REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 329 of 2007

STEEL STRUCTURES LIMITED …… PLAINTIFF

VERSUS

DAVID ENGINEERING LIMITED ……..…… 1ST DEFENDANT

DAVID NJOROGE MUIRURI ……..…..… 2ND DEFENDANT

RULING

The application dated 9th June, 2009 is premised under Order VI Rule 3, Order V Rule 1 (7) and Order L Rule 1 of the Civil Procedure Rules, as well as well as section 3A of the Civil Procedure Act.

It seeks prayer that the suit be dismissed with costs. The application is supported by grounds set forth on the face thereof and two supporting affidavits of the Defendants sworn on 9th June 2009.

The facts leading to said application are self explanatory. Along with filing of the Plaint an application for interim orders was filed, by the Plaintiff. That application was dismissed by a ruling delivered on 14th December 2007. The Plaint was filed on 11th April 2007. It is not in dispute that since the filing of the Plaint summons thereof has not been issued till filing of the application.

The counsel for the Plaintiff/Respondent has sworn a replying affidavit on 23rd October 2009 stating inter alia that on determination of the interlocutory application, the Plaintiff has sent an invitation notice to fix the case for hearing and Notice of hearing also was issued, but he only realized the omission of issuance and service of summons when the present application was served.

It is urged that the honest mistake be pardoned and the time to issue the summons be extended by the court. In short it is urged that the court should exercise its inherent power under Section 3A of the Civil Procedure Act.

The law as regards the issuance, service and validity of the summons is well established in the case of Uday Kumar Chandulal Patel and others versus Charles Thaithi (C.A. No. 55 of 1996 unreported). The court of Appeal in the said case held:-

"Order V Rule (1) provides a 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 3A cannot cure. The first summons having expired, the Deputy Registrar having held that there

was no proper service, he could not in the circumstances re – issue fresh summons after the expiry of 24 months period. Neither did the entry of appearance by the Defendant revive the summons which expired."

In the case of Mobile Kitale service station V. Mobile Oil Kenya Ltd and another *(2004) KLR 2.*

The court held;

"We ought to respect rules of engagement as they are promulgated to achieve justice to rival parties. Summons is a judicial document calling a party to submit to the Jurisdiction of the court".

Furthermore in the case of Kiptalum Runo Versus Agricultural Finance Corporation *(H.C.C.S No. 2348 of 1998 unreported).*

Waki J (as then he was), held.

"Order 5 in my view is tailored for those vigilant Plaintiffs who obtain summons to enter appearance when they ought to under Order IV and have made unsuccessful attempts to serve it over a period of 12 months".

I have cited the aforesaid passage in my Ruling delivered on 4th March, 2008 in the case of Trenton (k) Ltd V. Nairobi Homes Ltd & Another *H.C.C.S No. 1184/05 (Unreported).*

In this case the Plaintiff has absolutely overlooked to even comply with order IV as I see that the summons have not been taken out at all. No step at all has been taken by the Plaintiff for issuance of such summons.

Thus this court has no discretion otherwise but to dismiss the suit as more than 24 months have elapsed since filing the suit without issuance and service of summons.

In the premises aforesaid I allow the Notice to Motion dated 9th June, 2009 and dismiss the Plaint with costs.

Dated, Signed and delivered at Nairobi this 30th day of October 2009.

K. H. RAWAL

JUDGE

30.10.2009