



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CIVIL APPEAL NO. 25 OF 2019

BRENDA KARANJA.....APPELLANT

VERSUS

MWEKI DOMINIC.....RESPONDENT

(Being an Appeal from the Ruling of Hon. C. K. Kisiangani SRM in Machakos

Chief Magistrate’s Court Civil Case No. 506 of 2016

delivered on 30th January 2019)

BETWEEN

BRENDA KARANJA.....PLAINTIFF

VERSUS

MWEKI DOMINIC.....DEFENDANT

JUDGEMENT

1. The appeal herein arises from the ruling of Hon Kisiangani SRM dated 30.1.2019 wherein she dismissed the Appellant’s application seeking extension of summons to enter appearance.
2. Being aggrieved by the dismissal, the Appellant filed a memorandum of appeal dated 26.2.2019 in which she raised the following grounds;
 - a. That the Senior Resident Magistrate erred in both law and fact in failing to allow extensions of summons to enter appearance despite an application in that regard having been made as by law required.*
 - b. That the Senior Resident Magistrate erred in both law and fact in failing to note and to appreciate the fact that the appellant was desirous of prosecuting her suit, that being the reason why the appellant had applied for extension of validity of the summons to enter appearance.*
 - c. That the Senior Resident Magistrate erred in both law and fact in turning the appellant away from the seat of justice and falling to exercise her discretion judiciously.*
 - d. That the Senior Resident Magistrate erred in both law and fact in failing to take cognizance of the nature of the suit before her and the circumstances of the case and to allow the application for extension and re-issuance of summons to enter appearance.*
 - e. That the Senior Resident Magistrate erred in both law and fact by failing to consider all matters before her and by relying on procedural and legal technicalities to deny the appellant justice.*

The Appellant urged the court that the appeal be allowed and that the ruling dated 30.1.2019 be set aside and be substituted with an order

allowing the Appellant's application dated 5.10.2018 as prayed.

3. The trial magistrate while relying on the case of **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 others [2010] eKLR and Civil Appeal No. 82 of 1996 Udaykumar Chandulal Rajani & 4 others vs Charles Thaithi [1997] eKLR** dismissed the application on the grounds that the summons had already expired and therefore the court could not extend the same under order 5 Rule 1 and 2 of the Civil Procedure Rules, 2010. The trial court noted that the summons expired on 29.06.2017 and despite the Appellant's themselves being aware of this, they took no steps towards extension of the same. The court noted that it is the notice to show cause that prompted the Plaintiff (the Appellant herein) has made an effort to prove that they could not find the Defendant (the Respondent herein). The court stated that the matter had been scheduled for dismissal on 27.11.2018 and that is when counsel filed an application for extension of summons to enter appearance.

4. The Appeal was canvassed by way of written submissions. It is only the appellant's submissions that are on record and are dated 18.08.2020.

5. Nzei and Co. Advocates for the Appellant submitted that it was not the indolence of the appellant in tracing the Respondent that led to the expiry of the summons. Learned counsel submitted that the court has jurisdiction to grant the orders sought under section 3A of the Civil Procedure Act in the interest of justice and for it to be not only to be done but must be seen to be done. Reliance was placed on the case of **Phillip Chemwolo & Another vs Augustine Kubende (1986) eKLR**. It was submitted that the summonses expired before the appellant could trace the respondent for service. It was contended that the expiry of the summons was not occasioned by indolence on the part of the appellant and that the court ought to do justice to the appellant in the matter as the court has unfettered jurisdiction and power to give such orders as may be in the interest of justice.

6. I have given due consideration to the appeal as well as the submissions and find the following issues necessary for determination;

- a. *Whether there were valid grounds for extension of the summons by the trial court.*
- b. *Whether the summons could be extended after expiry of the same.*
- c. *Whether the dismissal of the appellant's application for extension of summons was proper.*
- d. *Who should bear the costs of the Appeal?*

7. As regards the first issue, it was the duty of the appellant to prove her claim before the trial court before the same could be considered. The standard of proof is on a balance of probabilities as per the provisions of Section 107 of the Evidence Act Cap 80 Laws of Kenya that states;

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

8. The courts are duty bound to determine matters on a balance of probability whilst taking into consideration the facts and evidence that has been placed before them. In the case of **Arbuthnot Express Services Limited vs Manchester Outfitters Suiting Division Limited & Another [1989] LLR 5515 (HCK)** the court observed as follows:-

"The general principle of law is that as far as possible, the courts should lean in favour of the trial and determination of proceedings on merits. There are yet other principles viz that delay defeats equities and that he who comes to equity must come with clean hands. The court is duty bound to balance the application of all the principles by weighing one thing against another to see which way the balance tilts."

9. The issue that was before the trial court was in regard to the validity of summons and the expiry thereof which is provided under **Order 5 Rule 2 of the Civil Procedure Rules, 2010** which reads:-

2. (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. (Emphasis mine)

(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.

