity of summons from time to time if satisfied that it is just to do so. Thus the discretion, even to extend the validity was obviously to be exercised judiciously and not to be granted on asking.

I shall also emphasis that Order V Rule 2 provides a comprehensive code of procedure so far as duration and renewal of summons is concerned. The provisions of Rule 2 (7) giving discretion to dismiss the suit after lapse of 24 months from the issue of the Original summary cannot be understated and has to be considered along with other provisions relating to the extension of validity.

I have considered the authority relied by the Plaintiff/respondent namely ***James Muniu Muchere –vs- National Bank of Kenya Limited (C.A. Nairobi) 636 of 2006***.

With due respect to the court, I shall have difficulty in accepting its finding that under the provisions of Order IV (now Order 5 Rule 1), the court can re-issue the summons. In my considered view, the simple reading of Rule 1 (5) makes it very clear that the Plaintiff and Summons are one unit and cannot be separated. The said sub-Rule 5 stipulates.

“Every summons shall be prepared by the Plaintiff or his advocate and filed with the plaintiff to be signed in accordance with sub-rule (2) of this rule.” (emphasis mine)

The said sub-rule is followed by Rule 2 which provides complete process of the duration and extension of validity of the summons issued. The Re-issued summons cannot be filed with the Plaintiff which has been on record and filed with the Original Summons.

To give the meaning as is found in James's case (*supra*) shall be very prejudicial to the Defendant. Taking that meaning would necessary follow that the plaintiff can be effective outside the limitation of time provided by law. That has exactly happened in this case.

The plaint was filed almost at the verge of the expiry of limitation period. The Original Summons expired in May, 1999. Thereafter, the summons was first re-issued on 17th September, 2001 after the expiry of 24 months and that too without any application or affidavit. It was not served. Again another application was filed on 10th February, 2003, for re-issuance of third summons. The summons was then re-issued on 2nd May, 2003. Thus the plaint was served **after the expiry of eight years from** the accrual of cause of action!!! It would be an outrightly unjust process of law which could allow this plaint to survive.

I shall thus without any 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 as it seems to have been done in this case.

There is no provision for reissuance of summons under the Civil Procedure Rules. I shall also find that the Appearance and Defence cannot put life into the expired summons and thus cannot validate the expired summons.

I shall quote the passage by Lord Denning in the case of *Macfoy –vs- United African Ltd. (1961)* 3ALL 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 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.”

The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers.

The Plaintiff in this case does not have any justifiable ground to seek overriding objectives under Sec. 1A of Civil Procedure Act. The plaint, as it is now, goes completely against justice and expediency.

I thus allow the application and dismiss the plaint with costs.

Dated, signed and delivered at Nairobi this 16th day of **June, 2011**

**K. H. RAWAL
JUDGE
16.06.2011**