



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. E059 OF 2021**

**JACKSON JOHN MUTURIA and MARY MUTHONI JOHN (Suing as the legal administrators of the estate of Morris Gitonga Mutoria - Deceased).....**

**.....APPELLANTS**

**VERSUS**

**PETER           MUNYAO           NDANGILI           alias           PETER  
MUNYAO.....**

**.....RESPONDENT**

**(An appeal from the Ruling of Hon. C.K Obara (S.P.M) in Maua CMCC No. 12 of 2019 delivered on 29/3/2021)**

---

**JUDGMENT**

1. This Appeal arises from the Ruling of the learned Senior Principal Magistrate Hon. C.K Obara (S.P.M) delivered on 29/3/2021 in Maua CMCC No. 12 of 2019, wherein the trial court dismissed the application dated 19/11/2020.
2. Aggrieved by the said Ruling, the Appellants set forth the following grounds in the Memorandum of appeal dated 28<sup>th</sup> April, 2020;
  1. The learned magistrate erred in law and fact by proceeding to consider the Appellant's application for extension of the

validity of summons on the false premise that such extension was sought outside the time set by the Civil Procedure Rules while completely ignoring the fact that there was a separate prayer for enlargement of time within which to file an application for extension of validity of summons which prayer ought to have been considered and exhausted first.

2. The learned magistrate erred in law and fact by making the erroneous finding that there was no valid summons before the court to be extended yet the Applicants had clearly and concisely sought for enlargement of time within which to make their application for extension of validity of summons.
3. The learned magistrate erred in law and fact by trivializing and belittling the serious and intervening circumstances explained in the supporting affidavit to the Applicant's application for enlargement of time and extension of validity of summons thereby occasioning the Appellants a gross miscarriage of justice.
4. The learned magistrate erred in law and fact by failing to consider that the validity of the summons sought to be extended had expired while the file was still active and in the custody of the court when it was considering another application for leave to serve the initial summons by way of substituted service, which leave was granted on 2<sup>nd</sup> March 2020 after the expiry of the validity of the summons on 12<sup>th</sup> February, 2020 which information and material on record was relevant to the prayer for enlargement of time and which was not considered at all.

5. The learned magistrate erred in law and fact by dismissing the application for enlargement of time and extension of validity of summons against the weight of the material and circumstances before him.
3. The Appellants filed an application dated 19/11/2020, seeking that:
  1. This Honorable Court be pleased to enlarge time and grant leave to file out of time the application to extend the validity of the summons to enter appearance.
  2. The validity of Summons to enter appearance upon the Defendant/Respondent in this matter be extended by another (12) twelve months.
4. The application was premised on the grounds that the summons to enter appearance issued to the Appellants for service upon the Respondent on 12/2/2019, had since expired, and the reasons for the failure to effect service was attributed to the Covid pandemic. The Appellants were granted leave to serve via substituted service but the validity of the Summons had already expired.

### **Submissions**

5. The Appellants, through the firm of Binyenya Thurania & Company Advocates, filed submissions dated 29/9/2025, citing **County Executive of Kisumu v County Government of Kisumu and 8 Others (2017) eKLR [Civil Application No. 3 of 2016], First American Bank of Kenya Ltd v Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65, Wachira Karani v Bildad Wachira [2016] eKLR and Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd**

**[1971] EA 188**, on the principles to consider before the discretion to extend time can be exercised. Counsel faulted the trial court for failing to consider material points of law at the time of hearing the application for substituted service, thus arriving at an erroneous conclusion.

### **Analysis and Determination**

6. This being a first appeal, the court is obligated to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions.
7. In **Selle & another v Associated Motor Boat Co. Ltd [1968] EA**, the court held as follows: ***“This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”***
8. I have considered the appeal herein, the trial court’s ruling which is the subject of this appeal as well as the submissions by counsel.
9. From the grounds of appeal, the issue for determination is whether the trial court’s erred in dismissing the Appellants’ application dated 19/11/2020.
10. Order 5 Rule 2 of the Civil Procedure Rules provides that; ***“(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."***

11. The summons herein were issued on 12/2/2019 and therefore they expired on 12/2/2020. There is no doubt that the application dated

19/11/2020 was belatedly filed 9 months after the summons had expired.

12. In their prior application dated 11/9/2019, the Appellants explicitly sought leave to effect service of the summons upon the Respondent through substituted service. The said application, does not, either expressly or by implication seek extension of the validity of the summons to enter appearance, as wrongly alluded to by the Appellants.

13. In **Julius Njoroge Muira v Harrison Kiambuthi Mburu [2011] KEHC 1777 (KLR)**, the court, (K. H. Rawal J), espoused that; ***“I shall thus without any hesitation find that the Original Summons is not in existence and all the efforts to revive the same by reissuance were null and void. The Original Summons which has lost its life cannot be resurrected as it seems to have been done in this case. There is no provision for reissuance of summons under the Civil Procedure Rules. I shall also find that the Appearance and Defence cannot put life into the expired summons and thus cannot validate the expired summons.”***

14. In **Elegant Colour Labs Nairobi Ltd v Housing Finance Company (K) Limited & 2 others [2010] KEHC 3648 (KLR)**, the court, (D.A Onyancha J), expressed that; ***“It is apparent then, that where the Plaintiff has not applied for the extension of the Summons to Enter Appearance the court is entitled to dismiss the suit but apparently only at the expiry of twenty-four months. It seems to me proper and correct to say that the extension of Summons aforesaid can logically only be***

***made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist...My understanding of the rule however, and it is my finding, is that that the period of 24 month provided under the rule is the largest period allowed to sustain the suit if and only, there is a valid extension of the original 12 months or there are from time to time similar extensions within the maximum period of 24 months allowed. That is to say, the maximum 24 months period would not matter and indeed would not make any logical sense if the original summons prescribed to last 12 months, and capable of extension is left to lapse by the Plaintiff."***

15. In ***Zakaria Somi Nganga v Kenya Commercial Bank Ltd & 3 others [2008] KEHC 1193 (KLR)***, the court, (Lesit J, as she then was) expressed that; ***"In the instant case, the original summons were issued by the court on 4<sup>th</sup> February, 2004. That is four years ago. There is no dispute that the summons were neither served on the 1<sup>st</sup> and 2<sup>nd</sup> Defendants nor was an application made to have them renewed within the requisite time. The summons to enter appearance in this case expired 12 months from the date of issue and 24 months after the date of issue, it was not possible to revive them."***

16. The provisions of Order 5 Rule 2 of the Civil Procedure Act are succinctly clear that extension of the validity of summons can only

be sought before their expiry, because once they do, they cease to exist.

17.The upshot from the foregoing is that the appeal is without merit and it is hereby dismissed with costs to the Respondents.

**DATED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF  
JANUARY, 2026.**

**S.M. GITHINJI**

**JUDGE**

**APPEARANCES:**

Ms. Wafula Holdings brief for Mr. Thurania for the Appellant.

No appearance for the Respondent.