(3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.

(4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.

(5) An application for an order under sub-rule (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.

(6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7) Where no application has been made under sub rule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

10. In interpreting the above provisions of the law, I note that in the first instance, the summons shall be **valid** for twelve months. Where a concurrent summons has been issued, it shall be **valid** in the first instance for the **period of validity** of the original summons which is **unexpired** at the date of the issue of the concurrent summons. Where the **validity of the summons is extended**, it shall be **until the period specified in the order**. As many attempts may be made to serve the summons during the **period of the validity** of the summons care must be exercised lest the same is relied upon when they are already expired.

11. In the celebrated case of **Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others vs Charles Thaithi [1997] eKLR** which is binding on this court, the Court of Appeal 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 caused 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....”

12. The court in **Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another [2017] eKLR** relied on the case of **UDAYKUMAR** (supra), and highlighted the facts of that case, that;

“briefly, were that in the main suit, Summons to Enter appearance to the suit were issued by the Superior Court on 2nd April, 1987. Those Summons were served upon some unnamed Manager of the Defendant firm on 3rd February 1988. That service was found to be irregular and upon request by the Plaintiff’s Lawyers summons were reissued on 27th August 1992 and served upon the Defendants on 28th August 1992. The Defendants Entered Appearance through Counsel on 9th September 1992.

Against that backdrop and in considering the purport of Order V Rule I of the Pre-Legal Notice 5 of 1996 Civil Procedure Rules the Court of Appeal rendered itself as follows:-

“Order V rule 1 provides a comprehensive code of the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the 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 he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the defendants revive the summons which had expired.

The original summons in an auction is only valid for the purposes of service for 12 months from the date of its reissue. The court, before 1996, could only by order extend its validity from time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the plaintiff nor his advocate did exhaust the provisions of Order V rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows, therefore, that the alleged service upon the defendants was ineffective and invalid and so were the summons issued on 28th August, 1992”.

13. The Appellant in her application has equated the failure to take out fresh summons and to effect service to lack of knowledge on the whereabouts of the Respondent and has sought refuge under 3A of the Civil Procedure Act. The purpose of that Act is to facilitate the just, expeditious proportionate, and affordable resolution of civil disputes efficiently in order to achieve substantive justice to all litigants without undue regard to technicalities. The appellant had other modes of service to resort to in the event of failure to trace the respondent as she was not expected to just sit there and wait for Godot.

14. A perusal of the lower court file shows that the summons to enter appearance were issued on 29.06.2016 and collected on 2.08.2016. The application for extension of summons was filed on 26.11.2018 following a suo motto notice to show cause why the suit should not be dismissed for want of prosecution issued by the court that was to come up on 27.11.2018 and served upon the Appellant on 23.11.2018. It seems upon being served with the said notice to show cause, the appellant woke up from slumber and sought for the extension of summons to enter appearance.

15. Under **order 5 Rule 2, sub rule 7 of the Civil Procedure Rules,2010** the court has power to dismiss a suit 24 months from issuance of the original summons. The trial court decided to issue a notice to show cause within this provision and it is at this point that the Appellant realised that the summons had expired and that she could not trace the Respondent. The summons had already expired and the Appellant attempted to seek extension thereof but the trial court rejected the application.

16. The provisions of **Order 5 Rule 1 of the Civil Procedure Rules, 2010** are couched in mandatory terms and cannot be taken casually and/or lightly. It is not couched to provide for procedural technicalities. This was reiterated in the case of **Lee Mwathi Kimani v National Social Security Fund & another [2014] eKLR** where the 1st Defendant had sought to have the suit struck out as summons to enter appearance were never served upon them to enable them to appear and file a defence. The Judge held that:-

“Under Order 5(1) subrule 3, 5, and 6 the plaintiff had an obligation to ensure that summons are prepared and signed by the

court to facilitate service on the defendant. The provisions of Order 5 Rule 1 are elaborate and comprehensive and couched in mandatory terms and where for some reason the plaintiff has experienced difficulty in service Order 5 Rule 2 provides reprieve in that the plaintiff can apply for the validity of summons to be extended. Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the defendant, the defendant has no valid invitation to defend the suit'

17. The summons in this case had expired and therefore the same could not be renewed nor re- issued. The court cannot resuscitate the dead summons and thus I find the trial court was right in rejecting the Appellant's application.

18. It is trite law that the power of dismissal is discretionary and must be exercised judiciously. In the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR**, the Judge quoted the case of **Utalii Transport Company Limited & 3 others v NIC Bank Limited & another [2014] eKLR** in which the principles developed by law to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution were set out. The principles are:-

(a) Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case.

