



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 67 of 2006

GOLDEN BELL (OVERSEAS) EAST AFRICA LTD.....PLAINTIFF

VERSUS

UNIVERSITY OF DAR ES SALAM.....1ST DEFENDANT

NORWEGIAN AGENCY FOR DEVELOPMENT COOPERATION (NORAD).....2ND DEFENDANT

RULING

The present application is moved by the 1st Defendant by way of chamber summons brought under Order VI rule 16 and Order V rule 1(1) and (2) and (7) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application seeks an order that the Plaintiff suit be struck out. The arguments presented on behalf of the 1st Defendant were as follows:-

That the Plaintiff was filed in 1994 and is dated 16th August, 1994. The summons were issued thereafter. The 1st Defendant was not served with the summons until the 24th August, 2005. The Defendant stated that the summons were not extended nor reissued on expiry and that it was not until ten years after the filing of the action that the summons were extended and reissued. That the plaintiff obtained orders of extension from the deputy registrar. 1st Defendant argued that the extension of those summons ten years later was an abuse of the court process. The 1st Defendant seeks that this court would stop that abuse by striking out the plaintiff. Defence counsel said that Order V Rule 1 does not allow renewal of the summons that it envisages renewal before the summons expires but not after. Counsel said that this suit falls under Order V rule 1 (1) and (2) before the amendments were effected. Order V rule 1 (1) and (2) before the amendment of L.N. 5/96 provided as follows:-

***“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 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 satisfied that it is just so to do.”

Defence counsel further submitted that the summons expired in 1995 and that the subsequent service and indeed the subsequent extension were in effective and invalid because the suit had abated.

The application was opposed on behalf of the Plaintiff. The plaintiffs counsel started by saying that the suit had peculiar circumstances. He confirmed that the suit was filed in 1994 and that the summons were issued in the same year. He said that the suit had been filed through the firm of M/s Ngobi & company advocate but after being filed the said advocate could not be traced by the Plaintiff. Thereafter the matter was taken over by M/s Ng’ang’a Rebiro & Company advocates who applied and obtained an order to serve the summons out of the jurisdiction of this court. That order was obtained on 22nd May, 1995. Unfortunately Mr. Rebiro passed away on or about January, 2002 and the plaintiff was thereafter unable to get further information on his suit until he began to visit the court registry when he was informed the court file could not be traced. On 1st March, 2004 the Plaintiff reconstructed the court file and subsequently the reissue summons to facilitate service. The Plaintiffs counsel said that he had been informed that attempts were made to serve the summons on the Defendants and indeed that a legal officer at the offices of Kenya Ministry of Foreign Affairs Mr. Kimemia had confirmed to the Plaintiff’s previous advocates that service had been effected. The Plaintiff therefore opposed the striking out of the action.

As previously seen herein before Order V rule 1 (2) before its amendment provided that summons could be extended from time to time for period not exceeding 24 months. In the absence of such extension the summons cannot be said to have been valid. Indeed quoting from a case of the Court of Appeal Rajjan and others v Thaithi (1996) LLR 443 (CAK) it will be seen that that is the correct position of the law. The relevant quote is as follows:-

“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”.

A further quotation from the said case states:-

“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 has no power to extend the validity of the summons beyond 24 months, when in fact there was no valid summons in existence”.

I find that I am fully pursuing by the arguments raised on behalf of the 1st Defendant for indeed when the deputy registrar extended the summons on 13th April, 2005 there was nothing to extend for the summons had expired and indeed the suit had abated. That finding cannot be affected by the special or peculiar circumstances that the Plaintiff finds itself in view of the fact that its advocates were unable to keep him informed or in view of the unfortunate death of his previous counsel. The Plaintiff having failed to prove that the summons on the expiry of 12 months were extended the court will accede to the prayers sought by the 1st Defendant. The court therefore grants the following prayers:-

1. That the suit as against the 1st Defendant is hereby struck out in view of the summons that had abated at the time of service on the 1st Defendant.
2. That the costs of the application dated 29th November, 2005 and the costs of this suit are awarded to the 1st Defendant.

MARY KASANGO

JUDGE

Dated and delivered this 16th day of October 2006.

MARY KASANGO

JUDGE