



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. 238 OF 2018

KALE FOUNDATION.....APPELLANT

-VERSUS-

ALPHARMA LIMITED.....1ST RESPONDENT

POLYCARP NJENGA KAMOCHÉ.....2ND RESPONDENT

(Being an appeal from the ruling order of A. N. Makau, SRM

delivered on 20th April, 2020 in Nairobi CMCC No. 8799 of 2016)

JUDGMENT

1. On 20th December 2016, **Kale Foundation**, (hereafter the Appellant) filed a suit in the lower court against **Alpharma Limited** and **Polycarp Njenga Kamoche** (hereafter the Respondents) seeking damages in respect of an accident that occurred on 22nd December 2013, involving the Appellant's motor vehicle registration number **KBL 556X**, while allegedly being lawfully driven along Ruiru /Ruai by -pass. It was averred that the accident occurred due to the negligence of the 2nd Respondent, a servant or agent of the 1st Respondent who was then driving the motor vehicle registration number **KBC 401R** owned by the 1st Respondent.

2. Summons to enter appearance issued on 29th December 2016 expired before service upon the Respondents. Thus, on 16th March, 2018 the Appellant proceeded to file a motion dated 14th March, 2018, expressed to be brought among others under Order 5 Rule 2(2) and Order 51 Rule 1 of the Civil Procedure Rules seeking that the time for filing the application be enlarged and the motion deemed to have been filed within time and that the validity of the summons to enter appearance be extended for 12 months from the date of the order of the court. The motion was anchored on the key grounds that initial summons to enter appearance expired on 29th December, 2017; that the Appellant had changed its address and counsel was unable to locate them in time to execute pertinent documents; and that the Appellant is desirous of prosecuting the suit.

3. The motion was supported by the affidavit sworn by **Margaret Miringu** counsel having conduct of the matter on behalf of the Appellant. In amplifying the grounds on the face of the motion counsel deposed that the suit was brought in the Appellant's name on behalf of Heritage Insurance Company Limited under the insurer's right of subrogation; that summons to enter appearance were issued on 29th December, 2016; that the insured could not be traced immediately to execute the verifying affidavit and witness statements to facilitate service of the pleadings upon the Respondents; that Heritage Insurance engaged private investigators who traced the insured for purposes of execution of relevant documents; and that by then the summons to enter appearance had lapsed on 29th December, 2017. That upon instructions from Heritage Insurance counsel applied *ex parte* for the extension of validity of summons through the motion filed on 16th March 2018.

4. The lower court by its ruling delivered on 20th April, 2016 dismissed the motion, provoking the instant appeal which is based on the following grounds:

“1. The Honorable Magistrate erred in law and in fact by holding that the summonses to enter appearance against the defendants are dead and cannot be resurrected.

2. The Honorable Magistrate erred in law and in fact by holding that the court could not exercise its discretion in favour of the appellant by extending the validity of the summonses to enter appearance.

3. The Honorable Magistrate erred in law by holding that the court did not have the jurisdiction to extend the validity of the summons to enter appearance despite the provisions of Order 5 rule 2(2).

4. **That as a consequence of the foregoing ground; the Honorable Magistrate erred in dismissing the appellant's application."**

5. The appeal proceeded ex parte and was canvassed by way of written submissions. Counsel for the Appellant while underscoring the provisions of Order 5 Rule 2(2) of the Civil Procedure Rules submitted that lower court erred in law by holding that the court did not have jurisdiction to extend the validity of the summons despite finding that the reasons for delay in bringing the motion were sufficient. Citing several decisions including **Mechanized Cargo Systems Limited v Fina Bank Limited [2007] eKLR**, **Kenya Commercial Bank Limited v Ann Kajuju Magundu & Others [2012] eKLR**, and **Trident Insurance Co. Ltd v Underwriting Services & Insurance Brokers Ltd [2017] eKLR** counsel asserted that Section 3A of the Civil Procedure Act reserves the inherent power of the court to make orders as may be necessary to meet the ends of justice; that that the learned magistrate erred by taking into consideration procedural technicalities at the expense of substantive justice contrary to the provisions of Article 48 and 159(2) (d) of the Constitution of Kenya, 2010. The Appellant placed reliance on the decisions in **Republic v County Government of Embu ex parte Embu County Liquor Dealers Association [2014] eKLR**, **Kenya Bus Services & Another v The Minister for Transport & 2 Others [2012] eKLR** and **Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 Others [2015] eKLR**. The court was thus urged to allow the appeal as no prejudice would be occasioned to any party.

6. The court has perused the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See **Peters v Sunday Post Ltd (1958) EA 424**; **Selle and Anor. v Associated Motor Boat Co. Ltd and Others (1968) EA 123**; **William Diamonds Ltd v Brown [1970] EA 11** and **Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) IKAR 278**.

7. Further, in **Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR** the same court stated:

"This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Mbogo Vs. Shah, (supra)

"....A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [Emphasis added]

See; **United India Insurance Co. Ltd v. East African Underwriters (K) Ltd [1985] E.A 898: -**

8. It is not disputed at the time of filing the instant motion the summons to enter appearance issued on 29th December, 2016 had expired on 29th December, 2017. The lower court in dismissing the motion stated that:

"I have considered the explanation given by the plaintiff advocate in her supporting affidavit why she did not file the application before expiry of the summons. I find the same to be sufficient and allowed.

