



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CIVIL CASE 22 OF 2005

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

1. MVITA BEER & GENERAL DISTRIBUTIONS LTD

2. PETER MBOGORI

3. FRANCO MUREITHI

4. LEMMY K. MBOGORI.....DEFENDANTS

RULING

This is an application by the plaintiff for two main orders of the court namely:

(1) That the Summons issued herein on 8th September 2005 against the 3rd defendant by the court be validated for a further period of twelve (12) months from the date of such validation.

(2) That the Summons issued by the court be served upon the 3rd defendant by way of advertisement in one daily newspaper of national circulation.

The application, which is supported by an affidavit of the plaintiff's advocate, is based on the ground that all efforts made to serve the said summons were not fruitful as the plaintiff does not know the current physical whereabouts of the 3rd defendant.

The application is expressed to be brought under the provisions of Order V Rules 1 and 17 of the Civil Procedure Rules. Section 3A of the Civil Procedure Act is also unnecessarily invoked.

Order V Rule 1 (1), (2), (5) and (7) are in the following terms:-

“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 for the period of validity of the original summons which is unexpired at the date of issue of the current 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.

(5). 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.

(7). 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.”

So, a summons is valid in the first instance for twelve months from the date of issue. The validity of such summons may however, be extended on application if the applicant satisfies the court that it is just to do so and where no application is made to validate the summons for twenty four months, the court of its own motion may dismiss the suit. The court therefore has discretion to extend the validity of the original summons and also to dismiss the suit where no application to extend the validity is made for twenty four months, the main concern of the court being to do justice to the parties.

This suit was filed on 5th September 2005 and summons were issued on 8th September 1995. The process server made attempts at service in September 2005 or at least before 11th November 2005 without success. It is now nearly four years since the plaintiff's attempt to serve the 3rd defendant failed to bear fruit. The plaintiff has not explained why it could not move the court earlier. It has all along been aware that the 3rd defendant has not been served because he could not be traced. Yet it did nothing. The power of the court to extend the validity of summons under Order V Rule 1 (2) is exercisable if it is just to do so. The applicant had to place material before the court showing sufficient reason for not having moved the court for nearly four years. In the premises, I do not find it just to extend the validity of the summons issued almost four years ago.

In the premises, the plaintiff's application dated 3rd July 2009 is dismissed with no order as to costs.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Mwakisha holding brief for Mr. Mogaka for the Plaintiff.

F. AZANGALALA

JUDGE

6TH OCTOBER 2009