



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 386 OF 2017

(Formerly Machakos ELC No. 222 of 2014)

JONATHAN KAPOSHI.....PLAINTIFF

VERSUS

COLLETA MBATHA MAWEU.....1ST DEFENDANT

MUTHIANI MUNYUA.....2ND DEFENDANT

ONESMAS KALL.....3RD DEFENDANT

SAMUEL MULWA.....4TH DEFENDANT

JOYCE KAVIL.....5TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff’s Notice of Motion application dated the 28th May, 2018 brought pursuant to Order 5 Rule 2 of the Civil Procedure Rules. The Plaintiff seeks for extension of validity of summons to enter appearance which were issued on 17th December, 2014, to the 5th Defendant. The application is premised on the grounds on the face of it and the supporting affidavit of Jonathan Kaposhi where he deposes that this suit was filed on 17th December, 2014 and summons to enter appearance issued on the same date. He explains that he accompanied the process server who served the Summons and all the pleadings upon all the Defendants. He confirms that the 5th Defendant has failed to enter appearance and/or file a Defence within the stipulated period despite having been duly served with the said summons. He contends that on 3rd August, 2017 he requested for interlocutory judgement but on 23rd August, 2017, the Court directed that a fresh Plaint and Summons to enter appearance do issue upon the 5th Defendant. He seeks for the extension of the validity of summons so that the same may be served upon the 5th Defendant.

None of the Defendants opposed the application.

The Plaintiff filed his submissions to canvass this application.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 28th May, 2018 including the supporting affidavit and submissions, the only issue for determination is whether the validity of the summons to enter appearance should be extended to enable the Plaintiff serve the 5th Defendant.

The Plaintiff seeks an extension of the validity of summons to enter appearance to enable him serve the 5th Defendant. The Plaintiff in his submissions reiterated his claim and relied on the case of **Trident Insurance Co. Ltd V Underwriting Services & Insurance Brokers Ltd (2017) eKLR** to support his argument. On extension of validity of summons, Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010 provides as follows:- “ **2 (1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning 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 the concurrent summons. 2 (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 it is satisfied it is just to do so.**”

Further Section 95 of the Civil Procedure Act stipulates that:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time enlarge such period, even though the period originally fixed may have expired”.

In the case of **Trident Insurance Co. Ltd V Underwriting Services & Insurance Brokers Ltd (2017) eKLR**, the Court while dealing with an issue of extension of validity of summons, held as follows: ‘**In principle therefore, the court has the discretion to either extend the validity of summons or to order for the re-issue of summons even if the original summons had already expired. But when the court was asked to either extend the validity of summons or to order for the re-issue of summons, it is imperative that the court exercises its discretion in a judicious manner. A plaintiff who had not provided a reasonable explanation for his failure to serve the original summons within the duration of validity, should not be granted either the extension or re-issuance of the summons. Similarly, if the result of either extending the validity of the summons or of ordering that the summons be re-issued would be a deprivation of a Defence which would have otherwise accrued to the defendant, it would be unjust to allow the application. In this case, it does appear that the claim is founded on contract, and that it dates back to the year 2010. But there were also claims that appear to arise until the year 2013. Therefore, whilst it might be possible that parts of the claim might be time-barred, I hold the considered view that the defendant would not be prejudiced if faced with the said claim. I say so because it would still be open to the defendant, if it was so minded, to put forward the Defence of limitation. I also find that the plaintiff has provided an adequate and plausible explanation for the delay in serving the defendant with the original summons. In the case of DUNCAN MWANGI KIORA Vs VALLEY BAKERY LIMITED & OTHERS [2011] e KLR, Dulu J. extended the validity of a summons which had expired for more than a year. It is my considered opinion that although the period of over 2 years, since the original summons was issued, is long, it does not, of itself constitute a bar to the re-issuance of the summons.’**

I note the fulcrum of the suit revolves around trespass to land and the Plaintiff seeking to evict the Defendants. The Plaintiff has confirmed serving all the Defendants who have participated in this suit except the 5th Defendant. He sought for interlocutory judgement to be entered against the 5th Defendant but the Court declined to do so and directed him to serve her afresh. Based on the pleadings filed herein, I opine that since the orders sought against the 5th Defendant are of a serious nature, it would be pertinent if she was served afresh to enable her defend the suit if she so wishes. Since the summons to enter appearance had expired, I note it is upon the Court’s discretion to extend its validity.

In relying on the provisions of Order 5 rules (2) 1 & 2 of the Civil Procedure Rules and being persuaded by the aforementioned judicial authority, I find that the Plaintiff has established a case requiring extension of the validity of the summons and will allow the same to be extended for twelve (12) months.

It is against the foregoing, that I find the instant application dated 28th May, 2018 merited and will allow it.

Costs will be in the cause.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8TH DAY OF APRIL, 2021.

CHRISTINE OCHIENG

JUDGE