



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 518 OF 2007

RUTH ANYANGO ODHIAMBO.....1ST PLAINTIFFS/APPLICANTS

KENNEDY ADUOL.....2ND PLAINTIFFS/APPLICANTS

(Suing As Personal Representatives of the Estate Of John Odhiambo Othim)

VERSUS

SHINSAKURA ENDTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

STEPHEN MUNGA KARIUKI.....2ND DEFENDANT/RESPONDENT

CHARLES MUKHWANA WANYAMA.....3RD DEFENDANT/RESPONDENT

RULING

The notice of motion dated the 25th February, 2016 is brought under the provisions of Order 5 Rule 2 (2), 5 of the Civil Procedure Rules and Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and Article 159 (D) of the constitution.

The Plaintiffs/Applicants have sought the following orders

1. That the honourable Court be pleased to validate the original summons issued and served on the 1st defendant/respondent on 6th September 2011 in this matter.
2. That the honourable court be pleased to deem the summons issued herein on 10th July, 2011 and served on the 1st defendant/respondent on 6th September, 2011 as having been validated as at the time of service thereof, now that the 1st defendant/respondent subsequently entered appearance and filed a defence and has been participating all along in the proceedings in the matter.
3. That the cost of this application be costs in the cause.

The application is supported by the annexed affidavit sworn by Nicholas Sumba on the 25th February, 2016 and is premised on the grounds set out on the body of the same.

The facts as captured in the affidavit are that the suit was filed on 5th July, 2007 and the summons to enter appearance were subsequently issued on the 19th July, 2007. It was not until 6th September, 2011 that the plaintiffs made an attempt at service of the summons upon the defendant by registered post which service

obtained a response in terms of memorandum of appearance and statement of defence by the first defendant/respondent.

That all along the plaintiffs/applicants had, without success, tried to trace the first defendant's registered office in vain and the service eventually effected by registered post was just on trial and error basis.

That the first defendant having filed a memo of appearance on the 19th September, 2011 and a statement of defence on 5th October, 2011 and the matter having gone through all the processes including pre-trial, it would be a travesty of justice to deny the plaintiffs/applicants the opportunity to prove their case and lay basis for their claim against the first defendant.

That the justice of the matter dictates that the substantive issues in the matter be determined on merits rather than dismissing the suit against the first defendant/respondent on a technicality due to non renewal and/or validation of summons to enter appearance.

That dismissal of the suit would be against the spirit of article 159 2(D) of the constitution and the plaintiffs/applicants whose claim arises out of a road accident that occurred on 9th January, 2003 shall forever lose out on damages for which they are administrators of the deceased estate. That failure to renew and/or validate the summons was due to uncertainty on the whereabouts and location of the first defendant which took so long to establish until and when an attempt was made on service of the summons by registered post.

The application was canvassed by way of written submissions. The plaintiffs' submissions reiterate the contents of the supporting affidavit.

The 1st defendant did not file a replying affidavit but submissions were filed on its behalf and since they raise points of law, the court will consider them as a party can raise a point of law anytime.

The issue herein revolves around the validity of summons at the time of service. The suit was filed on 5th July, 2007 and summons were issued on the 19th July, 2007. No attempt was made to extend the validity of the summons before service was effected. The plaintiffs have not denied that the summons that were served upon the first defendant had expired and though they have explained the reason why the same was not extended, the explanation does not cure that legal defect.

The plaintiff has further argued that the substantive issues in the matter should be determined on merits rather than dismissing the suit against the first defendant which he refers to as a technicality, due to non renewal and/or validation of summons to enter appearance.

He has averred that dismissal of the suit would go against the spirit of Article 159(2) (d) of the constitution to which I beg to differ. The validity of summons goes to the root of a matter and it is not a legal technicality as submitted by the plaintiffs and not even Article 159(2) (d) of the constitution can cure the defect.

The suit herein was filed before the Civil Procedure Rules were revised in 2010. The suit fell under Order V Rule 1 (1) and (2) of the then applicable Civil Procedure Rules and it provided as hereunder;

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 by order extend the validity of the summons from time to time for such period not exceeding in all twenty four months from the date of its issue if satisfied that it is just so to do.

Under that Rule, there was no provision for extension of summons beyond 24 months from the date of issue and even then, for the court to extend the validity as aforesaid, the summons had to be valid before extension. In the instant case, the summons had expired by the time the same was served and this court cannot extend the same in those circumstances.

In the premises, aforesaid, this court has no option but to dismiss the application dated 25th February, 2016 with no orders as to costs.

Dated, signed and delivered at Nairobi this 23rd day of February, 2017.

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L NJUGUNA

JUDGE

In the presence

.....**For the 1st Plaintiff/Applicant**

.....**For the 2nd Plaintiff/Applicant**

.....**For the 1st Defendant/Respondent**

.....**For the 2nd Defendant/Respondent**

.....**For the 3rd Defendant/Respondent**