



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KERUGOYA**  
**ELC CASE NO. 171 OF 2016**

**PAULINE WANJIKU GATIMU (Suing as a personal representative of the late ISAACK  
GITARI GATIMU ALIAS ISAAC GITARI H. GATIMU (Deceased).....PLAINTIFF**

**VERSUS**

**JAMES KAGUNYA NJOROGE.....1<sup>ST</sup> DEFENDANT**

**NEWTON MWANIKI MVUNGU.....2<sup>ND</sup> DEFENDANT**

**RULING**

By an application dated 22<sup>nd</sup> September 2020, the Applicant seeks the following orders:-

- 1. That this Honourable Court be pleased to extend the validity of summons for 12 months and subsequently thereto issue fresh summons to Enter Appearance.**
- 2. That the Honourable Court be pleased to allow the plaintiff to serve the summons to enter appearance and plaint, list of documents and witnesses by substituted service, by way of advertisement through the Nation Newspapers and/or any other newspaper which has country-wide circulation.**
- 3. That the costs of the application be provided for.**

**Grounds in support of the Application**

1. That the summons to enter appearance issued on 25th October 2016 have expired.
2. That this Court has the power to extend the validity of summons from time to time.
3. That it has become impossible to serve the defendants in person.
4. That all efforts to serve the defendants have been futile.

**Applicant's Statements of Facts**

The applicant in her supporting affidavit stated as follows:-

1. That she filed this suit on 25th October 2016 against the defendants. She annexed a copy of the plaint as "PWG 1".
2. That on the same day, this Court issued summons to the defendants to enter appearance within 15 days after service thereon. She also annexed copies of the summons to enter appearance and marked "PWG 2(a – b)".
3. That despite efforts to serve the defendants with the summons to enter appearance, plaint, list of documents and witnesses has turned futile.
4. That on 17th October 2017, this Court allowed her to serve the defendants with the aforesaid documents by substituted service

through Nation Newspaper or Standard Newspaper. She annexed a copy of the order as “PWG 3”.

5. That pursuant to the aforesaid orders, she served the defendants vide Nation Newspaper on Tuesday 12th February 2019. She annexed copies of the Newspaper extract and affidavit of service as “PWG 4(a – b)”.

6. That on 18th November 2019, the Court observed that summons issued on 25th October 2016 had expired and there was need to extend the validity of the same for further period.

### **Legal Analysis**

I have considered the application dated 22nd September 2020 and the supporting affidavit. I have also perused the documents annexed to the supporting affidavit. **Order 5 of the Civil Procedure Rules** is the applicable law governing the issuance of summons and extension of the same. **Order 5 Rule 2** provides as follows:-

“(1) A summons (other than 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 un-expired 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..”

My understanding of the law as regards service of summons to enter appearance is that original summons is only valid for twelve months but where a party is not able to serve the summons within the stipulated period, he may seek to extend the same with concurrent summons. Concurrent summons is likened to an umbilical cord which can only be extended during the life of the original summons. A party cannot seek validity of summons after the expiry of its lifespan of 12 months. Extension of validity of summons can only happen by way of concurrent summons which are issued during the life of the original summons. A Court cannot resuscitate or bring to life summons after the expiry of twelve months.

The applicant in the current application has stated that the original summons was issued to her on 25th October 2016 and confirmed that the same have since expired. Courts of law have no powers to extend validity of summons that have expired. I am alive to numerous interpretations given by the High Court on the interpretation of **Order 5 of the Civil Procedure Rules**. I am of the school of thought that Courts have no powers to extend summons to enter appearance after the lapse of twelve months unless an application is made for extension during the life of the original summons by way of concurrent summons which can then be extended from time to time. That was the reasoning by **Onyancha J.** in the case of **Elegant Colone Labs Nairobi Limited Vs Housing Finance Company (K) Limited & 2 Others (2010) e K.L.R** where it was observed as follows:-

“It seems to me proper and correct to say that extension of summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire, in my view, it would be legally impossible to extend it when it has so expired and therefore ceased to exist. .... The summons under the said order which have capacity to be extended by the Court on the application by the plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 fore-cited or under any duration allowed in the extension of original summons ....”

Again in the case of **Julius Njoroge Muira Vs Harrison Kiambuthi Mburu (2011) e K.L.R**, **Rawal J.** (as she then was) stated as follows:-

“..... I shall thus without hesitation find that the original summons is not in existence and all the efforts to revive the same by re-issuance were null and void. The original summons which has lost its life cannot be resurrected..... I shall quote the passage by Lord Denning in the case of **Macjoy Vs United African Limited (1961) 3 All E.R 1169 at 1172;**

“..... If any act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad ..... And every proceeding which it is founded on it is also bad and incurably bad. It will collapse .....” The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers”.

In the same vein, **Lesit J.** (as she then was) in the case of **Zakaria Somi Nganga Vs Kenya Commercial Bank Limited & 3 Others (2008) e K.L.R** had the following to say:-

“The summons to enter appearance in this case expired 12 months from the date of issue. .... It was not possible to revive them. That therefore means that the plaintiffs suit lapsed for reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules.....”.

The Court of Appeal also weigh into the issue and held in the case of **UdayKumar Chandulac Rajani & 4 Others Vs Charles Thaithi, Civil Appeal No. 82 of 1996** and reported in **(1997) e K.L.R** and held as follows:-

“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspects cause by failure to renew the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the Court under Section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons..... The Court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence”.

I agree with the persuasive decisions by the High Court and the decisions by the Court of Appeal which is binding. In a nutshell, failure by the applicant to file an application to extend the summons by 24th October 2017 was a fundamental flaw that cannot be cured by any provisions of the law. The applicant had an option of seeking for extension of original summons before its expiry even if under certificate of urgency but she waited until the same expired. This Court has no powers to revive expired summons under any law.

**Disposition**

For the aforesaid reasons, the ruling of this Court is that the plaintiff's Notice of Motion dated 22nd September 2020 is not merited and the same is hereby dismissed. Since the application is undefended, I make no order as to costs. It is so ordered.

**READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 19<sup>th</sup> day of February, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Mr. Ngigi for Applicant
2. Kabuta, Court clerk.