



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 119 OF 2014**

**TROPICAL FOODS INTERNATIONAL.....1<sup>ST</sup> PLAINTIFF**

**JAMES KIMONYE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EASTERN AND SOUTHERN AFRICAN TRADE**

**AND DEVELOPMENT BANK .....1<sup>ST</sup> DEFENDANT**

**CORFU INVESTMENTS LIMITED..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Summons to Enter Appearance were issued herein on 26<sup>th</sup> March 2014 and are yet to be served on the Defendants. This would be close to 3 years after the Plaint herein was presented on 25<sup>th</sup> March, 2014.

2. That state of affairs has attracted a Notice of Motion dated 25<sup>th</sup> October 2016 by the 2<sup>nd</sup> Defendant for the following Orders:-

- 1) The suit against it be dismissed with costs.
- 2) Costs of the Application be awarded to it in any event.

The Grounds upon which the Application is sought are that the validity of the Summons expired and there can be no extension of expired Summons. Secondly, that the suit having abated it should be dismissed with costs as it cannot proceed to hearing.

3. The Plaintiff resists the Application and sets out that resistance in a Replying Affidavit sworn by their Counsel Kennedy Nyaencha on 4<sup>th</sup> November 2016.

4. The Plaint herein, together with an Application for Injunction, were filed on 25<sup>th</sup> March 2014. Counsel avers that these were filed together with the Summons.

5. It is the Plaintiff's contention that the Plaint and Application were served upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 4<sup>th</sup> April 2014 and by this time his firm had not been notified of the issuance of Summons and was not aware that they were ready for collection and service.

6. In response to the Service of the Complaint and Application, the 2<sup>nd</sup> Defendant's Advocate filed a Notice of Appointment and a Response to the Application.

7. Counsel Nyaencha states that he had all along been under the impression that the Summons were indeed extracted and served together with the Complaint upon the Defendants Advocate. He explained that soon after the filing of this suit his Clerk proceeded on Maternity Leave for three months and upon her return assumed that Summons had been extracted and served when she was away.

8. Counsel Nyaencha gives a chronology of events that made him to assume that all was well. That soon after the service of the Complaint and Application on the Defendants, the Plaintiff's action was confronted with an Application for Stay brought by the 1<sup>st</sup> Defendant. That Application dated 28<sup>th</sup> April, 2014 was heard and a ruling rendered on it on 6<sup>th</sup> November 2014.

9. That ruling paved the way for the hearing of the Application of 24<sup>th</sup> March 2014, which was heard and a ruling made on 19<sup>th</sup> August 2016 granting the Injunctive relief sought in favour of the Plaintiffs.

10. It is deponed on behalf of the Plaintiffs that the 2<sup>nd</sup> Defendants actively participated in the proceedings and did not point out that they were not served with Summons. In addition they did not challenge the existence of the matter.

11. That, after the Ruling, Counsel for the 2<sup>nd</sup> Defendant intimated on phone that the 2<sup>nd</sup> Defendant was considering seeking a Counterclaim against the Plaintiffs and that he was therefore surprised with the bringing of this Application.

12. On agreement of parties and with the concurrence of Court, the Application was argued by way of written submissions.

13. The Application before Court cites the provisions of Order 5 Rules 1 and 2 of the Civil Procedure Rules and I understand it to be seeking dismissal of the Plaintiff's suit against the 2<sup>nd</sup> Defendant on two related grounds that:-

(i) The suit has abated

(ii) The Summons issued therein has expired and its validity has not been sought within 24 months of its issuance.

14. On abatement, a holistic reading of the order 5 Rule 1 is necessary. It provides:-

“(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate”.

15. Under the Provisions of Subrule 5 thereof, a Suitor presenting a Plaint takes up the responsibility of preparing a Summons to Enter Appearance. Upon preparation, the Summons is filed alongside the Plaint. By dint of the provisions of sub-rule 2, the Summons are deemed to be issued once signed by the Judge or Presiding Officer of a Court (Section 2 Civil Procedure Act) or an Officer appointed by the Judge, and sealed with the seal of the Court. The Rules require that the issuance of Summons be done without delay and in any event not more than 30 days from the date of filing suit.

16. Sub rule 6 is on abatement and reads:-

“(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate”. (*my emphasis*)

Explicit, the incident of Abatement happens when the Summons is not collected within 30 days of issue or notification, whichever is later.

17. In the matter at hand, there is consensus that the Summons were promptly issued on 26<sup>th</sup> March, 2014, this would be 2 days after the suit was filed. There is also no doubt that the Summons have not been collected to date, about 3 years after issuance. What however the Plaintiffs assert is that they have never been notified of the issuance of the summons. And this Court has to agree with the Plaintiffs as there is no evidence put forward by the 1<sup>st</sup> Defendant or in the court file that proves that the Plaintiffs were so notified. For that reason time has not started to run against the Plaintiff and the suit has not abated in the sense of order 5 Rule (1)(6). I think it would be opportune to observe that as the Law stands on notification of Summons it is advised that Court Registries devise a convenient but inexpensive way of notifying parties of the issuance of Summons. One way could be to put up periodic notices of this information.

