



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 117 OF 2012

GULAM RASUL MURDAT.....PLAINTIFF

VERSUS

DATMA ENTERPRISES LIMITED.....DEFENDANT

RULING

Introduction

1. Before me is an application by the plaintiff dated the 28/2/2015 and filed in court on 30/7/2015 seeking an order that the validity of the summons dated 21/6/2012 be extended and that the summons if so extended, together with the other pleadings be served by substituted service by; being affixation on the High Court Notice Board, by Registered post to the last Defendant's known postal address at P.O.Box 81306, MOMBASA, and by an advertisement in the Daily Nation Newspapers.
2. The application is expressed to be brought under the provisions of Order 5 Rule 1(2) & 5 Rule 17(2) (3) & (4) under 51 Rule 1 sections 1A, 1B and 3A Civil Procedure Act. It has three grounds on its face being that the summons to enter appearance have expired and not in accordance with the Civil Procedure Rules; that leave sought to validate the same and that the same cannot be served in the normal manner due to lack of information as to the defendant physical address.
3. The application is supported by the affidavit of the plaintiff whose effect is that he has been advised by Mr.Khagram advocate that attempts to serve the defendant was fruitless as its offices could not be traced within Mombasa. In support of that assertion there is a letter by Isaac Kinyua and an affidavit of non service by the same ISAAC KINYUA. From the affidavit and its annexures. It is apparent that the Plaintiff advocate were notified way back in September 2012, just some three months after the summons were issued. Their next attempt at locating the defendant is exhibited in the email between the said advocates and Raffnan Dhanji Elms & Virdee advocates which reveal that the attempt to carry out a search at the company registry was not successful as the advocates need the incorporation number of the Company. Nothing seems to have followed thereafter till 28/2/2014 when the application was drafted only to be filed on 30/7/2015. There is no attempt to explain what the plaintiff did between March 2013 to 28/2/2014 when it drafted the application and why the application having been so drafted was kept for a period in excess of one year only to be filed on the 30/7/2015.

Determination

4. I am called upon to exercised the courts inherent jurisdiction and apply the overriding objectives of the court to allow the application. My understanding of the Provisions of Section 1A 1b & 3A of the Civil Procedure Act is that they are designed to avail substantial justice or just determination of disputes expeditious and timely disposal of cases; efficient use of judicial and administrative resources while guarding against undue technicalities and there is reserved inherent power to make orders for the ends of justice and prevent abuse of the process of the court. It is not lost to me that parties and their advocates are enjoined to assist the court reach its overriding objectives.
5. With that obligation in mind, the only issue for determination is whether of not I have the jurisdiction to extend summons to appearance once the same have expired, even for the greater calling of just determination of disputes.
6. In seeking to answer that question I will strive to look at the statutory provisions in the light of Judicial pronouncements on the same point. The applicant, though Mr. Ondengo referred me to three decisions being:-

NBI Milimani Commercial Court HCC NO. 349 OF 2009 KENYA COMMERCIAL BANK LTD. -VS- ANN KAJUJU MAGONDU & OTHERS [2012]eKLR, and JAMES MUNIU MUCHERE -VS- NATIONAL BANK OF KENYA LTD [2010] eKLR and MECHANISED CARGO SYSTEMS LTD. -VS- FINA BANK LTD. [2007] eKLR.

7. In the second case, Okwengu J, as she then was in upholding the lower court for declining to strike out a plant on the basis that summons were served outside then lifetime made a distinction between extension and reissue of summons. She said:-

“...Reissue of summons to enter appearance implies that the original summons to enter appearance has been overtaken or substituted by new reissued summons to enter appearance. Therefore the defendant is served with new reissued summons to enter appearance. This may apply for instance, where the original summons enter appearance is no longer valid or was placed or destroyed to is for some other reason no longer available and the suit has not been dismissed under Order V Rule 1(7) Civil Procedure Rule”

8. In that case the court declined to strike out the suit at the instance of the defendant who had argued that the plaint was liable to being struck out because the summons served were reissued after the original ones had expired.
9. In the case of FINA BANK, *supra* LESIIT J, reissued summons to enter appearance and held that under the inherent power of the court, the court retained a discretion provided the court was convinced with the explanation for failure to serve the summons on time.
10. In the decision of **KENYA COMMERCIAL BANK LTD. MABEYA J**, also allowed an application seeking to validate expired summons and also seeking to have summons reissued. The Judge however did not say whether he was allowing the application for extension of the validity of the summons or ordering reissue.
11. I have great reservations on the conduct of the plaintiff in prosecuting this matter since it was filed. To me it goes against the duty of the plaintiff under Sections 1A & 1B Civil Procedure Act and its continued pendency in court without adequate steps being taken by itself may be construed as an abuse of the court process.
12. Be that as it may however, the ultimate goal of this court is to determine the dispute between the parties. That cannot be achieved unless the defendant shall have been notified of the existence of the case and given a chance to say his side of the story. That can only be achieved by having the summons, now expired, being given life by an order for reissue. I so order in the interests of justice for that is the only order that will ensure the matter proceeds on the merits the order sought

by the plaintiff is not available as summons which have expired cannot be injected with new life in order of extension. I hold on the view they the summons once expired cannot be extended. Extension is only available during the life of the summons not after.

13. For that reason alone I grant to the plaintiff an order allowing the application dated 28/2/2015 and filed in court on the 30/07/2015 but on terms that

- I. The plaintiff shall prepare the summons within 7 days and present the same to court for the purposes of being signed by the Deputy Registrar.
- ii. Upon being so signed, the summons must be collected and service effected within 30 days from the date the summons shall have been signed.
- iii. The service shall be effected by an advertisement in a daily newspaper of wide circulation, with the Daily Nation of East African Standard
- iv. As the plaintiff's conduct has been less than satisfactory I order that he gets no costs attendant to this application.

Dated, signed and delivered at Mombasa this 6th day of November 2015.

P.J.O. OTIENO

JUDGE

In the presence of

Mr. Ondego for the Applicant/plaintiff.

No appearance for the Defendant/Respondent.

JUDGE