



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT MOMBASA**

**ELC NO. 85 OF 2013**

**ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**SHAIBU HAMISI MGANDI .....1<sup>ST</sup> DEFENDANT**

**SHEIKH ALI TAIB..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE COMMISSIONER OF LANDS.....INTERESTED PARTY**

**RULING**

*(Application for extension of validity of summons and substitution of some parties; question whether an application for extension of summons can be made after the validity of the original summons has expired; some decisions holding that same cannot be extended and some holding that the same can be extended; court of opinion that nothing bars the extension of expired summons; issue of extension or not being within the discretion of the court as law permits an application for enlargement of time even when such application is made after lapse of the permitted period; application for extension of summons allowed mainly because of public element in the suit; substitution of deceased 2<sup>nd</sup> defendant already previously made; substitution of Commissioner of Lands with the National Land Commission allowed; order given that 1<sup>st</sup> defendant may be served by substituted means)*

1. The application before me is that dated 4 December 2018 filed by the plaintiff. The application seeks the following orders (paraphrased for there are obvious grammatical errors) :-

*(i) Spent (certification of urgency).*

*(ii) This Honourable Court be pleased to extend the validity of Summons to Enter Appearance for a period of 12 months.*

*(iii) The plaintiff/applicant be granted leave to effect service of Summons to Enter Appearance upon the 1<sup>st</sup> defendant by substituted service through his last known address.*

*(iv) Leave be granted to the plaintiff/applicant to substitute the 2<sup>nd</sup> defendant Sheikh Ali Taib with Abdulla Ali Taib the legal representative of his estate, and the Commissioner of Lands the interested party, with the National Land Commission.*

*(v) The plaintiff be granted leave to amend the pleadings and substitute the new defendants noted above.*

2. To put matters into context, this suit was commenced through a plaint which was filed on 6 May 2013. The case of the applicant is that the 1<sup>st</sup> defendant was illegally allotted the land parcel MN/1/9816 on 19 January 1996 by the Commissioner of Lands, cited in the suit as interested party. The applicant contended that this plot is a public road reserve and could not be allotted to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> named defendant, Sheikh Ali Taib was sued because the 1<sup>st</sup> defendant transferred his interest in the land to the 2<sup>nd</sup> defendant. In the suit, the applicant sought orders of cancellation of title and a permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

3. I have seen from the record that summons were duly issued on 8 May 2013. It seems to me as if the summons were never served and the applicant did not move the matter in any way, culminating in a Notice issued by Court on 28 September 2017, asking the applicant to appear in court on 10 October 2017 to show cause why the suit should not be dismissed for want of prosecution. On the said day, counsel for the

applicant appeared, and stated from the bar that the applicant is still keen on proceeding with the suit, and orally sought orders for re-issue of summons to enter appearance. The court (Odeny J) made an order for summons to be reissued. I have seen that fresh summons were issued on 8 November 2017.

4. On 7 May 2018, a Memorandum of Appearance, “under protest” was filed on behalf of the 2<sup>nd</sup> defendant by the law firm of M/s Taib A. Taib Advocates. The said law firm also made an application dated 18 May 2018 for various orders, one of which was to vacate the orders of Odeny J made on 10 October 2017 extending the validity of summons, and another for a declaration that this suit is *res judicata*. Another application dated 13 June 2018 was filed, where it was mentioned that the named 2<sup>nd</sup> defendant, Sheikh Ali Taib, was now deceased, and the said application sought orders to have him substituted with his legal representative, one Abdulla Ali Taib. That application for substitution was allowed on 26 July 2018.

5. The application dated 18 May 2018 was heard, and through a ruling delivered on 26 November 2018, Omollo J, vacated the orders of 10 October 2017 in so far as they related to extension of summons. The court however dismissed the prayer that this suit is *res judicata*. The court directed the applicant to file an application seeking extension of summons within 14 days of the ruling and in default the suit to stand dismissed for there being no valid summons. It is following that ruling that this application was filed.

