



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 667 OF 2013

JOHN CHIGOYA NJOGU.....1ST PLAINTIFF

ROSE WAIRIMU CHIGOYA.....2ND PLAINTIFF

VERSUS

JAMES FREDRICK MURIUKI.....1ST DEFENDANT

AGNES WANJIRU MURIUKI.....2ND DEFENDANT

JOHN MURIUKI MIGWIH.....3RD DEFENDANT

PAUL MAINA MURIUKI.....4TH DEFENDANT

RULING

What is before me is the Notice of Motion dated 28th January 2020 brought under **Order 5 Rule 2 (1) and (2) Civil Procedure Rules**. The applicant is seeking an order for extension of summons to enter appearance against the 1st, 3rd and 4th defendants. The application is based on the following five grounds:-

- i. That the Originating Summons was filed on 23rd May 2012.
- ii. That the summons to enter appearance were issued on the same day and were later served upon the 1st, 2nd and 4th defendants who never entered appearance and the plaintiff/applicant's counsel never requested for interlocutory judgment.
- iii. That the Court directed the plaintiff/applicant to issue fresh summons upon the 1st, 2nd and 4th defendants.
- iv. That the summons have since expired and are no longer valid.
- v. That the plaintiff/applicants are desirous of prosecuting this suit and hence this application.

Applicant's Statement of Facts

The applicant in addition to the grounds on the face of the application filed an affidavit and made the following factual statements:-

1. That they filed Originating Summons on 23rd May 2012 and summons to Enter Appearance were issued the same day.
2. That all the defendants were served but only the 3rd defendant entered appearance. He attached a copy of the affidavit of service as "**J.C.N. 1**".
3. That the 1st, 2nd and 4th defendants never entered appearance and his previous advocate never requested for interlocutory judgment against them.
4. That the Court directed that since an interlocutory judgment had not been entered, the 1st, 2nd and 4th defendants be served with fresh summons.

5. That the summons that had been entered issued have since expired and are no longer valid.
6. That he is desirous of having this matter heard and concluded.
7. That it is in the interest of justice that this application be allowed.

The application was served upon the firm of Magee Law LLP who appear for the 3rd defendant but counsel instructed by the said firm of Advocates informed the Court that their client passed on and that they had no further instructions on the matter. The 3rd defendant did not therefore file any response.

Analysis and Decision

I have considered the Notice of Motion, the grounds on the face thereof and the supporting affidavit. I have also considered the applicable law. **Order 5 Rule 2 (1) & (2) CPR** provides 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”.

The literal interpretation of the law as regards summons to enter appearance is that summons are only valid for 12 months from the date of issue. However, the Courts have been granted discretion to extend the validity of summons from time to time if satisfied that sufficient reasons have been given. The extension of summons can only be done before the expiry of the original summons. There is no reason for a Court to extend summons which have lapsed. Extension of summons can only be made during the life of the original summons. Once the life of the original summons lapse, the Courts have no discretion to enlarge time where time limitation have been given either by the Constitution or statute. In the case of **Karachi Walla Nairobi Ltd Vs Sanji Van Mukherjee (2015) e K.L.R, Hon. F. Ochieng J.** stated as follows:-

“J. Kamau J. made the following observation when determining that application:-

Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitation have been given and to proceed to determine matters without undue regard to technicalities as provided in Article 159 (2) (d) of the Constitution of Kenya, 2010. However, Courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period, in particular, where there are express and clear provisions of the law regarding those time lines”. I am in complete agreement with pronouncement of my learned sister

Again in the case of **Elegant Colour Labs Nairobi Limited Vs Housing Finance Company (K) Ltd & 2 others (2010) e K.L.R, Onyancha J.** also faced with a similar conundrum held 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 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”.

The same position was held in the case of **Julius Njoroge Muira Vs Harrison Kiambuthi Mburu (2011) e K.L.R** where **Rawal J.** (as she then was) held thus:-

“..... 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 **Macfoy Vs United African Limited (1961) 3 All E.R. 1169** at 1172:

“..... If an 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. The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers”.

Finally, in the case of **Unday Kumar Chandulal Rajani & 4 others Vs Charles Thaiti (1997) e K.L.R,** the Court of Appeal in a decision which is binding on this Court 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 aspect 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 totally agree with the above decisions particularly the binding decision by the superior Court. In the upshot, I find the Notice of Motion dated 28th January 2020 lacking merit and the same is hereby dismissed with no order as to costs. It is so ordered.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 12th day of February, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Igati Mwai holding brief for Wanjiru Waweru for Applicant
2. Respondent/Advocate – absent
3. Kabuta (Court clerk) – present