Does that therefore mean the summons should be extend? In determining this I am guided by the holding of the court in the case of **Elegant Colours Labs Nairobi Limited v Housing Finance Co. Ltd (K) Limited and 2 others (2010) eKLR...**

It is therefore clear from the foregoing cases invalid summons to enter appearance cannot be extended to validate actions that are null and void. The law cannot aid an incompetent party who fails to comply with the laid down provision of the law to ride on ground of a mere irregularity or procedural technicality. According to Hon. Justice Kamau, in the case of **Barclays Bank of Kenya Limited v Patrick Njuguna Kubui (2014) eKLR,**

The failure to file an application to extend summons by 29th December, 2017 was a procedural (step) that cannot be cured by any provisions of the law as it stands. The learned judge stated that, Application of Article 159(2) of the Constitution of Kenya 2010 in all situations would be a recipe for total chaos. It ought to be used where there are procedural technicalities only but not where there are substantive flaws.

The upshot of this court ruling therefore is that the plaintiff's notice of motion dated 14/3/2018 is not merited and the same is hereby dismissed."

9. The Appellant's motion in the lower court was anchored on the provisions of Order 5 of the Civil Procedure Rules. Order 5 Rule 2 of the which provides that:

"(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 subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”

10. The Appellant in its motion before the lower court had in the first prayer sought an order that the time for making its application be extended and the motion be deemed to have been filed within time. The law is that summons to enter appearance shall be valid in the first instance for twelve months and the court has discretion to extend the validity of summons from time to time if satisfied it is just to do so. There seems to be two schools of thought on the question whether expired summons to enter appearance can be “revived” through an application such as the instant one. The decision of **Onyancha J in Elegant Colours Labs Nairobi Limited v Housing Finance Co. Ltd (K) Limited and 2 others (2010) eKLR** appears to represent the school of thought that answers the question in the negative. On the other hand, decisions cited by the Appellant on this appeal represent the opposite viewpoint.

11. To my mind, the provisions of Order 5 Rule 2 are couched in permissive terms so far as the time within which to apply is concerned and the only apparent time limitation in the Rule is found in subrule 7 which states “*Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.*” Reading that subrule together with subrules 1 and 2, it appears that whether or not an application has been made to extend the life of the summons, the suit does not become liable for dismissal after 12 months (which is the period of validity of original summons) but only after 24 months have lapsed since issuance of the original summons.

12. And even then, the permissive phrase used is that the court “*may without notice dismiss the suit*”. Therefore, read together the rules appear to anticipate that a suit may well continue to subsist outside the 24 months since issuance of original summons, even where no application in terms of sub-rule 2 has been made. And that a plaintiff in such a case could potentially apply, subject to sub-rules 5 and 6 and the general rules on extension of time, for the extension of summons “*and the court may extend the validity of the summons from time to time if satisfied it is just to do so.*” In sum, the provisions give a wide discretion to the court.

13. It appears to this court that the trial court read the provisions of Order 5 Rule 2 of the Civil Procedure Rules in a rather technical manner and applied them more strictly than the language of the Rule itself anticipates. This court while hastening to affirm that the rules of procedure serve a purpose and ought to be complied with, agrees with the Appellant’s assertion that such a technical approach appears to run afoul of the command in Article 159(2) (d) of the Constitution for courts to eschew undue regard to technicalities. In this instance, the lower court appears to have effectively constricted its otherwise wide discretion donated under Order 5 Rule 2.

14. The Court has power under Section 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules to extend time for the doing of any act notwithstanding that the application for extension is made after the time for the doing of the act has lapsed. In the application before the lower court, the Appellant had in my view correctly invoked the provisions of Order 50 Rule 1 and included a prayer for extension of the time for applying. In the ruling appealed from, no direct reference was made to the general power of the court to extend time under section 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules, but the Court appeared to accept the reasons given for the delay in making the application.

15. This court is persuaded that under these provisions, the life of expired summons can be extended in proper cases. The provisions allowed the Appellant in this case the leeway to apply for the extension of time to apply for the extension of the life of the expired summons and the Appellant’s motion ought to have been allowed as the lower court had been otherwise satisfied with the reasons given for the late application which reasons also logically applied to the actual prayer for extension of the validity of summons; the insured had not been traced within the period required to execute vital pleadings and witness statements to accompany the summons to enter appearance intended to be served. Indeed, the verifying affidavit and key witness statements on record by the date of the motion were executed by employees of Heritage Insurance Co. and not the Plaintiff in whose name the suit had been brought. It is evident that the lower court’s failure to consider the merits of the prayer for extension of the validity of summons stemmed from an erroneous apprehension of its discretion under the rules.

16. In the circumstances, the appeal must be allowed by setting aside the ruling of the lower court delivered on 20.04.2016 and substituting therefor an order allowing the Appellant’s motion in the lower court dated 14th March 2018. Costs will abide the outcome of the suit in the lower court.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 9TH DAY OF DECEMBER, 2021

C.MEOLI

JUDGE

In the presence of:

Ms Alosa h/b for Mr. Obwangi for the Appellant

C/A: Carol