



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**

**Civil Suit 837 of 2000**

**PALACE DRYCLEANERS LTD ..... 1<sup>ST</sup> PLAINTIFF**

**GEORGE GIBUKU MBUTHIA ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KENYA POWER & LIGHTING & CO. LTD ..... DEFENDANT**

**RULING**

Let me begin, if I may, with a brief history of this case so that the context within which this decision is made is clearly understood.

This suit was filed on 30<sup>th</sup> May, 2000 seeking, among other things, a mandatory injunction directing the defendant to reconnect electricity to the Plaintiffs. Summons to enter appearance were issued on the same day, that is on 30<sup>th</sup> May, 2000. On 23<sup>rd</sup> November, 2000 this Court granted the Plaintiffs interlocutory orders requiring the defendant to reconnect power supply pending the hearing and determination of the suit. Having obtained these orders, it would appear that the Plaintiffs went to slumber. According to the defendant, the Plaintiffs did not even bother to serve it the Summons to enter appearance. So, on 26<sup>th</sup> June, 2002 the defendant moved to the Court asking that the suit be struck out, or dismissed for want of prosecution on the grounds that it had not been served with summons to enter appearance, and that the Plaintiffs had taken no action for more than two years after the issue of the summons. Indeed, according to the defendant, summons to enter appearance had expired.

That application came before Hon. Mbitio J on 17<sup>th</sup> September, 2002, who, in a well considered ruling found that the Plaintiffs had indeed failed to serve the defendant summons to enter appearance for over twenty four months. However, he ordered that the Plaintiffs do make an application for extension of summons within fourteen days of his order (18<sup>th</sup> October, 2002) failing which “the suit shall stand dismissed with costs without any further order of this court”.

No such application was made. There was one such application dated 25<sup>th</sup> October, 2002 and filed in Court on 29<sup>th</sup> October, 2002. The same was withdrawn by the applicant, and an order to that effect was recorded by Hon. Rimita, J on 26<sup>th</sup> March, 2003. The suit, therefore, stood dismissed. All the same, upon an application made by the defendant, the suit was formally dismissed by an Order of Hon. Ransley, J on 28<sup>th</sup> April, 2004.

Undaunted by these events, the Applicants moved the court by an application dated 10<sup>th</sup> May, 2004 to set aside the Orders of Mbitio, J made on 18<sup>th</sup> October, 2002. The Hon. Mugo, J heard that application on

15<sup>th</sup> October, 2004 and dismissed the same. Of course, the Applicants did not give up, and are now before this court with an application for “review” of Mbitio, J’s orders of 18<sup>th</sup> October, 2002.

The application is dated 12<sup>th</sup> August, 2005 and is made under Order 2 Rule 7, Order 3 Rule 8 and Order 44 Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act, and all enabling provisions of the law.

The applicant seeks the following orders:

1. ***THAT this Honourable Court do review orders of Justice Mbitio and hence reinstate this case forthwith.***
2. ***THAT this Honourable Court do declare as null and void orders issued by Hon. Justice Mbitio on 18<sup>th</sup> October, 2002 and all consequential Orders thereto.***
3. ***THAT this Honourable Court do expunge from the record all documents filed by the firm of M/s Hamilton Harrison & Matthews Advocates who were acting for the Defendant.***

Let me deal first with Orders 1 and 2 which are inter-related, and which really form the essence of this application.

Order 44 Rule 1 (1) states as follows:

***“1(1) Any person considering himself aggrieved –***

***(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***

***(b) by a decree or order from which no appeal is hereby allowed,***

***and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

There are two important issues that arise from Order 44 Rule 1 that need to be addressed first: whether the “new” information now sought to be provided could not have been produced at the relevant time when the decree was passed; and secondly, whether this application has been brought “without unreasonable delay”.