In the present case the suit had been pending and had been inactive since 2.08.2016. The only form of activity seen on the Appellant's side is when she picked up the summons to enter appearance and thereafter failed to set down the suit for hearings forcing the trial court to issue the notice to show cause why the suit should not be dismissed for want of prosecution. The explanation given by the appellant that she did not know and still didn't know the whereabouts of the Respondent was not satisfactory as she did not even bother to use other modes of service. She could not have just sat there and expect the respondent to know about the existence of the suit. I find the appellant was indolent and hence the eye of equity could not come to her rescue.

(b) Whether the delay is intentional and therefore inexcusable:

The delay in my view is not excusable. The appellant claims that she was unable to trace the whereabouts of the Respondent. It is worth noting that the appellant has not offered any evidence to prove that she was keen to follow up and trace the Respondent at the lower court. It is not enough to just allege that the Respondent cannot be found, one must go a few steps further to demonstrate the efforts made to trace them in order to be granted orders. Our courts are those of evidence and not just allegations without proof.

(c) Whether the delay is an abuse of court process:

A suit filed by the Appellant belongs to the Appellant and where there is delay she has a duty to see that whatever is causing the delay is removed. The fact that the Appellant did not make any effort to ensure that this matter was concluded expeditiously by serving summons on time or by seeking to use other methods of service and was only woken up from slumber by the notice of dismissal of the suit for want of prosecution, is an abuse of the court process. Clearly. The eye of equity could not come to her aid due to her indolence.

(d) Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the defendant:

The case had been filed by the appellant and for over two years, there was no traction in the matter. The case had been filed in court to be prosecuted and not for cosmetic purposes. The delay to prosecute had the effect of causing prejudice to the person sued. The consequence of this is that the adverse party's right to a fair trial is curtailed. The delay to prosecute the suit led to the trial court issuing a notice to show cause why the suit should not be dismissed for want of prosecution.

(e) What prejudice will the dismissal of suit occasion the Plaintiff?

The Appellant only states that they believe that the suit is merited but does not disclose what prejudice it will suffer. The allegation has not been substantiated.

In **Lubulellah & Associates Advocates v N K Brothers Limited [2014] eKLR** the court held that the objective of Article 159(2) (d) of the constitution of Kenya was not to validate actions that are null and void but disguised as procedural technicalities. The court further held that these provisions cannot be invoked by a party who has been indolent and fails to comply with the laid down provisions of the law to ride on a ground of a mere irregularity or procedural technicality.

19. Further, on the issue of extension of time, the court in the case of **Barclays Bank Of Kenya Limited v Patrick Njuguna Kubai [2014] eKLR** stated that;

"Assuming that this court could extend time for the extension of the validity of the summons under Order 50 Rule 6 of the Civil Procedure Rules, 2010 and in particular because it can extend the validity of summons from time to time if it is just to do so under Order 5 Rule 2 of the Civil Procedure Rules, 2010, in the absence of any plausible explanation as to the cause of the delays in seeking extension of the said summons, this court finds that the Plaintiff could not have enjoyed the exercise of its wide and unfettered discretion, which must be exercised judiciously, to extend the validity of summons in its favour as it would not have found it just to extend the same."

20. **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others [2010] eKLR**, where Onyancha J held that:-

"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...

Similarly Lesiit J in Zakaria Somi Nganga vs Kenya Commercial Bank Limited & 3 Others [2008] eKLR , Lesiit J stated that:-

“ 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 reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules...”

In the case of Julius Njoroge Muira vs Harrison Kiambuthi Mburu [2011] eKLR, 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 reissuance 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 ER 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.”

21. Under the Provisions of **Section 59 of the Interpretation and General Provisions Act** on Construction of the Power of Court to enlarge time, the same provides thus:-

“Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed”.

22. In the instant appeal, the Appellant has filed and served the record of appeal, submissions and a mention notice vide post after leave was granted by this court on 8.11.2020 as a result of which this appeal was fast tracked. The Respondent was served with this documents and failed to file a response forcing the appellant to proceed in the absence of the respondent. Nothing prevented the Appellant from filing a similar application in 2016 seeking to serve the Respondent via substituted means. The Appellant was aware of a postal address that she could use to access the Respondent but instead claimed that she had no idea about the whereabouts of the Respondent. To my mind, this goes to show that the conduct of the Appellant is one of laxity in prosecuting the suit before the lower court which led to issuance of a notice to show cause why suit should not be dismissed for want of prosecution. I agree with the lower court for rejecting the appellant’s application for extension of summons to enter appearance. It is noted that the summonses were collected two months after they were issued and that the application for extension was filed 28 months, 27days after the original summons had been issued. This was clearly way outside the period as the summons had already expired and couldn’t be extended by any stretch. I therefore find that the Appellant and her counsel slept on their rights and that the trial court was right in rejecting the appellant’s application for extension of summons since equity comes to the aid of the vigilant and not the indolent.

23. The upshot of the foregoing observations is that I find no merit in the appeal. The same is dismissed with no orders as to costs.

It is so ordered.

Dated and delivered at **Machakos** this 12th day of **March, 2021**.

D. K. Kemei

Judge