



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NYERI

Civil Case 64 of 2007

JOHN MWANGI KIGOTHO.....PLAINTIFF

Versus

MOSES WAFULA WASWA.....DEFENDANT

R U L I N G

The ex-parte application before court is dated 23rd July, 2009. It has been brought by the plaintiff hereinafter referred to as “the applicant” under the provisions of Orders XLIX Rule 5(1), Order V Rules 1(1), (2), (5), 2(b), 17 and 32 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The prayers sought in the application are in the main that:-

“1.....

2. That this honourable court be pleased to enlarge the time for the filing of an application to extend of validity of summons to enter appearance issued herein on 5th September, 2007 and that this application be deemed to have been filed within time.

3. That this honourable court be pleased to extend the validity of the summons to enter appearance issued herein on 4th September, 2007 for another period of 12 months from the date of the order of the court.

4. That this honourable court be pleased to grant leave to the plaintiff to serve the said summons to enter appearance upon the defendant by substituted service by way of advertisement in one of the daily newspapers circulating within the Republic of Kenya.

5. That this honourable court be pleased to order the defendant to enter appearance to the said

summons within fifteen (15) days of the advertisement.”

The application was hoisted or anchored on the following grounds:-

“a) The validity of summons to enter appearance issued by this honourable court on 4/9/2007 expired on 3/9/2008 before the same were served.

b) The defendant could not be traced despite the exercise of due diligence by two process servers and could therefore not be served with the summons to enter appearance within the prescribed time.

c) The honourable court has discretion to extend the period of validity of such summons even when the initial period of 12 months envisaged under Order V Rule 1 of the Civil Procedure Rules has expired.

d) The period of 24 months envisaged under Order V Rule 7 of the Civil Procedure Rules is about to expire and therefore the reason for the urgency.

e) It is in the interest of justice that this application be heard as a matter of urgency and the validity of the summons be extended and the same be served by substituted means as prayed to enable the plaintiff proceed with is case.”

The application was further supported by the affidavit of Simon **Theuri Wanjohi**, Esq, learned counsel for the applicant alongside two affidavits of service sworn. The application is supported by three affidavits. The first is an affidavit of service which was **Samuel Nganga** and **George Maingi** both authorized court process servers. The averments made in these two affidavits recite in detail the efforts made to serve the summons herein upon the defendant and their results according to counsel for the applicant. The uncontested facts leading to this application as captured in the said three affidavits are that this suit was filed on 31st August, 2007. Subsequent thereto summons to enter appearance were issued by court on 4/9/2007. A process server by the name Samuel Nganga was engaged to effect service of the same upon on the defendant. After extensive inquiries he discovered that the defendant worked at Nanyuki Air Base. On more than three occasions he made attempts to serve him with summons but was however unable to do so as he was said to be away on duty. Later on he learnt that he had been transferred to Nyali Barracks of Kenya Navy in Mombasa.

Alternative arrangements were made by counsel for the applicant to sere the defendant with the summons at the Nyali Barracks of Kenya Navy in Mombasa. **George Maingi** another process server was engaged for that purpose. He too made numerous fruitless attempts to effect service upon the defendant. Eventually the summons expired hence the instant application.

Order V rules 1(1), (2), (5) and (7) of the Civil Procedure Rules pursuant to which the application provide interlia:-

“1. (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve

months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.

(3) Where the validity of a summons has been extended under (2), before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same sum which has not been served so as to extend its validity until the period specified in the order.

(5) Application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff person being heard.

(6) As many attempts to serve the summons as necessary may be made during the period of validity of the summons.

(7) Where no application has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”

From the foregoing it is apparent that a summons is valid for a period of 12 months. In the circumstances of this case the summons were valid from 4th September, 2007 when they were issued up to 3/9/2008 when their validity expired.

Rule 1 (2) gives the court jurisdiction to extend the validity of the summons where the same has not been served upon the defendant from time to time. Such extension of validity is sought by way of an application with an affidavit setting out the attempts made to serve the summons and the results of such attempts as directed in Rule 1 (5) cited above. Rule 1 (6) directs that as many attempts should be made to serve during the validity of the summons.

In this case I have no doubt at all that the applicant made several attempts to have the summons served on the application before the first validity of 12 months came in to play. The crucial question however is when should the application for extension of validity of summons be made. Should it be made before the expiry of the period in the original summons or should it be made even after such expiry. The applicants position seem to be that though on the decided authorities, the law seems to be that an application for extension of validity of summons should be made during the lifespan of the original summons and before the same has expired, he nonetheless sought to distinguish those authorities with the circumstances obtaining in this case. The cases which the applicant cited to me and sought to distinguish are **Chesoni & another Vs Silverstein & another (2006) 2 EA 39, and Uday Kumar Chandulal Rajani & 3 others Vs Charles Thaithi, C.A. No.85 (UR)**. In the first case, **Visram J. (as he then was)**

delivered himself thus:-

“Now, it is common ground that the plaintiff had never applied for the extension of validity of summons, during the lifespan of the summons. What they did was simply to write to the Deputy Registrar requesting that the summons be reissued, and the Deputy Registrar did exactly that. So, according to the decision in the case of UdayKumar (supra), and my own decision in Kalsi Vs Withatu (2001) LLR 5817 (HCK) the summons having expired, there was nothing to extend, and reissuance thereafter of the summons was invalid.” (Emphasis added)

In coming to the foregoing conclusion, **Visram J.(as he then was)** relied on the decision of the court of appeal in **Udaykumar Chandulal Rajani & 3 others Vs Charles Thaithi C.A. No.85 of 1996** (UR) where the court expressed itself thus:-

