

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 329 of 2007

TRUFOODS LIMITED PLAINTIFF

VERSUS

VARUNDEV LIMITED

(IN RECEIVERSHIP) 1ST DEFENDANT

PVR RAO 2ND DEFENDANT

KVSK SASTRY 3RD DEFENDANT

R U L I N G

By this application, the plaintiff seeks an order that this court be pleased to extend the validity of summons to enter appearance issued on 3rd July, 2007 for a further period of 12 months. The application is made by a chamber summons dated 7th January, 2010 and taken out under **Order V Rules 1, 2, 3, 4, 5** and **32** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act** and all enabling provisions of the law.

The application is supported by the annexed affidavit of Edwin C. Koech, an advocate of the High Court of Kenya, and is based on the grounds that all attempts to trace the 2nd and 3rd defendants, who are the Receiver Managers of the 1st defendant, have proved futile; that a search at the Companies Registry to locate the physical address of the 1st defendant's file could not be traced; and that the 2nd and 3rd defendants never use their last known address as letters posted to them were returned undelivered.

At the oral hearing of the application, Ms. Kamau appeared for the applicant and submitted that she was relying on the supporting affidavit and the grounds set out on the face of the application, and that although the summons had expired, she begged to move the court to extend its validity under **Section 3A** of the **Civil Procedure Act**.

I note that the summons which is the subject matter of this application was indeed issued on 3rd July 2007. **Order V Rule 1 (2)** of the **Civil Procedure Rules** empowers the court to extend the validity of the summons from time to time if satisfied that it is just to do so. An application for extension is required to be made by filing an affidavit setting out the attempts made at service and their result. The rules further require that as many attempts to serve the summons as are necessary may be made during the validity of the summons.

Under **Order V Rule 1** of the **Civil Procedure Rules**, a summons is valid in the first instance for twelve months beginning with the date of its issue. The summons herein was issued on 3rd July, 2007, and was therefore valid, in the first instance, until 2nd July, 2008. That date came and went, and no application was made for the extension of the summons. Even though the rules allow for as many attempts to serve the summons as may be necessary to be made during the period of validity of the summons, the applicants have not set out the number of attempts they made to effect

service upon the defendants. Paragraph 4 of the supporting affidavit states that they made several attempts to trace the 2nd and 3rd defendants but all the attempts proved futile. This does not disclose the number of attempts they made. Similarly, paragraph 5 shows that they sent a registered letter only once, and it was returned unclaimed. Likewise, paragraph 6 states that the applicants were informed at the Companies Registry that the 1st defendant's filed could not be traced, but they don't reveal whether this information was relayed only once or whether on several occasions. In the absence of a clear statement to that effect, it seems from the wording of that paragraph that the search of the file was conducted only once.

On the account of the foregoing, the applicants have not demonstrated due diligence on the service of the summons in this case. The summons had an initial lifespan of 12 months, but upon expiry of that period, the applicants did not seek an extension of the summons. It is now more than 18 months since the expiry of the validity of the summons after the first twelve months, and the applicants were only awakened from this long slumber by the notice to show cause why this suit should not be dismissed. Indeed, by law, the suit ought to have been dismissed without notice after the expiry of the 24 months from the issue of the original summons.

The applicants have not been diligent in this matter, and yet they have come to a court of equity which they know very well does not aid the indolent. In the circumstances, this court is not satisfied that it should exercise its powers under **Section 3A** of the **Civil Procedure Act**, and this application is accordingly dismissed.

DATED and **DELIVERED** at Nairobi this 9th day of February, 2010.

L. NJAGI

JUDGE