



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**ENVIRONMENT AND LAND NO. 438 OF 2014**

**FLORENCE NGOSIA MASIEYI (Suing for and on**

**Behalf of the Estate o the late FREDRICK**

**MASIEYI SHITONDA ..... PLAINTIFF/APPLICANT**

**VERSUS**

**GEORGE GITAU MUNGAI ..... 1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MARY MUKAMI GEORGE ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**BURUGU KAGUCIA JOSEPH .... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The application before me is one dated 10/7/2012 brought under **Order 5 rule 17** of the **Civil Procedure Rules, 2010**. The applicant has sought leave to serve summons to enter Appearance upon the 1<sup>st</sup> and 2<sup>nd</sup> defendants by way of substituted service. The application is based on the grounds on the face of the Motion and is supported by the applicant's affidavit sworn on 10/7/2012.
2. The gist of the application is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants cannot be traced for purposes of effecting service upon them despite efforts made. The applicant says that it is necessary that the court gives directions on how an alternative mode of service can be effected before the suit is fixed for hearing.
3. In her short affidavit, the applicant depones that it has been impossible to trace the 1<sup>st</sup> and 2<sup>nd</sup> defendants as shown in the affidavit of service by the process server annexed to her affidavit in support of the Motion.
4. The 3<sup>rd</sup> respondent has opposed the application and filed grounds of Opposition against the application. The 3<sup>rd</sup> respondent has stated that; the summons sought to be served by way of substituted service are “**stale**” meaning they have expired, the application is based false and inaccurate affidavits and that the affidavit is insufficient as to efforts made.
5. On 9/12/2014 when the application came before me for hearing, Mr. Ngigi appeared for the 3<sup>rd</sup> respondent while Mr. Kundu was for the applicant. Mr. Kundu largely adopted the contents of the affidavit and grounds on the face of the Motion in his submissions. He submitted that although the summons are stale after one year, under **Order 5 rule 2 (2)**, the plaintiff can extend summons for a

further twelve months as long as good cause is shown. He therefore urged the court to grant the application.

6. Mr. Ngigi on his part submitted that summons in the suit expired twelve months from the date of their issue and an application for extension of their validity must be made during the life of the summons. Counsel submitted that there are no live summons upon which the court can make an order for substituted service.

7. According to counsel, the 3<sup>rd</sup> respondent was not served with summons but became aware of the suit at the Land Registry Kakamega, and moved quickly to file a defence on the suit under protest. Counsel was of the view that under **Order 5 rule 7**, the court has only one option, that of dismissing the suit. He referred to a number of decisions on the issue. He contended that for an application such as the one before court to succeed, there must be live summons that are sought to be served by way of substituted service. The summons expired on 16/5/2012, two months before the application was made and he asked that the application be dismissed with costs.

8. I have considered the application, the supporting affidavit, submissions by counsel for both parties and authorities cited. The applicant has sought leave of the court to serve summons by way of substituted service stating that she was unable to serve the 1<sup>st</sup> and 2<sup>nd</sup> defendants despite efforts made by the process server to effect service on them.

9. The process server has sworn an affidavit stating the efforts he made in trying to serve the two defendants which efforts were in vain because he could not trace these defendants.

10. The applicant seems to have made attempts to serve the 1<sup>st</sup> and 2<sup>nd</sup> defendants but those efforts bore no fruits. Those defendants remain at large and summons have therefore not been served. If that was the only issue in this matter, I would have exercised my discretion and granted the application.

11. However, there are other issues raised in this application which I must address my mind on. The 3<sup>rd</sup> respondent has argued that there are no valid summons upon which the orders sought can be granted.

12. According to the record, summons were issued on 16/5/2011, the same day the suit was filed and those summons therefore expired on 15/5/2012. There is no evidence that the validity of those summons was extended.