6. There are various grounds listed in support of the application, but basically, the applicant mentions that she has since learnt that the 2<sup>nd</sup> defendant is deceased; that the whereabouts of the 1<sup>st</sup> defendant are unknown; that the office of the Commissioner of Lands is now defunct with the National Land Commission being the successor; and that summonses to enter appearance were not served for reason that the applicant was unable to locate the physical addresses of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The application is supported by the affidavit of Patrick Chirongo, a process server working with the applicant. He has stated that on 19 February 2015, prior to expiry of the first summons, the applicant did apply to be re-issued with fresh summons, and he has annexed a letter of even date addressed to the Deputy Registrar. He has also referred to the proceedings of 10 October 2017 where counsel orally applied for reissuance of summons and the order of Odeny J, allowing the same. He stated that the applicant came to learn of the demise of the 1<sup>st</sup> defendant after the application of 13 June 2018 was made.

7. Mr. Abdulla Ali Taib, the representative of the estate of Sheikh Ali Taib, has sworn a replying affidavit to oppose the motion and also filed Grounds of Opposition. Inter alia, he has deposed that the first set of summons was issued on 8 May 2013 and Mr. Sheikh was never served with the summons. He has averred that summons are only valid for a period of 12 months from the date of issue and the original summons thus expired on 7 May 2014. He has stated that the application made on 19 February 2015 was made well after the original summons had expired, and this was a nullity, as the Deputy Registrar had no powers to extend the validity of summons nor issue fresh summons where the original summons have lapsed. He has deposed that no material has been placed before court to evidence why the initial summons were never served, and no evidence established to demonstrate attempts to serve, or any difficulties or challenges in respect of service that may have been encountered. He has deposed that if there was difficulty, there was opportunity to approach the court to serve by substituted means including advertisement. It is thus his belief that the prayer for extension of summons has no basis whatsoever. He is also of the belief that there can be no extension of summons that have expired. He has contended that the failure to extend summons caused the abatement of the suit and the same cannot now be revived. He has averred that the delay of well over 4 years is not explained. He has deposed that the applicant was only jolted into action after issuance of the Notice to Show Cause (NTSC) otherwise the applicant would still be asleep. He has argued that this suit is sub judice and/or *res judicata* the case *Mombasa ELC No. 212 of 2012, Engel Gisela t/a Engelpop Tours & Safaris vs Shaibu Hamisi Mgandi & Others*. He has asked that the application be dismissed.

8. Counsel were invited to file written submissions and I have seen the written submissions of counsel for the applicant and counsel for the 2<sup>nd</sup> defendant.

9. The first issue raised by counsel for the 2<sup>nd</sup> defendant is that this suit is *res judicata*. The issue of whether or not this suit is *res judicata* is not within the purview of this application. In any event, the issue of *res judicata* was raised and determined within the application dated 18 May 2018 in the ruling of Omollo J, delivered on 26 November 2018. I have seen a Notice of Appeal was filed against that ruling. I therefore do not have jurisdiction to again determine the issue of *res judicata* as I cannot sit on appeal against the decision of Omollo J. The issue of whether or not this suit should be declared *res judicata* is now in the hands of the Court of Appeal. I see no need of saying more on that point.

10. It was also argued by counsel for the 2<sup>nd</sup> defendant that this suit has abated as against the 2<sup>nd</sup> defendant following the provisions of Order 24 Rule 4. I do not see the basis of this, for through the application dated 13 June 2014, Mr. Abdulla applied to be enjoined to this suit on behalf of the estate of the late Sheikh Ali Taib (the deceased original 2<sup>nd</sup> defendant) and sought to be allowed to proceed with the suit on behalf of the deceased. This application was allowed. In effect, the 2<sup>nd</sup> defendant waived his right to claim that this suit has abated against the 2<sup>nd</sup> defendant. In any event, the suit could not have abated by virtue of Order 24, for the 2<sup>nd</sup> defendant died on 28 June 2017, and the application for his substitution was made on 18 June 2018 before the lapse of one year of his death. The suit thus could not be deemed to have abated by dint of the provisions of Order 24 Rule 4 of the Civil Procedure Rules (which provides for abatement of suit where a defendant has died) for the suit would only have abated if no application for substitution was made within one year of death. That is not the situation here, for as I have demonstrated above, the application for substitution was made within one year of the death of the original 2<sup>nd</sup> defendant before the suit had abated. I see no issue for determination on the claim that this suit has abated following the provisions of Order 24 of the Civil Procedure Rules. The case of *Kenya Farmers Cooperative Union vs Charles Murgor t/a Kiptabei Coffee Estate (2005) eKLR* relied upon by counsel for the 2<sup>nd</sup> defendant does not therefore apply. In the said case, an application for substitution was made one year after the death of the deceased defendant which is not the case here. That case is therefore distinguishable to the circumstances prevailing in this suit.

