



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 76 OF 2012**

**ISFAHAN MOHAMED AHMED.....PLAINTIFF**

*(Suing through her mother and next friend Nur Mohamed Abadalla)*

**-VERSUS-**

**ATIF SALEH AMIR ABOUD.....DEFENDANT**

**RULING**

1. By a Chamber Summons dated 10<sup>th</sup> May 2017 and filed in Court on 11<sup>th</sup> May 2017 made under Section 1A, 1B, & 3A of the Civil Procedure Act and Order 51 Rule 17 of the Civil Procedure Rules the Plaintiff seeks orders:

**1. That this Honourable Court the (sic) pleased to grant leave to the Plaintiff to serve the Defendant by way of substituted service by advertisement through one or any of the local daily newspapers.**

**2. THAT costs be in the cause.**

2. The Application is based on the grounds:

**a) THAT The Plaintiff has made several attempts to serve the Defendant without success as the Defendant cannot be traced at his home and none of the adult members of the Defendant's family are willing to accept service on his behalf.**

**b) THAT this Application is in the interest of justice and the Defendant is a necessary party to this suit and this application should be allowed without any delay.**

**c) THAT in any event, no prejudice will be suffered by the Defendant since he will have an opportunity to respond.**

3. The application is supported by the Affidavit of Mulwa Nduya, Advocate for the Plaintiff sworn on 3<sup>rd</sup> March 2017 in which he depones *inter alia* that on or about 30<sup>th</sup> April 2012, he caused the Plaint to be filed and soon thereafter about 17<sup>th</sup> May 2012, caused the summons and the Plaint to be taken out for service on the Defendant at his house. He further depones that the said copies were returned to them on or about 31<sup>st</sup> May 2012 by the Defendant's sister on claims that she did not know when the Defendant would be back. He avers that they have endeavoured to serve the Defendant in vain since his whereabouts are not known and his family have refused to accept service on his behalf.

4. I have considered the Application, the Affidavit in support and the annexures thereto. Order 5 Rule 2 of the Civil Procedure Rules provides 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 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 that it is just to do so**

**(3)**

**(4)**

(5)

**(6) As many attempts to serve the summons as are necessary may be made during the period of validity of 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.**

5. It is clear from the provisions of Order 5 Rule 2 that summons (other than concurrent summons) shall be valid in the first instance for twelve months from the date of its issue. In the present case, it is clear to this Court that the summons to Enter Appearance were issued on 3<sup>rd</sup> May 2012. There is no evidence that the same were re-issued or extended. There is no evidence that an Application was made for the said summons to be extended. It is clear therefore that the said summons lapsed twelve months from 3<sup>rd</sup> May 2012. There is no valid summons in existence that can be served on the Defendant. It is only summons that are valid that may be served. A party may also apply to the Court to extend summons that are still valid. As there is no evidence on record showing that the summons were extended, it therefore follows that the original summons issued on 3<sup>rd</sup> May 2012 is not in existence as it lost its life twelve months from the date of issue. And as there are no summons in existence, it follows that there is nothing the Court can allow the Plaintiff to serve the Defendant as prayed in the Application.

6. Order 5 Rule 2(7) though not stated in mandatory terms gives the Court the discretion to dismiss a suit where no application had been made for extension of validity of summons at the expiry of the Original Summons. See the case of Zakaria Somin Nganga –v- Kenya Commercial Bank Limited & 3 Others (2008)eKLR and Udaykumar Chandulal Rajani & 4 others –v- Charles Thaiti (1997)KLR. Consequently, having not been served and renewed within the lifetime of the original summons, the suit stood abated against the Defendant. This was a defect that could not be cured by merely relying on the provisions of Section 1A, 1B & 3A of the Civil Procedure Act. It is immaterial that the Defendant would suffer no prejudice if the orders sought are granted as prayed.

From the understanding of the Court, the provisions of order 5 Rule 2(7) gives the Court discretion to dismiss suit if no application has been made under Order 2(2) without notice to the Plaintiff.

7. Accordingly, I find that the Chamber Summons dated 10<sup>th</sup> July 2017 lacks merit and the same is hereby dismissed. Further, I exercise my discretion under Order 5 Rule 2(7) and dismiss the Suit herein as it has abated as against the Defendant.

**Delivered, signed and dated at Mombasa this 21<sup>st</sup> March, 2018.**

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C. YANO

JUDGE