13. **Order 5 rule 2 (1)** of the **Civil Procedure Rules, (2010)** provides (where relevant) as follows:-

*“A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue...”*

14. **Sub-rule 2** of the same rule provides as follows:-

*“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.”*

15. From the provisions to those rules, it is clear that although the validity of summons is twelve months from the date of issue, the court has power to extend the validity of those summons if it considers it just to do so. The court must be satisfied that there exist circumstances that will justify the extension of the validity of those summons. The justification must be made by the plaintiff or applicant when seeking the extension of the validity of those summons.

16. Where the summons have not been served, and no application has been made to extend their validity, the suit becomes liable to be dismissed. This is clear from **Order 5 rule 2 (7)** which

provides as follows;

***“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...”***

17. It is clear from the record that summons herein have expired and that there was no application made to extend their validity. This has also been admitted by counsel for the applicant. **Order 5** of the **Civil Procedure Rules (2010)** provides a comprehensive procedure for issuing, serving and generally dealing with summons. However, those procedures have not been exhausted by the applicant in relation to this suit. More specifically, the summons issued herein expired on 15/5/2012 and its validity was not extended. As it is, there are no valid summons before court. The plaintiff's suit has therefore abated as regards the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

18. I do not think the application before court, even if granted, will serve any useful purpose. This is because the applicant will still have to apply to extend validity of summons to enable her serve the 1<sup>st</sup> and 2<sup>nd</sup> defendants. Can the applicant apply to extend validity of summons after they have expired? I also doubt whether that is possible. This is because there will be no valid summons to extend the suit having abated, and there are numerous authorities on this including – **VdayKumar Chanulal Rajini & Others -vs- Charles Thaiti – Civil Appeal No. 85 of 1996** where the Court of Appeal held that the court did not have jurisdiction to extend validity of summons beyond 24 months. For those reasons, the present application cannot succeed.

19. The 3<sup>rd</sup> defendant filed a defence under protest on 31/5/2011 saying that he was not served with summons to enter appearance. He also put up a counter-claim against the plaintiff/applicant. Counsel for the 3<sup>rd</sup> respondent has urged that the suit against his client be dismissed on account of non service of summons.

20. The purpose for serving summons on a defendant is to bring to that party's attention the filing of a suit against him and calling on him/her to intimate to the court whether he/she intends to defend the suit and if so file his/her defence within a specified period. That is why **Order 5 rule 1 (1)** is in the following words;

***“Where a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”***

21. That being the case I do not think failure to serve the 3<sup>rd</sup> defendant, who in any case, has filed a defence and raised a counter-claim, caused him any prejudice. Dismissing the plaintiff's suit against the 3<sup>rd</sup> defendant will cause more injustice to the plaintiff than the prejudice, if any caused to the 3<sup>rd</sup> defendant by non service of summons. This court should be minded of doing substantive justice than dismissing the plaintiff's suit against a party who has filed a defence on a procedural technicality.

22. With the introduction of the overriding Objective Principle under **Sections 1A and 2A** of the Civil Procedure Act, courts are emboldened to be guided by a broader sense of justice, to achieve a fair, just, speedy, proportionate, time and cost saving disposal of suits. And as was observed by **Nyamu, JA**, in **Kenya Commercial Bank Ltd. -vs- Kenya Planters Co-operative Union [2013] 1EA**, technicalities of Procedure, non compliant precedents or the exercise of power in a manner that would defeat the court's core business of acting justly would have to give way.

23. Consequently, the application dated 10/7/2012 is declined and is hereby dismissed. The plaintiff's suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants having abated, is hereby struck out. However, having regard to the overriding objective that the court should strive to do justice, the suit against the 3<sup>rd</sup> defendant will proceed to hearing and final determination despite the fact that summons were not served on him.

23. Costs of the application to the 3<sup>rd</sup> defendant/respondent in any event.

24. Orders accordingly.

*Dated and delivered at Kakamega this 3<sup>rd</sup> day of February, 2015*

**E. C. MWITA**

**J U D G E**