Let me first deal with these issues. This application for review was filed almost three years after the Order sought to be reviewed was made. The delay, in my view, was highly inordinate, and not sufficiently explained. The only explanation appears to be that the Applicant’s file was in the possession of his advocates with whom he had fallen out. That is certainly not a good reason, coming from a person who is highly knowledgeable and sufficiently skilled to conduct his own hearing. Surely, the Applicant knew of the Orders and as he states in ground six of his application, he knew that the summons had been served because “he accompanied the process server to Stima Plaza”. Accordingly, I find that there is no

discovery here of new evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him when the Order was made. I also find that this application has not been made “without unreasonable delay”, and that such delay has not been sufficiently explained.

Where an applicant comes to the Court late it is incumbent upon him to explain the delay – indeed, as the Court of Appeal held in the ***Standard Ltd vs Wilson K. Kalya (C. A. 306 of 2002 – Nairobi)***, some explanation of the delay must be given. In ***Peter Kungu Waweru vs Stephen Karanja Waweru (C. A. Nairobi 389 of 1996)*** Omolo J A said the same thing. In his view a delay of three months was inordinate and not deserving of Court’s discretion. More recently, in ***Benson Mbuchu Gichuki vs Evans Kamende Munjua (C. A. 79 of 2004 Nairobi)*** Deverell, Ag. J A agreed with Ang’awa, J that the application for review filed more than four years after the Consent Judgment was recorded, was inordinate.

On these grounds alone, I would dismiss this application. However, should I be wrong in my conclusion, let me further consider the merits of this application.

Based on the evidence before Justice Mbito, the learned Judge came to the conclusion that the Plaintiffs had failed to serve the summons on the defendant. That was a finding of fact. Justice Mugo, in her Ruling to set aside Mbito, J’s Order, reaffirmed that finding of fact and declined to set aside the Order. I find the same, and re-affirm that finding of fact. Furthermore, I find that the Plaintiff’s attempt now to introduce “new” evidence, by way of the deposition of Benson Njihia Karanja, Process Server, is not credible. Karanja has sworn an affidavit on 12<sup>th</sup> August, 2005 stating that he served the summons upon Beatrice Muendo, Chief Legal Officer of the defendant company, on 13<sup>th</sup> June, 2000. In a replying affidavit Mrs Muendo swears that she was never served with the summons and that the signature appearing on the return of service is not hers. I have no reason to disbelieve her. On the other hand, I have every reason to find Mr Karanja’s affidavit not credible as it is sworn five years after the event.

For what it is worth, let me make one final comment regarding the validity of the Summons to enter appearance at the time it was sought to be extended in the application before Mbito, J. At that time, as Justice Mbito observed, but did not quite rule on the issue, the summons had expired. Now, can a summons that has expired, be extended or re-issued?

Order 5 of the Civil Procedure Rules reads as follows:

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 subrule (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 subrule (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 in person being heard.*
6. *As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.*
  7. *Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”*

Order 5 is clear beyond peradventure. It stipulates the period for the validity of the summons; provides for its renewal; and outlines the consequences for non-renewal. Sub-rule (7) gives the Court the discretion to dismiss the suit, without notice, where no application to renew the summons has been made at the expiry of 24 months from its original issue.

Here, in this case, the original summons issued on 30<sup>th</sup> May, 2000 expired on 29<sup>th</sup> May, 2002. The original summons having expired on 29<sup>th</sup> May, 2002 - was there anything left to extend, or re-issue? Here is what the Court of Appeal said in *Udaykumar Chandulal Rajani & Others vs Charles Thaithi C A 85 of 1996*:

*“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 by order extend its validity from time to time for such period not exceeding 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 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.”*

The Court of Appeal also said in the above case that non-compliance with the procedure outlined in Order 5 rendered a fundamental defect in the proceedings that the inherent powers of the Court under Section 3 A of the Civil Procedure Act could not cure nor could it be cured or revived by the entry of appearance by the defendants.

Finally, with regard to prayer three of the application, I find that the defendant had indeed filed a notice of appointment of advocates on 5<sup>th</sup> June, 2002, and there is nothing irregular about its representation in this suit.

Accordingly, and for all the reasons cited, this application for review dated 12<sup>th</sup> August, 2005 is dismissed with costs.

Dated and delivered at Nairobi this 13<sup>th</sup> day of February, 2006.

**ALNASHIR VISRAM**

**JUDGE**