



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE 62 OF 2004**

**ZAKARIA SOMI NGANGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NDARAGU MERCHANTS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FRANCIS MWANGI NJUGUNA.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MARGARET WANGECHI NJUGUNA.....4<sup>TH</sup>  
DEFENDANT/RESPONDENT**

**RULING**

The Applicants in this case are the Defendants. By a Chamber Summons application dated 2<sup>nd</sup> May, 2008, the Defendants seek to have the Plaintiff's plaint struck out with costs. The application is brought under **Order V rule 1(7), Order VI rule 13(1) b, c and d** of the **Civil Procedure Rules** and **section 3A** of the Civil Procedure Act (Cap 21) Laws of Kenya.

The grounds of the application are basically that the Plaintiff has failed to serve the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with the summons to enter appearance issued on 4<sup>th</sup> February 2004, as provided under Order V rule of the Civil Procedure Act and that therefore the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants has abated. Further, that the application in which leave to join the 3<sup>rd</sup> and 4<sup>th</sup> Defendant in the suit was granted was based on a non existing suit and therefore it is scandalous, frivolous and an abuse of the court process.

There is an affidavit sworn in support of the application by one Evans Mose, dated 2<sup>nd</sup> May, 2008. I have considered the contents of this affidavit.

The application was duly served on the Respondent/Plaintiff but despite service, no replying affidavit or papers were filed in response to the application.

Mr. Mungai for the Respondent unsuccessfully sought adjournment of the case. The application was argued by Mr. Kimani for the Applicants. I have considered submissions by counsel and the case cited in support of the application. In the cited case **UDAYKUMAR C RAJANI & OTHERS VS. CHARLES THAITHI CA NO. 85 OF 1996**, the Court of Appeal 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 of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was not proper service he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the defendants review the summons which had expired.***

***The original summons in an action is only valid for the purposes of service for 12 months from the date of its re-issue. The court, before 1996, could only be order extend its validity from time to time for such period not exceeding 24 months from the date of its issue it 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 in fact 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 on 28<sup>th</sup> August, 1992.”***

In the instant case, the original summons were issued by the court on 4<sup>th</sup> February, 2004. That is four years ago. There is no dispute that the summons were neither served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants nor was an application made to have them renewed within the requisite time. The summons to enter appearance in this case expired 12 months from the date of issue and 24 months after the date of issue, it was not possible to revive them. That therefore means that the Plaintiff’s suit has lapsed for reason of non compliance with Order V rule 1 of the Civil Procedure Rules which stipulates thus;

***“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.”***

Likewise there being no suit as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who were the parties initially sued in this suit, there cannot be any suit into which the 3<sup>rd</sup> and 4<sup>th</sup> Defendants could be joined.

Having come to this conclusion, I am satisfied that the Plaintiffs suit is a non starter by reason of expiry of the summons to enter appearance. The Plaintiff’s plaint is accordingly struck out with costs to the Defendants.

**Dated at Nairobi this 9<sup>th</sup> day of October, 2008.**

LESIIT, J.

JUDGE

**Read, signed and delivered, in the presence of:**

Mr. Kimani for the Applicant

Mr. Mung’ao for the Respondents

LESIIT, J.

JUDGE