11. I find the main issue in this application to be whether or not this Court should extend the validity of summons as applied by the applicant. Order 5 of the Civil Procedure Rules relates to summons. The issue of durations of summons, their validity and extension, is covered under Order 5 Rule 2 which provides as follows :-

*Duration and renewal of summons [Order 5, rule 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 subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

12. It will be seen from the above, that summons are first valid for a period of 12 months (sub-rule 1), but the court has power to extend the summons from time to time (sub-rule 2) upon an application being made. If no application is made for extension of summons, the court has discretion to dismiss the suit on expiry of 24 months from the issue of the original summons (sub-rule 7). In our case, there is no question that 12 months lapsed from the time of issuance of the original summons which were issued on 8 May 2013. A period of 24 months have lapsed before this application, which is an application made under sub-rule 2, but the court has not dismissed the suit under sub-rule 7 for reason that no application for extension of summons has been made. This court can thus consider whether or not to extend the validity of summons under sub-rule 2 for the suit has not been dismissed.

13. Counsel for the applicant in her submissions relied on the case of *Kenya Commercial Bank Limited vs Ann Kajuju Magondi & Others (2012) eKLR*. The plaint in the said case was filed on 19 May 2009 and summons were not served. An application for extension of the validity of summons was made on 2 March 2012. Mabeya J, allowed the application and held as follows at paragraph 5 of the ruling:-

*Under Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules, the life of a summons is twelve months from the date of issue but the same can be extended from time to time. There is no time limit given when the application for extension of the validity of the summons is to be made. Rule 2(7) of Order 5 provides that if no application is made for extension of the validity of summons, at the expiry of 24 months of the date of the original summons then the suit may be dismissed. The original summons were issued on 21<sup>st</sup> May, 2009. Accordingly, their validity expired on or about 20<sup>th</sup> May, 2010. Can their validity be extended when it is long gone. I believe so. Order 5 Rule 6 of the Civil Procedure Rules provides:-*

***“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.”***

*My reading of Order 5 Rule 2(2) is that the validity of a summons to enter appearance may be extended on application. The rules do not specify at what time such an application may be made. Whether it is before or after the validity has expired does not make any difference since under the above provision time may be extended for making such an application if good reasons are advanced.”*

14. On his part, counsel for the 2<sup>nd</sup> defendant relied on the case of *Barclays Bank of Kenya Limited vs Patrick Njuguna Kubai (2014) eKLR*. In the said case, a plaint was filed on 1 February 2012 and summons were issued on 6 February 2012 but served to the wrong address. An application for extension of validity of summons was filed over a month after the summons had expired. The court (Kamau J) asked the question whether the court had power to extend summons which have expired. She held as follows at paragraph 41 and 43 of her ruling:-

*“41. ...This court reiterates that the summons could not be extended after 5<sup>th</sup> February 2013 and not even a prayer to extend time within which the application for extension of the validity of summons could be extended could save the plaintiff... (43) The failure to file an application to extend the summons by 5<sup>th</sup> February 2013 was a fundamental flaw that cannot be cured by any provisions of the law as it stands...”*

15. In making the above decision, the learned was persuaded by the holding of Onyancha J, in the case of *Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others (2010) eKLR* and the decision of Rawal J, in the case of *Julius Njoroge Muira vs Harrison Kiambuthi Mburu (2011) eKLR*. In both cases, the learned Judges held that once summons have expired, then one cannot apply for their extension.