18. It would seem that the more substantial ground is in respect to the expiry of the Summons as against the 2<sup>nd</sup> Defendant.

19. A discussion on the expiry of Summons revolves around the interpretation of the provisions of Order 5 Rule 2 which reads:-

“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”.

20. There is no unanimity in the High Court on what would be the implication of non-extension of Summons after 24 months from the date of issue.

21. One view is that the Court does not have jurisdiction to extend validity of Summons beyond 24 months and neither Article 159 nor the overriding objectives edict will resurrect expired Summons. The High Court decisions in this league include **GRACE WAIRIMU MUNGAI VS. CATHERINE NJAMBI MUYA** [2014]eKLR, **MUNICIPAL COUNCIL OF EMBU VS. POSTAL CORPORTION OF KENYA** [2014] eKLR, **BARCLAYS BANK OF KENYA LTD BS. PARTICK NJUGUNA KUBAI** [2014]eKLR and **ELEGANT COLOUR LABS NAIROBI LTD vs. HOUSING FINANCE COMPANY (K) LTD & 2 OTHERS** [2010]eKLR cited by the 2<sup>nd</sup> Defendant.

22. That view would draw its inspiration from the Court of Appeal Decision in **UDYKUMAR CHANDULAL RAJANI & 3 OTHERS VS. CHARLES THATHI** [1997] eKLR which by its binding nature and importance on this subject will be discussed at some length shortly.

23. The Plaintiffs on the other hand sought to rely on the decisions of **TEGPRAKASHA SHEM VS. PETROAFRIC COMPANY LTD & 2 OTHERS** [2014] eKLR and **KENYA INDUSTRIAL ESTATES LTD VS. MOHAMMED ABDALLA & ANOTHER** [2012] eKLR. But on my reading of those decisions they are not on point in respect to the fate of a suit when Summons have not been validated before the end of 24 months after issuance.

24. The facts in play in **UDAYKUMAR** (supra), briefly, were that in the main suit, Summons to Enter appearance to the suit were issued by the Superior Court on 2<sup>nd</sup> April 1987. Those Summons were served upon some unnamed Manager of the Defendant firm on 3<sup>rd</sup> February 1988. That service was found to be irregular and upon request by the Plaintiff’s Lawyers summons were reissued on 27<sup>th</sup> August 1992 and served upon the Defendants on 28<sup>th</sup> August 1992. The Defendants Entered Appearance through Counsel on 9<sup>th</sup> September 1992.

25. Against that backdrop and in considering the purport of Order V Rule I of the Pre-Legal Notice 5 of 1996 Civil Procedure Rules the Court of Appeal rendered itself as follows:-

“Order V rule 1 provides a comprehensive code of the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew 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 month period. Neither did the entry of appearance by the defendants revive the summons which had expired.

The original summons in an auction is only valid for the purposes of service for 12 months from the date of its reissue. The court, before 1996, could only by order extend its validity from time for such 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 in fact 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 on 28<sup>th</sup> August, 1992”.

26. The 2<sup>nd</sup> Defendant argues forcefully that this Court is bound by the decision in **UDAYKUMAR** and

must find that the life of these proceedings must come to an abrupt end. It is also argued that Article 159 of the Constitution which directs Courts to administer justice without undue regard to technicalities cannot be a panacea to the malady in these proceedings.

27. This matter has received my anxious consideration and I have come to a conclusion that is divergent from some past Decisions.

28. In **UDAYKUMAR** (supra), The Court of Appeal was considering the Provisions of order V Rule 1 which then read:

“1.(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 of 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 to do so.

(3) Where the validity of a summons has been extended under subrule (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 sum which has not been served so as to extend its validity until the period specified in the order.

(5) Application for an order under subrule (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.

(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”

29. The current Provisions on duration and renewal of Summons are found in order 5 Rule 2 of the Civil Procedure Rules which the court reproduces once more:-

“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.

30. It seems to this Court that in reaching the decision that the Court had no power to extend the validity of Summons beyond 24 months from the date of issue the Court of Appeal gave effect to Sub rule 2 which then read:

“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 to do so.*”*(my emphasis)*

The clear and uncontestable effect of this sub rule was that, then, although a Court could from time to time extend the validity of Summons the extended period could not, in all, exceed 24 months from the date of its issue.

31. That must be compared and contrasted with the changes that were introduced to sub rule 2 by Legal Notice No 5. of 1996 and retained in the current wording of sub rule 2:-

“where a summon 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.”

