



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

Civil Suit 383 of 2005

MECHANISED CARGO SYSTEMS LTD.....PLAINTIFF

VERSUS

FINA BANK LIMITED.....DEFENDANT

RULING

This application is a chamber summons dated 9th November 2006 and filed in court by the Plaintiff on the same day. It is brought under Order V rule 1(2) of Civil Procedure Rules and the inherent powers of the court seeking the extension of summons issued by this court on the 14th July 2005. Two grounds have been advanced as the reason for the application, one being that the Plaintiff has not effected service of the summons and that they have now expired. The other reason advanced is that failure to serve the summons upon the Defendant was due to inadvertence. The application was vehemently opposed. The Defendant filed grounds of opposition which mainly opposes application on a point of law that summons cannot be extended outside the 12 month period of validity after they have expired based on an application under Order V rule 5(1) of Civil Procedure Rules.

The Plaintiff filed the instant suit on 12th July 2005 under a certificate of urgency. The application was certified urgent and after hearing it ex-parte **Kasango, J** granted the application by granting an injunction to the Plaintiff restraining the Defendant from appointing a Receiver Manager over the Plaintiff's business. There was an exchange of correspondence between the Plaintiff's and Defendant's Advocate culminating with the Defendant filing a suit against the guarantors of the Plaintiff's in the instant suit over the same financial facility which is in issue in the instant suit. Mr. Singh for the Plaintiff/Applicant herein contends that as a result of the various correspondences exchanged between her and the Respondent's advocates, Walker Kontos, and as a result of the institution of the suit by the Defendant which was closely related to the instant one, he inadvertently failed to effect service of summons to enter appearance in this suit on the Defendant. Mr. Singh takes the full blame for the omission, which he says, was caused by an honest mistake. This application for extension of the summons has been made almost 16 months after the first summons were issued. Mr. Singh has urged the court to find that it has jurisdiction to extend expired summons due to recent amendment to Order V rule 1(1) and (2) pursuant to Legal Notices No.5 and 84 of 1996.

Both counsels agree that there has been an amendment to Order V rule 1(1) and (2) of Civil Procedure Rules. Previously by the rule provided as follows:-

“1(1) A summons shall be valid in the first instance for the twelve months beginning with the date of it's issue and a concurrent summons shall be valid in the first instance of the period of validity of the original summons which is unexplained at the date of issue of the concurrent summons.

(2) Where a summons has not been served on a defendant, the court may by order extend the validity of the summons from time to time for such period not exceeding in all twenty four months from the date of its issue if it is satisfied that it is just to do so.”

Both Advocates are in agreement that the interpretation of the above rule was dealt with in the case of UDAY KUMAR C. RAJAM AND 3 OTHERS VS CHARLES THAITHI NAIROBI CIVIL APPEAL NO. 85 OF 1996 (UNREPORTED). The Court of appeal held as follows:

“Held

1. Order 5 Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by the 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.

2. The Court, before 1996, could only by order extend its validity from time to time for such period not exceeding 24 months from the date of its issue if it was satisfied that it was just to do so.

3. Since no application had been made 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 28th August 1992.”

The recidendi of the case is to my understanding two fold, one that before 1996 the court could not extend the validity of the original summons beyond 24 months and secondly such extension could only be effected on a formal application.

The 1996 amendment rendered the rule to read as follows;-

1(1) A 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 a period of validity of the original summons which is un expired at the date of issue of the concurrent summons.

1(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.”

It is the effect of the amendment of the above rule that is the issue of contention between Mr. Singh for the Applicant and Mr. Gichuhi for the Respondent. Mr. Singh argues that the effect of the 1996 amendment was to remove the limitation of 24 months and to give the court complete and unfettered discretion on issuance of summons. Learned counsel relies on the ruling by **Njagi, J** in **FETE FREDRICK MBUGUA vs THE EAST AFRICAN BUILDING SOCIETY MILIMANI HCCC NO. 490 OF 2003**. The learned judge observed thus:-

“The total effect of these rules Order V rule 1(1), (2) and (5) is that the normal span of life of a summons is twelve months, after the expiration of which the summons ceases to be valid. However, the court has jurisdiction to extend the validity of the summons from time to tome if satisfied it is just to do so. For this purpose, the court considers the plaintiff’s affidavit of service setting out the attempts made at service and their result.”

The Learned **Njagi, J** proceeded to allow the application for reissue and service of summons. 15 months after the first summons had been issued after the court was satisfied that failure to serve the summons was due to inadvertence and honest mistake on the Plaintiff’s advocate’s part. Mr. Gichuhi on his part relied on several High Court decisions made subsequent to the 1996 amendment to say that what was initially thought to have heralded a new dawn of gracious judicial discretion towards the extension of the validity of summons was short-lived as it was discovered not to be so, to the consternation of many an Advocate. The first case cited is **OKONDA VS KCB MILIMANI HCCC NO. 3089 OF 1996 (UNREPORTED)** where **Onyango Otieno, J** as he then was ruled that an application to extend the

validity of summons has to be made within the first twelve months before its expiry otherwise there would be nothing to extend.

