



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 125 OF 2016**

**JOSPHAT KAMAU GATIMU & 5 OTHERS.....PLAINTIFF**

**VERSUS**

**PETER GATIMU KANYONYO.....1<sup>ST</sup> DEFENDANT**

**PETER MUCHIRI GAKU.....2<sup>ND</sup> DEFENDANT**

**GRACE WAMUYU MUNYUA.....4<sup>TH</sup> DEFENDANT**

**FREDRICK DICKSON MWAI MBURIA.....5<sup>TH</sup> DEFENDANT**

**EUNICE WAKIAGA MUTONYI.....6<sup>TH</sup> DEFENDANT**

**ZABLON KIMINDU MUTONYI.....7<sup>TH</sup> DEFENDANT**

**FREDRICK MURIUKI KIBUCHI.....8<sup>TH</sup> DEFENDANT**

**EUNICE WAITHERA MUNYUA.....9<sup>TH</sup> DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 24<sup>th</sup> January 2019 brought under *Section 1A, 1B, 3A and 63 (e) CPA, Order 5 Rule 2 (5) and Order 50 Rule 6 CPR*. The Applicants are seeking the following orders:

***1. That this Honourable Court be pleased to extend the validity of summons to enter appearance in this matter, for service upon the 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants.***

***2. That the costs of this application be in the cause.***

The application is supported by the affidavit of Catherine Wanjiku Kariuki advocate and grounds shown on the face of the said application. In brief, the deponent of the supporting affidavit stated that despite service of summons upon the 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants herein, they failed and/or refused to enter appearance and file defence as required in law. She attached a copy of an affidavit of service sworn by one Alex Ngungi Chomba on 23<sup>rd</sup> January 2018.

In response to that application, the 4<sup>th</sup> defendant filed grounds of opposition opposing the same stating that there is no provision for resurrecting summons which have legally died. The 4<sup>th</sup> defendant averred that the application is bad in law and should be dismissed with costs.

The issue of summons is provided under *Order 5 CPR* while the life of summons is given under *Order 5 Rule 2 (1) & (2)* which reads as follows:

***“2 (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 time of issue of the concurrent summons.***

***2 (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.*

My plain reading of **Order 5 Rule 2 CPR** is that the lifespan of summons to enter appearance (other than concurrent summons) is only one year. Unless a party seeks leave to extend the validity of summon during its original life span of one year, it will not be legally practicable to breath life to such summons after its twelve months existence. A party wishing to extend the existence of such summons must move the Court for re-issuance of concurrent summons for the remainder of the 12 months period but not after. In this case, the applicants stated that the 7<sup>th</sup> and 8<sup>th</sup> defendants were served with summons to enter appearance on 21<sup>st</sup> December 2017 and on 10<sup>th</sup> January 2018, they served the 3<sup>rd</sup> defendant herein. From those averments, it is clear that the summons no longer exists and therefore nothing to extend after 12 months period. What the applicants are seeking is to ask this Court to bring to life the dead summons to enter appearance. This Court cannot exercise a discretion over summons to enter appearance which no longer exist. The Courts cannot extend validity of summons beyond the period set out by statute of 12 months.

In celebrated case of **Uday Kumar Chandulal Rajani & 4 others Vs Charles Thaithi (1997) e K.L.R.**, the Court of Appeal held as follows:

***“Order V Rule 1 provides a comprehensive Code for the duration and renewal of summons and therefore non-compliance with the procedural aspects cause by failing to renew, the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the Court under Section 3A of the Civil Procedure Act cannot cure. The first summons have expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons ..... The Court had no power to extend the validity of summons beyond 24 months when in fact there was no valid summons in existence”.***

That decision from the superior Court is binding on this Court. Summons can only be extended during the life span of the original summons. Once the original summons expired, the Court has no discretion under the numerous provisions cited by the applicants. I also find the authorities cited by the applicant distinguishable and irrelevant in this case.

In the upshot, the application dated 24<sup>th</sup> January 2019 lack merit and the same is hereby dismissed with costs.

***READ and SIGNED in open Court at Kerugoya this 10<sup>th</sup> day of June, 2019.***

**E.C. CHERONO**

**ELC JUDGE**

**10<sup>TH</sup> JUNE, 2019**

***In the presence of:***

***1. M/S Kariuki for Plaintiff***

***2. Mr. Maina Kagio for Defendants/Respondents***