REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCA NO. 25 OF 2017

LENISI AKORILE.....APPELLANT

=VERSUS=

ELDORET EXPRESS CO. LTD.....RESPONDENT

[Being an appeal from the Ruling of the Resident Magistrate's Court at Eldama Ravine

PMCC. No. 74 of 2014 delivered on the 14th day of February, 2017 by Hon. R. Yator, SRM]

JUDGMENT

1. This is an appeal from the ruling of the trial Court in a consolidated suit for damages by plaintiffs who sought compensation for personal injury resulting from a motor vehicle accident for which they blamed the respondent's driver. By a Memorandum of Appeal dated 9th March 2017, the appellant raised the following grounds of appeal and sought the prayers set out therein as follows:

> *"**LENISI AKORILE** appeals to the High Court of Kenya at NAKURU from the Ruling of the learned Resident Magistrate in Eldama Ravine Senior Resident Magistrate's Court Civil Suit No. 74 of 2014 dated the 14th February, 2017 wholly and sets forth the following grounds of objection to the ruling appealed from namely:*
>
> *1.The learned Magistrate erred in law and in fact in ignoring and disregarding the appellants submissions dated 9th of December, 2014 and filed on 31st October, 2016 together with the authorities cited therewith.*
>
> *2. The learned Magistrate erred in law and in fact in disregarding the appellant's pleading in general.*
>
> *3. The learned Magistrate erred in law and fact in failing to consider the presentation of appellant's Counsel and in applying extraneous facts to dismiss the suit.*
>
> ***REASONS WHEREFORE** the appellant prays that:*
>
> ***a. The Appeal be allowed and Ruling against the appellant be set aside and this Honourable Court directs that the appellant be allowed to prosecute the suit to its logical conclusion.***
>
> ***b. Costs of this Appeal and Costs of the Chief Magistrate's Court be granted to the Appellant.***
>
> **c. *Any other order this Honourable Court may deem fit to grant."***

2. The appellant set out the facts of the case and the circumstances of the appeal in his submissions dated 30th May 2019 as follows:

> *"The plaintiff/appellant in this case brought the suit before the lower Court for an award of general damages for injuries suffered by the appellants in an accident caused by the respondent's driver and or servant, who drove the said motor vehicle in a dangerous manner causing an accident the consequence of which the plaintiffs who were students who were students from Turkana suffered and sustained injuries.*
>
> *The plaintiff/appellant filed the suits, was issued with summons, which were given to a process server who in the course of service*

and without the knowledge of counsel for the appellant fell sick and consequently died. The advocate waited for the process server to return the service to no avail and prompted to start investigations because there was no communication from the process server.

And on realizing that the process server had passed on did make effort, wrote to the Court for the re-issue of the summons on 23-5-2016 which was issued and using the same, effected service of summons on the respondent, who accepted service, filed a memorandum of appearance and defence without any protest but later filed an application in the lower Court contesting the validity of summons.

The lower Court, allowed the application by the defendant/respondent and dismissed the plaintiffs suit and hence this appeal."

3. The respondent urged no interference with the *"findings of fact by the trial Court unless it can be demonstrated that the judge misdirected himself or acted on matters which he/she should not have acted upon or failed to take into consideration matters which he or she should have taken into consideration and in so doing so arrived at a wrong conclusion"*, and submitted as follows:

"6. In light of [the provision of Order 5 Rule 1 and 2 of the Civil Procedure Rules] it is not correct for the appellant to submit that his suit was filed on 28th July 2014 and the re-issue of summons was done in June 2016 within two years as contemplated by Order 5 Rule 2 (2) . Summons in the first instance are valid for 12 months only. So that upon such expiry of 12 months the plaintiff ought to extract/obtain concurrent summons that will be valid for the remainder of the period of the two original summons.

7. Appellant has submitted correctly that Courts have powers to extend and indeed do extend validity of summons which have not expired. However, whereas the appellant's counsel alleges that the process server tasked with extracting and serving the contested summons has passed, no single evidence was tendered in this regard to support this contention. As the learned Magistrate rightly found in the Ruling dated 14/02/2017 even the identity of the alleged process server or his process server certificate or even a copy of the death certificate was not availed.

8. The attempt to ask the Court to reissue summons in June 2016, two years after the filing of the suit was a foreign concept that is not provided for under Order 5. At that point in time, 2016, there was no summons in place to reissue or extend as the Appellant wants us to believe. It is trite that where no summons to enter appearance are served within 12 months, the suit abates."

Issue of Summons

4. The duration of validity of summons to enter appearance is provided for under Order 5 Rule 2 of the Civil Procedure Rules as follows:

[Order 5, rule 2.] Duration and renewal of summons.

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.

5. There is clearly discretion in Order 5 Rule 2 (7) of the Civil Procedure Rules, and the question arises as to what would happen to the proceedings where the Court does not in exercise of the discretion dismiss the suit at the expiry of twenty four months from the issue of the original summons. It must be that the Court has a discretion to re-issue the summons in such circumstances. The discretion of the Court to make orders in the interests of justice is unaffected.

6. For instances, as relates to extension of time under the rules, Order 50 Rule 6 of the Civil Procedure Rules provides for extension of time *even after expiry of the prescribed period* as follows:

"[Order 50, rule 6.] Power to enlarge time.