“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 of the civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances reissue fresh summons after the expiry of the aforesaid 24 months period. Neither did the enter of appearance by the defendants revive the summons which had expired. (T) he original summons in an action is only valid for the purposes of service for 12 months from the date of its reissue. The court before 1996, could only be order extend its validity from time to time for such a period not exceed 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the plaintiff nor his advocate did exhaust the provisions of Order v, rule 1 (5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when infact there was no valid summons in existence. It follows, therefore, that the alleged service upon the defendants was ineffective and invalid and so were the summons issued (by the deputy Registrar).” (Emphasis added)

The import of the foregoing two decisions is that an application for extension of validity of summons should be made during the lifespan of the original summons and before the same has expired. In distinguishing those authorities the applicant has stated that the court of appeal in the **Udaykumar case** (supra) was considering the provisions of Order 5 Rule 1 before the amendments effected thereto by Legal Notice No.5 of 1996 and Legal Notice No.84 of 1996.

Prior to the aforesaid amendments the validity of the summons could only be extended for a maximum period of 24 months from the date of issuance. The amendment removed that limitation so that now court has the unfettered discretion to extend summons from time to time as it shall deem necessary and so long as it satisfied to do so.

It is for that reason that the applicant maintains that **Udaykumar case** is not a good authority for the interpretation of Order 5 Rule 1 of the Civil Procedure Rules as it stands today. The applicant further contends that the court of appeal in the **Udaykumar case** (supra) nor **Visram J** in the **Chesoni Case** (supra) considered the provisions of Order 49 Rule 5 which states:-

“5. 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.”

The foregoing provision gives the court unfettered jurisdiction to extend time for doing any act or taking proceedings in respect of which a time has been fixed under the rules to do. Such enlargement can be allowed even where the application for extension is made after the time has expired.

Accordingly and in this case the argument is that even though the application has been brought after the expiry of the first 12 months when the summons were valid the court still has the discretion to enlarge time under Order 49 rule 5 for the filing of the application outside the period of 12 months and extended the validity of the summons herein. In support of this position, counsel referred the court to several High Court decisions on the subject; In the case of **Pan African Bank Ltd Vs Jasop Limited & 2 others Nairobi HCC No.4616 of 1993** (UR). **Ransley J** (*as he was then*) after considering the provisions of Order 5 Rule 1 both before and after the 1996 amendments delivered himself thus:-

“In the Udaykumar case referred to above the summons filed (sic) under the Rule before Order V, Rule 3 was amended and as a result the learned court of appeal held the court had no power to extend the validity of the summons beyond 24 months when infact there was no valid summons in existence. The power of the court was thus limited to extend its validity upon a maximum of 24 months.

The new rule as amended has no time limit and a court if it is satisfied that it is just to do so may extend the life of a summons without regard to when it was issued.

In this matter the applicant has applied to extend the validity of the summons herein. There is nothing in the rules to say when such an application should be made.

Under order V Rule (7) where no such application has been made the court may without notice dismiss the suit at the expiry of 24 months. This has not been done and the suit still subsists.” (*Emphasis added*)

In **Nairobi HCC No.116 of 2003 – Kenya Shell Limited Vs Gaitho Oil Limited** (UR) **Waweru J.** stated:-

“Under sub-rule (2) of rule 1 of Order 5, where a summons has been served on a defendant the court may extend the validity of the summons from time to time if satisfied that it is just to do so. However, under sub-rule (7) of the same rule, where no application for extension of validity of the summons has been made under sub-rule (2) the court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons. The original summons herein was issued on 5th March, 2003. The suit was liable to be dismissed without notice at the expiry of twenty four (24) months from the said date, that is on or about 5th March, 2005. But no order for dismissal was made and therefore the suit is still alive. The court can thus extend validity of the summons.”

I am afraid I am unable to agree with the reasoning of my brothers in the High court. Their decisions are in any event not binding on me. They are merely of persuasive. As I understand it, it is trite law that you can only breath into and extend life alive thing. You cannot breath life in a dead document. Order V rule 1(1) is categorical

“...A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue....”

That rule is couched in mandatory terms. The rule was not affected by the amendment of 1996 vide legal notices No.5 and No.84 of 1996 respectively. That rule was intact when the court of appeal delivered the judgment in **Udaykumar** case. Infact that decision was delivered on 29th May, 1997. In my view the

application to extend the validity of summons must be made in the lifespan of the original summons. To extend the summons when the original had passed on would be tantamount to ex-post facts legitimizing the summons after they have expired, something **Ransley J** frowned upon and rightly so in my view in the case of Pan African Bank (supra)

Secondly, the court of appeal decisions are binding on this court. The holding in **Udaykumar** case has to the best of my knowledge not been varied nor set aside. As of now that is the law. I do not buy the distinction played to me by the applicant. If the intention of the draftsman was that the validity of the summons ought not be extended or renewed within 12 months of issuance, there would have been no need to insert the requirement that such summons shall be valid for 12 on the 1st instance.

Of course under rule 5 of Order XLIV, where a limited time has been fixed for doing any act or taking any proceedings under the Civil Procedure Rules, or by summary notice, or by order of the court, the court shall have power to enlarge such time upon terms (*if any*) as the justice of the case may require. The court therefore has power to extend the periods prescribed by rule 1 of the property moved. The court shall be properly moved if the application for extension of validity of summons is made whilst the original summons are alike.

My view is that an application for extension of validity of summons should be made during the lifespan of the original summons and before the same have expired. That being my position, no useful purpose shall be served in granting any of the prayers in the application. Accordingly the application dated 23rd July, 2009 is dismissed with no order as to costs.

Dated and delivered at Nyeri this 19th day of November, 2009.

M.S.A. MAKHANDIA

JUDGE