The words **“not exceeding in all twenty-four months from the date of its issue”** were left out and that must be of significance. The significance in my view is that the extension of validity of Summons need not be restricted to 24 months from the date of issue.

32. But before drawing any further conclusion the Court must consider whether the provisions to Sub rule (7) makes a difference. They provide:-

“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.”

This Court takes the view that this sub rule gives the Court discretion to dismiss a suit at the expiry of 24 months from the issue of the Original Summons if no Application for extension is made under sub rule (2).

33. Consequent to my finding that sub rule (2) does not restrict the period for extension of validity of summons to 24 months from the date of issue or at all, this Court is unable to read sub rule (7) as limiting the time within which such an application for extension to 24 months from the date of issue. What sub rule 7 does is to fix 24 months from the date of issue of summons as the time after which the Court, either *suomoto* or Application, can dismiss a suit. And that power of dismissal is discretionary to be exercised judicially.

34. In reaching a decision that an Application to extend the validity of summons can be made even after the expiry of the Original Summons, this Court gives regard to the Provisions of Section 59 of the Interpretation and General Provisions Act. These Provisions, on Construction of the Power of Court to enlarge time, are:-

“Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then ,unless a contrary intention appears, the

power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed”.

Nothing in order 5 Rule 2 suggests that the intention of the Rules is to restrict the bringing of the Application for extension before their expiration. Quite to the contrary, the generous wording of sub rule 2 read in concert with sub rule 7 would allow the bringing of such an Application even after 24 months from the issue of the Original Summons.

35. My appreciation of the Law as set out above is that the decision of **UDAY KUMAR** (*supra*) may not be applicable to the current code on the validity and enlargement of summons to Enter Appearance.

36. The Court now turns to consider whether there is good reason to dismiss the suit against the 2<sup>nd</sup> Defendant. It is, once more, agreed that the Summons issued on 26<sup>th</sup> March 2014 have not been taken out and have therefore not been served upon the 2<sup>nd</sup> Defendant. It must however be noted that the Summons were prepared by the Plaintiff's Counsel and filed on 25<sup>th</sup> March 2014 alongside the Plaint. The Summons were therefore issued promptly.

37. This Court has also found that the Plaintiffs were never notified of the issuance of the Summons. Nonetheless it would be incumbent of a diligent litigant to continuously check with the Registry on the status of filed Summons.

38. It is not disputed that the copy of the Application and Plaint were served on the firm of Wamae & Allen on behalf of the 2<sup>nd</sup> Defendant on 4<sup>th</sup> April 2014. The said firm filed a Notice of Appointment to represent the 2<sup>nd</sup> Defendant on 9<sup>th</sup> April 2014.

39. Thereafter the 2<sup>nd</sup> Defendant filed an Affidavit in reply to the Plaintiffs Notice of Motion of 24<sup>th</sup> March 2014. The Affidavit was sworn by Noel Nzyima Munyithya on 29<sup>th</sup> April 2014. The Court record further shows that thereafter the 2<sup>nd</sup> Defendant's Counsel robustly participated in the proceedings. One example of that participation suffices; the 2<sup>nd</sup> Defendant through Counsel resisted the Plaintiffs Application for Injunction dated 24<sup>th</sup> March 2014 and filed lengthy and detailed Written Submissions in response.

40. Those submissions clearly demonstrated that the 2<sup>nd</sup> Defendant was fully aware of the contents of the Plaint as the 2<sup>nd</sup> Defendant's Counsel made comments on the inadequacy of the Plaint and the Plaintiff's Cause of Action generally.

41. The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.

42. In the matter before me, the 2<sup>nd</sup> Defendant was made aware of suit through service of the Plaint and the application for injunction. The 2<sup>nd</sup> Defendant has actively participated in subsequent proceedings and upto the point of filing of the current Application has not raised the issue of non-service of Summons. In addition nowhere in the Application does the 2<sup>nd</sup> Defendant say that these State of Affairs has prejudiced its position.

43. In the circumstances of this case the Court should not dismiss the suit as prayed. That would be too drastic a step to take. The application of 25<sup>th</sup> October 2016 is hereby dismissed with costs.

44. To enable this matter move forward and as a way of making good use of judicial time I would now validate the Summons issued herein on 26<sup>th</sup> March 2014 for 30 days with effect from the date of this

Ruling. The said summons shall be served by the Plaintiff upon the 2<sup>nd</sup> Defendant's Advocate within 21 days of this Ruling and the 2<sup>nd</sup> Defendant shall thereafter respond as by law required.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> day of February,2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

N/A for Plaintiff

Okoth for 1<sup>st</sup> Defendant for Defendant

Kingata for Gichuhi for 2<sup>nd</sup> Defendant

Alex - Court Clerk