6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by

order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise."

7. The scheme of enforcement of time-lines within which the various acts or steps in the process of litigation under the Civil Procedure Rules, allows for the Court's intervention to extend such time limitations even after the said time line may have expired. The philosophical basis for this is the interests of justice, which the substantive underpinning of all rules of procedure as handmaids of justice.

8. In express terms, section 3A of the Civil Procedure Act saves the inherent power of the Court to do justice as follows:

"*3A. Saving of inherent powers of Court.*

Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

9. In addition, the overriding objective of the civil process set out in section 1A of the Civil Procedure Act emphasizes the interest of justice as one of the elements of objective of the Act as follows:

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

10. Accordingly, this Court must seek to do justice in the matter by considering the respective positions of the parties.

11. Having considered the balance of convenience in this matter, I consider as urged by the appellant that the respondent does not suffer any prejudice in the reissue of summons as the same were duly served and the respondent duly filed appearance and defence and steps taken towards the hearing of the suit by seeking a second medical examination and opinion by the respondent's own doctors. All that remained is for the suit to be set down to hearing after suitable directions are given for the hearing.

12. In her ruling on the application before the trial Court dated 24th August 2016 seeking dismissal of the suits or the striking out of the same as incompetent, the trial Court ruled as follows:

"RULING

….

The Plaintiff's reasons for delay is that the unnamed process server fell ill and thereafter, passed away. However, there is no proof who the process server was or even his/her death. Further and as stated herein above, no copy of the extracted summons was ever filed alongside the plaint on 20th July 2014.

In mobile Kitale Service Station –Vs- Mobil Oil Kenya Ltd and Another Kisumu HCC. No. 205 of 1999. Warsame J. observed that;

"…*In my understanding Orders 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 there is no explanation as to why the summon s were 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, excuses, mistakes, errors which are excusable but when there is no proper explanation then the Court's powers are invited*".

I hence find that the plaintiff has been disinterested to prosecute the suit herein and excuse given for extracting summons two years later after filing of plaint is not justifiable nor excusable. As such the defendants/applicant application is hereby allowed and the plaintiff's suit herein is dismissed and/or struck out with costs. [emphasis added]

Hon. R. Yator – SRM

14.02.2017"

Principle for interference with discretion of trial Court

13. There can be doubt that the trial Court in dismissing/striking out the suits was exercising its discretion under the Civil Procedure Rules. The principle for the interference with the discretion of trial Court was elaborated in the case of ***Mbogo v. Shah*** [1968] E.A. 93 where De Lestang V-P observed at page 94:

> *"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision was clearly wrong, because it has misdirected itself or because it has acted on matters of which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

14. Most significantly, the trial Court failed to consider the overriding objective of the civil process under section 1A of the Civil Procedure Act to for the ***just*** determination of the dispute, which would require the hearing and determination of the plaintiffs' suits for recovery of compensation of damages for personal injury if their cause of action in negligence were proved against the defendant. Notwithstanding failure of the Counsel to explain, to the satisfaction of the Court, failure to take out summons to enter appearance, the trial Court ought to have considered that the plaintiffs' claim may on substance have merit which in the interests of justice cry out to be heard.

15. I consider that the trial Court also failed to consider the role of the counsel for the plaintiff in the failure to serve the summons in the period of the validity and the countervailing fact that the appellant students were innocent of the act of failure by their counsel, and therefore the principle of justice that mistake of counsel shall not be visited on an innocent party. Had the trial Court so considered the mistake of counsel as the true cause of the failure to serve the summons, it would have validated the summons reissued in June 2016, and punished the advocate who had through his want of vigilant superintendence of the process server occasioned the late remedial steps for failure of service.

Orders

16. For the reasons set out above, I find merit in the appellant's appeal, which is, therefore, allowed as prayed. The suits shall, accordingly, be listed for hearing after the taking of any necessary directions as to hearing.

Costs

17. This is an appropriate case for the imposition of costs on the advocate for the party for failure to follow the rules of Court thereby occasioning the party he represents or any other party to incur costs. The advocate did not bother to follow up for a period of almost two years on the service of the summons which he said had he had given to a process server who by "*an act of God*" passed on. The process server failing to get back to him on the service of the summons, the advocate should have earlier established the position by seeking a return thereof within reasonable time after the summons were given to the process server for service. In neglecting until the validity of the original summons had expired, the counsel for the plaintiff conducted himself in a manner to occasion expenses to the plaintiffs in applications for extension of validity of summons or reissue thereof, and the advocate must be mulcted in costs.

18. There shall, therefore, be an order that the advocate for the appellant shall personally pay the costs of the application for dismissal of the suits in the trial Court.

Appellant as the guilty party

19. The appeal was provoked by the original act of the delay in the service of the summons and even though successful in the appeal, the appellant by his counsel is the guilty party in the genesis of the situation that made the appeal necessary and as author of his own misfortune, he shall not be entitled to *party and party* costs of the appeal and there shall, therefore, be an order that each party shall bear its own costs of the appeal herein.

Order accordingly.

DATED AND DELIVERED THIS 17TH DAY OF SEPTEMBER 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S N. K.W Bichanga & Co. Advocates for the Appellant.

M/S Kairu M'Court & Co. Advocates for the Respondent.