

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Case 804 of 2003

THOMAS N. MAOSAPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.1ST DEFENDANT

SAMUEL MWANGI NJOROGE2ND DEFENDANT

RULING

By its application of the 19.5.2005 the Applicant seeks to strike out the suit herein under the provisions of Order VI rule 13(1) (d) and 16 of the Civil Procedure Rules on the grounds that under O V rule 1 the summons issued herein is no longer valid it having expired 12 months after its issue on the 19.12.2003.

Miss Gitonga submitted that the Plaintiff had demonstrated a lack of bona fides as having obtained an exparte injunction took no steps to serve the summons or apply for an extension of the same.

Mr. Maosa for the Respondent informed the court that there was an application outstanding to extend the life of the summons which was filed after this application to strike out was made. He sought to explain the delay in filing the application on the fact that the ruling of Mr. Justice Mutungi on the injunction application was delivered on the 11.3.2005 and that no steps to serve the summons or extend its life were made whilst waiting for the ruling.

Mr. Justice Waweru ordered that the application to strike out the application to extend the life of the summons to be heard at the same time.

So far as the relief sought in the Plaint is concerned only prayer (iv) (v) (vi) (vii) and (viii) subsists.

A court is loath to strike out proceedings where issues still exist. However Miss Gitonga submitted that the summons once expired could not be extended and an application to do so must be made within the life of the summons being extended. She relied on a ruling of Rawal J. in the case of **Khushal K. Singh & another v Kingsway Motors (K) Co. & another CC. No.1694 of 1997** in which the learned Judge relied on the decision of the Court of Appeal in **Viray Kumar Chamadlal Ranjan & others v Thaithi CA No.85 of 1996** in which the learned Court of Appeal held that failure to apply for the renewal of a summons was a fundamental defect that cannot be cured. The court however went on to say that in that case, neither the Plaintiff nor his advocate did exhaust the provisions of O V Rule 1(5) which states:-

“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”.

In order to succeed therefore the Applicant must satisfy the court as to the attempts made at service. The supporting affidavit of the Plaintiff to his application to extend the life of the summons is totally lacking any facts relating to the Plaintiff’s attempts to serve the summons. The presumption is that he failed to do so. Although I have a discretion to extend the life of the summons even after it has expired such an order could only be made where the Applicant has shown diligence in either seeking to serve the summons or

made an application immediately upon its expiry for an extension. The Applicant has not shown such due diligence in this case and I dismiss his application to extend the life of the summons.

In the result the Defendant's application to strike out the suit succeeds with costs to the Applicant/Defendant in the application.

Dated and delivered at Nairobi this 24th day of October, 2005.

P. J. RANSLEY

JUDGE