



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 57 OF 2016

MILLICENT WAIRIMU.....1ST PLAINTIFF

WILSON NJERU NJOKA.....2ND PLAINTIFF

VERSUS

JOHNSON NYAGA MAINA.....1ST DEFENDANT

CHIEF LAND REGISTRAR, KIRINYAGA.....2ND DEFENDANT

MAP ZONE COMPANY.....3RD DEFENDANT

RULING

The application before me is brought under **Order 5 Rule 2 & 7, Order 52 Rule 1 CPR and Section 3A & 63 CPA**. The applicant is seeking an order for re-issuance of summons for service upon the 2nd defendant herein. The application is supported by grounds shown on the face thereof and an affidavit sworn by Charles Mwangi Ndegwa on 22nd January 2020. According to the applicant, he successfully effected service upon the 2nd defendant but the same was not forwarded to the Hon. Attorney General as this Honourable Court had directed as the Constitutional body with the mandate to appear for the State agencies. The deponent stated that he has been informed by the applicant that the summons was not forwarded to the Attorney General as this Honourable Court had directed. It is further stated that the summons were issued on 26th January 2018 and further granted leave to the applicant's advocate to effect service upon the Attorney General in person. He deponed that the summons issued on the said 26th January 2018 have since expired and are yet to effect service upon the 2nd defendant herein. He stated that the defendant will not suffer any prejudice should the orders sought be granted.

DISPOSITION

I have considered the Ex-parte application by the plaintiff/applicant and the supporting affidavit. The issuance of summons is provided for under **Order 5 of the Civil Procedure Rules, Chapter 21 Laws of Kenya**. Order 5 Rule 2 provides as follows:

“(1) A summons (other than 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 un-expired 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”.

Where a plaintiff seeks leave of the Court to extend the validity of summons, the rules under **Order 5 Rule 5** sets out conditions to be met before Court grants such an application. The provision of the said order reads as follows:

“5 (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”.

My plain reading of the provisions of law regarding extension of validity of summons is that concurrent summons can only be issued during the lifetime of the original summons. The plaintiff cannot be heard to seek extension of summons where the original summons has expired. Secondly, a plaintiff seeking leave for extension of summons must file an affidavit of service setting out the attempts made with a view to effecting service of the summons sought to be extended. The applicant in this case has not annexed an affidavit of service which is

mandatory, showing the attempts he made to effect the service of summons upon the 2nd defendant. From his own admission, the applicant stated that the summons sought to be extended were issued on 26th January 2018. This application was filed on 22nd January 2020, almost two years after the original summons were issued. The original summons expired one year from the date of issue. Once the original summons expired, a Court has no powers to resuscitate or revive dead summons. The overriding objective of the **Civil Procedure Act provides under Order 1A** emphasizes the interest of justice as one of the elements of objective of the Act as follows:

“1A (i) The overriding objective of this Act and the rules made thereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

In the case of **Mobile Kitale Service Station Vs Mobil Oil Kenya Ltd & Another HCCC No. 205 of 1999 (Kisumu) (unreported) Warsame J.** (as he then was) held as follows:

“..... in my understanding, Order 4 and 5 of the Civil Procedure Rules are designed to enable parties to follow certain procedures. The word used is “shall” which makes it mandatory to comply with the discretion. And is therefore no explanation as to why the summons was not taken out then. The Court has no discretion but a judicial duty to ensure the rules of procedure are followed and failure to observe would be fatal.....”

However, a Court can only revert to the discretion when there is valid reasons, excuse, mistake, errors which are excusable but when there is no proper explanation, then the Court’s powers are invited”.

Again in the case of **Uday Kumar Chandulal Rajani & 3 others Vs Charles Thaithi C.A. No. 85 of 1996 (U.R)**, the Court of Appeal expressed itself as follows:

***“Order V Rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to review 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 months period. Neither did the Enter Appearance by the defendants revive the summons which had expired. The original summons in an action is only valid for the purposes of service for 12 months from the date of its re-issue. The Court before 1996, could only order extend its validity from time to time for such a 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 infact 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 by the Deputy Registrar”.* (Emphasis added)**

The import of the rules and the two decisions is that an application for extension of validity of summons should be made during the lifespan of the original summons and secondly, an applicant must annex an affidavit of service showing the attempts made or any reasonable explanation, error or excuse for failing to effect service of summons sought to be extended. That being my position, I find the application dated 22nd January 2020 lacking merit and the same is hereby dismissed with no order as to costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of March, 2020.

E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Mr. Ndegwa for Plaintiff/Applicant
2. Mr. Asimwe holding brief for Makworo and Mr. Omenya for 1st and 2nd Defendants
3. Mbogo – Court clerk