16. It will be seen that the decision of Mabeya J, in the case of *Kenya Commercial Bank vs Ann Kajuju* is diametrically opposite that of Kamau J, in the case of *Barclays Bank of Kenya Limited vs Patrick Njuguna Kubai*. None of the decisions are binding upon me and both are

only of persuasive value.

17. On my part, I am persuaded by the reasoning of Mabeya J in the case of *Kenya Commercial Bank vs Ann Kajuju*. Going back to Order 5 Rule 2 (2), it will be seen that the said rule states that the court may extend the validity of summons from time to time if satisfied that it is just to do so. The law does not say that expired summons cannot be extended. Of course, the argument made in the case of *Barclays Bank vs Kubai*, is that you cannot extend what has expired. However, nothing stops the court from reviving what has expired, and giving life to it, where the law does not explicitly bar such action. Indeed, that is the very foundation of the provisions on extension of time covered in Order 50 Rule 6 which is drawn as follows :-

*Power to enlarge time [Order 50, rule 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.*

18. From the above, it will be observed that the power to enlarge time can be granted even where the application is made after the expiration of the time appointed or allowed. It is thus incorrect, in my view, to argue that one cannot apply for enlargement of time, if the original duration given has already expired. In the case of summons, I do not agree, that one must apply for their extension only when the summons are still valid. I have seen nothing in the law that bars the court from extending the validity of summons because such application is made after the original summons have expired. The court therefore has discretion to consider an application for extension of validity of summons even where the said summons have expired. The court will of course consider all the surrounding circumstances of the case and make a decision whether or not to exercise its discretion in favour of the applicant. It is of course certainly prudent to apply for extension before the summons have expired, or shortly thereafter, for as more time lapses, the more difficult it will be to convince the court to extend the validity of summons, because avenues such as an application for substituted service can be explored, and further, the plaintiff runs the risk of having his suit dismissed if no application for extension is made 24 months after the issuance of the first summons.

19. In the circumstances of this case, the applicant has explained that she could not trace the defendants before the summonses expired. She has also mentioned that there was a similar related matter that was on going, that is the case of *Engel Gisela vs Shaibu Hamisi & Others*. I have since learnt that the said suit was dismissed for want of prosecution. I agree with counsel for the 2<sup>nd</sup> defendant that probably the applicant ought to have done more in the matter, including seeking orders for substituted service. I also agree with counsel for the 2<sup>nd</sup> defendant that the applicant took quite some time before filing this application for extension of time and it actually appears that the applicant was jolted into action after the court issued a notice for dismissal for want of prosecution. I agree with counsel for the 2<sup>nd</sup> defendant that the applicant ought to have done better. I however note that in this case, the applicant seeks to advance a case for recovery of what it considers to be public property, and it is mainly because of that public element, that I am persuaded to exercise my discretion in favour of the applicant. I will therefore allow the application for extension of validity of summons and do revive the expired summons and proceed to extend the same for a further duration of 90 days. I am also persuaded to allow the prayer that the 1<sup>st</sup> defendant be served by way of substituted means. I direct that the 1<sup>st</sup> defendant be served through an advertisement to be placed in both the Daily Nation and Standard Newspaper within this period of 90 days.

20. There was a prayer for substitution of the deceased 2<sup>nd</sup> defendant. I find that superfluous given that there was already an application for substitution of the deceased 2<sup>nd</sup> defendant made by the legal representative of the 2<sup>nd</sup> defendant which was allowed on 26 July 2018. The prayer to substitute the Commissioner for Lands with the National Land Commission is however allowed. The applicant is hereby directed to file an amended plaint to reflect the above within 14 days of this ruling.

21. I make no orders as to costs.

22. Orders accordingly.

DATED and delivered this 16<sup>th</sup> day of APRIL 2020

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**