



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 50 OF 2015

CYRUS GICHOBI MWANIKI (Suing as the Legal Representative of the Estate of MWANIKI TIRUS deceased).....PLAINTIFF

VERSUS

JOHN GICHOBI NJOKA.....1ST DEFENDANT

DIANA WAMBUI GICHANGI.....2ND DEFENDANT

MUGUCHI NJUE.....3RD DEFENDANT

GEOFFREY M. WAMUNYU.....4TH DEFENDANT

FLAVIAN MWANGI OMARI.....5TH DEFENDANT

SAMUEL KAMITI KAGUNDA.....6TH DEFENDANT

RULING

The applicant vide a Notice of Motion dated 21st June, 2019 brought under **Order 5 Rule 17(4) CPR** sought the following orders:-

a) That this Honourable Court be pleased to grant leave to the plaintiff to effect service upon the 1st, 5th and 6th defendants by way of substituted service by Advertisement in the Daily Nation Newspaper.

b) That the costs of this application be provided for.

The Application is supported by the affidavit of the applicant sworn on 21st June, 2019. According to the Applicant, he has made numerous attempts to trace the 1st 5th and 6th defendants for purposes of effecting summons with no avail. He stated that he has looked for them in Gichonjo village, Merichi sub location and Njukii-ini location in Kirinyaga County where the suit land is located **but** nobody knows their whereabouts. The Applicant further deponed that service upon the two Respondents has not been effected since their whereabouts is not known.

That application is opposed by the 2nd and 3rd defendants who filed grounds of opposition through their advocates dated 3rd and 9th July 2019. The 2nd and 3rd defendant through the firm of Joshua Magee Wa

Magee stated that there was no valid summons which can be served upon the 1st 5th and 6th defendant and that the said Notice of Motion is incompetent and bad in law. On their part, the 4th defendant through the firm of Maina Kagio and & Co. Advocates stated that if summons issued on 24.4.2015 have not been effected upon the 1st 5th and 6th defendant, it follows that the validity of the summons lapsed on 23.4.2016 and no efforts were made to extend the same before the lapse of the validity period as is required under **Order 5 rule 2(1) and 2 CPR**. As such, the 4th defendant contends that there is therefore no summons to be served upon the 1st 5th and 6th defendants and that the suit as against the 1st 5th and 6th defendants has also lapsed. When this application came up for hearing the parties agreed by consent to canvass the same by submissions.

DECISION

I have considered the legal arguments by counsels and their submissions. The Plaintiff/Applicant contends that he was issued with summons to enter appearance on 24th of April 2015 and that he has not been able to effect the same upon the 1st 5th and 6th defendants.

The applicable law regarding service of summons is **Order 5 Rule 2** which provides as follows:-

“5 (2) (1) A summons (other than a concurrent 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 summons has been extended under sub-rule (c) before it may be served it shall be marked with an official stamp showing the period for which its validity has been entered.

(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 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”.

My interpretation of the law as provided is that summons (other than 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 a period of validity of the original summons which is unexpired at the date of issue of the concurrent summons. That interpretation was put into perspective by Hon. Lady Justice Rawal (as she then was) In the case of **Julius Njoroge Muira Vs Harrion Kiambuthi Mburu [2011] e KLR** where she held as follows:-

“..... I shall thus without hesitation find that the original summons is not in existence and all the efforts to revive the same by re-issuance were null and void. The original summons that has lost its life cannot be resurrected”.

Again *In the Case of Zakaria Somi Nganga -Vs- Kenya Commercial Bank Limited & 3 others [2008] e KLR* Hon. Lady Justice Lesiit J held:-

“The summons to enter appearance in this case expired 12 months from the date of issue

..... It was not possible to revive them. This therefore mean that the plaintiff’s suit lapsed for reason of non-compliance of Order V Rule 1 of the Civil Procedure Rules”.

I concur with the findings of the learned Judges. The summons in this case are said to have been issued on 24th April 2015. It therefore follows that the summons expired on 23rd April 2016. During the validity of summons from 24th April 2015 to 23rd April 2016, the plaintiff did not make any attempts to have the validity of the summons extended.

As such, the plaintiff cannot be granted leave to effect service of summons which has since lapsed. I find the application dated 21st June 2019 not only incompetent but also bad in law. The same is hereby dismissed with costs to the 2nd, 3rd and 4th defendants.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 15th day of November, 2019 at Kerugoya.

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E.C. CHERONO

ELC JUDGE

15TH NOVEMBER, 2019

In the presence of:

- 1) M/S Nzekele holding brief for Okwaro for Plaintiff
- 2) Mr. Asiimwe for 2nd and 3rd Defendants
- 3) Mr. Mbogo – Court Assistant