



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 116 of 2003

KENYA SHELL LIMITED.....PLAINTIFF

VERSUS

GAITHO OIL LIMITED.....DEFENDANT

R U L I N G

This application (by chamber summons dated 30th January, 2006) is stated to be brought under sections 3A and 95 of the Civil Procedure Act and also under Order 49, rule 5 and Order 5, rules 1, 17 and 32 of the Civil Procedure Rules. It seeks four main orders:-

1. That time for making the application be enlarged.
2. That time for the renewal of the summons to enter appearance issued herein on 5th March, 2003 be enlarged.
3. That the summons to enter appearance be renewed and the validity thereof extended for twelve months from the date of the order.
4. That the renewed summons to enter appearance be served upon the defendant by way of substituted service by fixing a copy thereof on the notice board of this court and by notice in one of the local daily newspapers or in any other manner as the court may deem fit.

The application is made upon the following grounds:-

1. That the time for making this application has expired.
2. That the summons to enter appearance issued on the 5th of March, 2003 could not be served personally upon the Defendant because it resisted service.
3. That an application for substituted service of the summons to enter appearance was made on 15th August, 2003 and an order thereon issued on 21st October, 2003, but that the order could not be extracted as the same had erroneously been made in HCCC No. 1014 of 2000 (**Kenya Shell Limited vs James Kariuki**).

4. That the summons expired before the same could be served upon the Defendant.
5. That leave of the court is required to make this application for the renewal of the expired summons to enter appearance and for substituted service thereof upon the Defendant.
6. That the court has power to enlarge the time for the renewal of summons to enter appearance notwithstanding the expiry of the time within which this application ought to have been made.

There is a supporting affidavit sworn by one NELSON HAVI, learned counsel for the Plaintiff. It gives the factual background of the application. The application was presented *ex-parte*.

I have read the supporting affidavit. I have also given due consideration to the submissions of the Plaintiff's learned counsel. Let us first examine the legal provisions quoted. Section 3A of the Civil Procedure Act of course saves the court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. It is now well established that recourse will not be had to this section where there is another specific provision of law or procedure dealing with the situation or matter at hand. Section 95 of the same Act donates to the court the power to enlarge, in its discretion and from time to time, any period fixed or granted by the court for the doing of any act prescribed or allowed by the Act. In the present case no period appears to have been fixed or granted by the court for the renewal of the summons to enter appearance issued on 5th March, 2003 or for extension its validity. It appears to me therefore that section 95 of the Act is not relevant to this application.

Under rule 5 of Order 49, 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 Order 5 of the Civil Procedure Rules.

Under sub-rule (2) of rule 1 of Order 5, 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 that it is just to do so. However, under sub-rule (7) of the same rule, where no application for extension of the validity of the summons has been made under sub-rule (2), the court may without notice dismiss the suit at the expiry of twenty-four (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 the 5th of March, 2005. But no order of dismissal was made, and therefore the suit is still alive. The court can thus extend the validity of the summons.

The first order sought in the application is that the time for making the application be enlarged. I think, with respect, that the application in this regard is misconceived. I can find no period prescribed under Order 5, or under any other Order for that matter, for the bringing of the present application. I also do not understand what is meant by the term "renewal" of the summons to enter appearance as used in prayer No. 2 in the application. The term used in rule 1 of Order 5 is "extension" of the validity of summons. I think this prayer is also misconceived. In the event I will strike out prayers 1 and 2 of the application. I will grant prayer no. 3 and extend the validity of the summons issued herein on 5th March, 2003 to **31st July, 2006.**

Regarding prayer no. 4, the Defendant appears to be a corporation. Service of summons to enter appearance on a corporation is prescribed under rule 2 of Order 5. Such service includes, where the process server is unable to find the secretary, director or other principal officer of the corporation, by leaving the summons at the registered office of the corporation or by sending it by prepaid registered post to the registered address of the corporation, or if there is no registered office and no registered postal address of the corporation, by leaving it at the place where the corporation carries on business, or by sending the summons by registered post to the last known postal address of the corporation. I therefore do not see how the Defendant could have resisted service of summons to enter appearance upon itself. In the circumstances I do not see the need for substituted service under rule 17 of Order 5, and I must refuse prayer no. 4 of the application. I hereby dismiss it.

In summary, prayers nos. 1 and 2 are hereby struck out. Prayer no. 4 is dismissed. Only prayer no. 3 is allowed as above. Costs of the application shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF MARCH, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 19TH DAY OF MAY, 2006.