The second decision relied upon is **RAJU INVESTMENT LTD VS VIPIN C RAJANI & ANOTHER NAIROBI HCCC NO. 3320 OF 1991 (UNREPORTED)**. **Visram, J** in cited case dismissed the suit after allowing an application made by the Defendants in the suit under Order V rule 1 of Civil Procedure Rules on grounds that the summons served on the Defendant had not been renewed in accordance to the procedure set out under Order V rule 115 of the Civil Procedure Rules. The summons were re-issued by the Deputy Registrar of the High Court on the basis the Plaintiff's Advocates letter requesting for the re-issue of the summons after they had expired.

The third and final case relied upon by Mr. Gichuhi is the case of **KENYA**

TRIAL ESTATES LTD. VS REM OGANNA AND ANOTHER MILIMANI HCCC NO. 1259 OF 2001 where Kasango J, dismissed an application by the Plaintiff in the suit to enlarge the time set out in the summons issued by the Court for a further 12 months on the grounds that since the original summons had expired, they were incapable of extension. The court relied on the court of appeal decision of Uday Kumar Rajani, Supra. At the time the application was made the original summons had been in existence for 24 months and 14 days.

Mr. Singh, commenting on the decisions by Otieno, J (**OKONDA CASE, SUPRA**) AND Visram J, (**RAJU INVESTMENTS LTD, SUPRA**) submitted that had both Judges been guided through the provisions of Order V rule 1(2) and (7) of Civil Procedure Rules they could have ruled differently. On Kasango J's decision (**KENYA INDUSTRIAL ESTATES SEE, SUPRA**) Mr. Singh was of the view that had the courts attention been drawn to Order V rule 1(1) and (2) she may have come to the conclusion that the court has unfettered discretion to extend summons. Dealing first with the Okonda case Supra, what was before **Onyango Otieno, J** as he then was, was a preliminary objection by the Defendant on grounds the suit had abated and that no orders could properly be made therein. **Otieno, J** was very clear that why he dismissed the suit was because the original summons had expired before since and no application had been made to have them extended for service. Even though **Otieno, J** made certain observations regarding the effect of the amendment on Order V rule 1(1) regarding the validity of the summons the fact remains that the application before him was not for extension of summons, and further the case at the time the preliminary objection was taken had abated pursuant to Order V rule 1(1). That case is therefore not applicable to the facts in this instant case.

In Raju Investments Ltd, Supra, **Visram, J** was dealing with an application for dismissal of the suit under Order V rule 1 of Civil Procedure Rules on grounds the Defendant/applicant had been served by ineffective and invalid summons on grounds the same had been re-issued by letter to the Deputy Registrar written by the Plaintiff's advocate and not by application as provided under Order V rule 1(5). **Visram J**, was quite right in my humble view, to rely on the Uday Kumar Rajani case, Supra, to find that the service of summons issued unprocedurally was ineffective and invalid. **Visram, J** had no alternative but to dismiss the suit as the summons served upon the Defendants were invalid. However, clearly that case does not apply to the facts of the instant case. That leaves me with two of the cited cases which directly dealt with the issue of renewal of summons. **Kasango J**, in **KENYA INDUSTRIAL ESTATES LTD. CASE, SUPRA**, felt that since no evidence was provided to the court of attempts made by the Plaintiff to serve the summons on the Defendants and the results of those attempts as envisaged under Order V rule 1(5) the Plaintiff failed to satisfy the rule governing renewal that is in addition to her view that expired summons were not renewable.

Njagi, J in the case of Mbugua, Supra, allowed renewal of the summons 13 months after their original issues upon being satisfied that no attempts were made to serve the summons due to inadvertence and honest mistake by the Plaintiff's advocate. **Njagi, J** even quoted Order V rule 1(5) meaning he was fully aware of the rule. Nevertheless the learned Judge was of the view that the court could exercise its inherent powers under Section 3A of Civil Procedure Act and Order L rule 1 of Civil Procedure Rules, where, as in the application before him that jurisdiction was invoked, to re-issue summons whose validity had expired, provided the court was satisfied it was just to do so. I agree with **Njagi, J** concerning two

points. One that Order V rule 1 does not deal with the re-issue of summons, which have expired. Two, that the High Court has power to re-issue summons whose validity has expired under its inherent jurisdiction as provided under Section 3A of Civil Procedure Act where court is satisfied it is just to do so.

In the instant application, the summons expired on 13th July 2006. The instant application was made almost four months after their expiry. The Advocate for the Applicant has deponed that no attempts at service were made prior to the filing of this application and reasons advanced why that was not done. I have considered the reasons advanced and I am satisfied that the failure to serve the summons on the Defendant during its validity was due to inadvertence and honest mistake on the part of the Plaintiff's Advocate and not due to any attempt to hinder or obstruct justice. I do not agree with Mr. Gichuhi's argument that the mistake of counsel is irrelevant and that it is not envisaged under Order V rule 1(5).

The application involved the courts inherent jurisdiction together with Order V rule 1(2) of the Civil Procedure Rules. I am satisfied that this court has power to re-issue the summons as sought and having been satisfied by the explanations given why the original summons were not served in time proceed to validate the summons issued in this case by ordering a re-issue and service of summons within 14 days from date herein.

The costs of this application together with thrown away costs go to the Respondent.

Dated at Nairobi this 21st day of September 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Matuga holding brief Mr. Gitao for Applicant

N/A for Respondent

LESIIT, J.

JUDGE