



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 197 of 2003**

JATCO TRANSPORTERS & TOURS

AGENCY LTD. 1ST PLAINTIFF

**DANIEL MUTUA MUOKI 2ND
PLAINTIFF**

VERSUS

JASON NJIRU KITHINJI *t/a*

STYLE OF JETCO CABS 1ST DEFENDANT

BIG NIPPON LTD. 2ND DEFENDANT

SAMUEL M. WARUTERE 3RD DEFENDANT

JOSEPH KIPKORIR CHEBII 4TH DEFENDANT

JETCO CABS LIMITED 5TH DEFENDANT

R U L I N G

In this case summons have never been issued. There are copies on the file unsigned and unsealed, therefore not served. **Order V Rule 1 (2)** states that where summons have not been served on the defendant, the court may extend the validity of summons from time to time where it is satisfied it is just so to do.

However, **1 (7)** where no application is made the court may without notice dismiss the suit at the expiry of 24 months from the issue of original summons. In this case the plaintiff filed copies of summons and has never checked at the Registry to see if the same has been signed and sealed for service. This suit was filed in the year 2003. Several years now have passed.

The other issue raised is that no action has been taken by the plaintiff to prosecute suit. The defendant made another application on 17/5/06 for dismissal of this suit. The application was dismissed and the plaintiff was given time to prosecute the suit. It is now 2 years and nothing has been done.

It is correct that **Order XVI Rules 4, 5 and 6** deals with dismissal of suit for want of prosecution, the court has power to proceed notwithstanding either party fails to produce evidence and court may dismiss suit if no action is taken for 3 years. The plaintiff has not given any reasonable explanation as to why he has not moved to prosecute his suit all this period except to say summons not signed by Registrar. The

plaintiff ought to have checked with the Registrar about the summons for purposes of service.

It is said that this application is *res judicata*. I say not the applicant is entitled to raise the matter every time the period has expired as prescribed in the order. I see no merit in these opposition and I allow the application and grant orders as prayed.

Costs shall be paid by plaintiff in the suit and in this application.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 6th day of October 2009.

JOYCE N. KHAMINWA

JUDGE