



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Coram: Hon. D. K. Kemei - J**

**CIVIL APPEAL NO. 125 OF 2019**

**BERNARD MWALIMU NDOLO.....APPELLANT**

**-VERSUS-**

**CHI MOTORS.....RESPONDENT**

***(Being an appeal from the Ruling of Hon. C.A. Ocharo (SPM) at Machakos***

***Chief Magistrate's Court in CMCC No. 72 of 2017 delivered on 23<sup>rd</sup> day of September 2019)***

**BETWEEN**

**BERNARD MWALIMU NDOLO.....PLAINTIFF**

**-VERSUS-**

**CHI MOTORS.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIARIE KARANJA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The appeal herein arises from the Ruling of Hon. C. A. Ocharo (SPM) dated 23<sup>rd</sup> September, 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 1<sup>st</sup> October, 2019 in which he raised the following grounds:-

- a) THAT the learned magistrate erred in law and in fact in dismissing the Appellant's suit when there are no legal grounds in support of the ruling.***
- b) THAT the learned magistrate erred in law and in fact in finding that the Appellant's suit as against the Respondent had abated as at 28<sup>th</sup> March, 2018 when the application dated 28<sup>th</sup> March, 2018 was filed.***
- c) THAT the learned magistrate erred in law and in fact in failing to find that a court of competent jurisdiction had reissued summons against the Respondent pursuant to the application dated 28<sup>th</sup> March, 2018.***
- d) THAT the learned magistrate erred in law and in fact in failing to find that the summons issued on 29<sup>th</sup> May, 2018 and served upon the Respondent herein were valid and had not expired.***
- e) THAT the learned magistrate erred in law and in fact in finding that the reissuance of summons dated 29<sup>th</sup> May, 2018 was erroneous since the said order was made by a court of competent jurisdiction and she should not have acted as an Appellate court.***

*f) THAT the learned magistrate erred in law and in fact by ignoring the Appellant's submission in her ruling without proper reasons to do so.*

*g) THAT the learned magistrate erred in law and in fact in coming to the conclusion that she did contrary to the facts on record.*

*h) THAT the learned magistrate erred in law and in fact by arriving at the conclusion she did while relying on extraneous material and/or facts which did not form part of the proceedings.*

*i) THAT the learned magistrate erred in law and in fact in coming to the conclusion that she did without any reason or sufficient cause.*

3. The Appellant urged the court that the appeal be allowed and that the ruling dated 23<sup>rd</sup> September, 2019 be set aside and be substituted with an order allowing the Appellant's suit be reinstated for hearing on its merit.

4. The trial magistrate while relying on the case of **Koileken Ole Kiolonka Orumoi vs. Mellech Engineering & Construction Company Ltd & 2 Others (2019) 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 said court noted that the summons was issued the same day the suit was filed, on 14<sup>th</sup> February, 2017 and as the law stipulates the same are required to be collected within 30 days of issuance. In this case, though on record it indicates the summons were issued on 14<sup>th</sup> February, 2017 it does not indicate when it was collected or by whom. The only signature and wording was **"FOR KYALO & ASSOCIATES."** The Plaintiff/Appellant filed the application dated 28<sup>th</sup> March, 2019 too late in time and there was no suit in existence as the same had already abated.

5. The Appeal was canvassed by way of written submissions.

6. M.M. Uvyu & Company, for the Appellant filed submissions dated 12<sup>th</sup> April, 2021. Counsel 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 not only to be done but must be seen to be done. Reliance was placed on the case of **Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another [2017] 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.

7. Mungai Kalande & Co. Advocates, for the Respondents filed submissions dated 25<sup>th</sup> May, 2021. Counsel in opposition to the appeal submitted that summons which has expired cannot be injected with new life and a suit cannot exist where the summons has expired. Reliance was placed on the case of **Civil Appeal No 82 of 1996 Udaykumar Chandulal Rajani & 4 Others vs Charles Thaiti [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 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...."*

8. 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 to enter appearance 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?*

9. As regards to the first issue, it was the duty of the Appellant to prove his 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."*

10. 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 **Arbutnot 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.”*

11. 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.*

*(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.*

12. In interpreting the above provisions of the law, I keenly note that in the first instance, the summons shall be valid for twelve (12) 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.

13. 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 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....”*

14. The Appellant has contended that the learned magistrate did not take into account the fact that the summons had been collected by the firm of Kyalo & Associates and therefore the suit against the 1<sup>st</sup> defendants had not abated.

15. A perusal of the lower court file shows that the summons to enter appearance were issued on 14<sup>th</sup> February, 2017 and no indication of when it was collected or by whom as the same only stipulated a signature and wording of **“FOR KYALO & ASSOCIATES”**.

16. 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 noted that the summons had already expired and the Appellant attempted to seek extension thereof but the court rejected the application.

17. 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 1<sup>st</sup> 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) sub-rule 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”*

18. 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.

19. 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 he 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 he did not know and still didn't know the whereabouts of the Respondent was not satisfactory as he did not even bother to use other modes of service. He 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 his rescue.

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

The delay in my view is not excusable. The appellant claims that he was unable to trace the whereabouts of the Respondent. It is worth noting that the appellant has not offered any evidence to prove that he 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 he 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 his aid due to his 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.

20. 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.”*

21. **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...”*

22. 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.”

23. 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”.***

24. In this instant appeal, the summons in question expired on 13<sup>th</sup> February, 2018 (the same having been issued on 14<sup>th</sup> February, 2017). This court has also found that the Respondent was never notified of the issuance of the Summons. Nonetheless it would be incumbent of a diligent litigant to continuously check with the Registry on the status of filed Summons. My view is that an application for extension of validity of summons should be made during the lifespan of the original summons and before the same have expired. Hence the appellant’s attempt to seek for extension of summons by the trial court could not succeed and thus the decision of the learned trial magistrate was sound and must be upheld. Going by the decision in Macfoy vs United African Limited (supra), the appellant could not possibly seek to extend the life of something which does not exist and further, he could not expect the court to act in vain by granting orders based on nothing. The ruling by the learned trial magistrate dated 29/3/2019 must be upheld.

25. The above observations have disposed issues **a) to c)**. The last issue on costs is that costs follow the event and in this case the Appellant having not proved his case on the threshold of proof must meet the costs of the Respondent.

26. The upshot of the foregoing observations is that I find no merit in the appeal. The same is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 1ST DAY OF JULY, 2021.**

**D. K. KEMEI**

**JUDGE**