



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 46 OF 2019

JOSPHAT KAMAU GATIMU.....1<sup>ST</sup> PLAINTIFF

JESSEE MURIITHI GATIMU.....2<sup>ND</sup> PLAINTIFF

PATRICK KANYUNYU GATIMU.....3<sup>RD</sup> PLAINTIFF

JAMES GATHARA GATIMU.....4<sup>TH</sup> PLAINTIFF

JOSEPH KARIUKI GATIMU.....5<sup>TH</sup> PLAINTIFF

ESTHER WANJIRU MUTUGI.....6<sup>TH</sup> PLAINTIFF

VERSUS

GRACE WAMUYU MUNYAU.....1<sup>ST</sup> DEFENDANT

FREDRICK MURIUKI KIBUCHI.....2<sup>ND</sup> DEFENDANT

EUNICE WAITHERA MUNYUA.....3<sup>RD</sup> DEFENDANT

AND

MARY MURINGO MWAI.....INTERESTED PARTY

RULING

### **Introduction**

By a Notice of Motion dated 13th November 2020, the Plaintiff/Applicant is seeking the following orders:-

- 1. That this Honourable Court be pleased to issue summons to enter appearance in this matter for service upon the 3rd defendant the previous summons having expired on 5th November 2020.**
- 2. That this Honourable Court be pleased to grant leave to the Applicant to effect service of the summons by way of substituted service upon the 1st Defendant.**
- 3. That the costs of this application be in the cause.**

The application is supported by sixteen (16) grounds apparent on the face of the application and the affidavit of Catherine Wanjiku Kariuki Advocate sworn the same date.

### **Summary of Facts**

The applicants contend that after the plaint was filed and summons to enter appearance were issued on 5th November 2019, they caused the same to be served upon the 1st and 3rd defendants on 7th November 2019. The applicants further stated that on 11th November 2019, they

served the 2nd defendant and again on 10th December 2020.

The applicant also stated that only the 1st defendant entered appearance through the firm of Sichangi & Co. Advocates but the 2nd and 3rd defendants blatantly failed and/or refused to enter appearance to-date. The applicant stated that on 18th December 2020, they wrote to the Deputy Registrar requesting the regularization of the service. However, on 13th January 2020, the Deputy Registrar wrote back to the plaintiff/applicant's counsel on record stating that the matter did not have orders for verification of the affidavit of service.

They stated that consequently, the issue of regularization of service of summons upon the defendants/respondents was not addressed until 12th November 2020. The applicants further contend that on 12th November 2020, this Honourable Court found that service of summons upon the 2nd defendant was proper but that service of summons upon the 1st and 3rd defendants herein were improper and that since the 1st defendant has already entered appearance in this matter, it is only the 3rd defendant who requires to be served with summons.

### **Legal Analysis**

I have considered the affidavit evidence and the applicable law. This Court on numerous decisions rendered itself on the provisions of **Order 5 of the Civil Procedure Rules. Order 5 Rule 2 (1)** of the said Act which provides as follows:-

“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”.

My interpretation of the law as regards the life of summons to Enter Appearance is that it is only valid for twelve (12) months from the date of issue. The only way to prolong the life of summons before the lapse of its life span is to apply for concurrent summons. Concurrent summons can thereafter be extended from time to time upon the Court satisfying itself that there are sufficient reasons to do so. The applicant in this case stated that summons were issued for service upon the defendants on 5th November 2019. Unless concurrent summons were sought and obtained before the lapse of the original summons, the Courts have no powers to revive expired summons. The provisions of the law regarding the life of summons for one year is couched in mandatory terms. The Courts have no power or discretion to prolong the life span of summons whose life span of twelve months have lapsed.

In the case of **Zakaria Somi Nganga Vs Kenya Commercial Bank Limited & 3 Others (2008) e K.L.R, Lesiit J.** (as she then was) 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 plaintiff's suit lapsed for reasons of non-compliance of Order V Rule 1 of the Civil Procedure Rules”.

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 **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. It will collapse”. The non-compliance of the process of renewal is a fundamental defect which cannot be cured by inherent powers”.

The applicant in the instance case is seeking to revive summons to enter appearance which were issued on 5th November 2019 and expired on 4th November 2020. By the time this application was filed, there were no valid summons. Once summons to enter appearance lapse at the expiry of 12

months, the Courts have no power to revive the same. For the reasons above stated, I find the Notice of Motion dated 13th November 2020 lacking in merit and the same is hereby dismissed. I make no order as to costs.

**READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 12<sup>TH</sup> DAY OF MARCH, 2021**

.....

**E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Wambui holding brief for Mr. Kariuki for the Plaintiff/Applicant
2. Respondent/Advocate – No appearance

3. Kabuta, Court clerk – present.