



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 279 OF 2017

BENJAMIN MUTUA MUEMA.....PLAINTIFF/APPLICANT

VERSUS

KALUSI KOMU.....DEFENDANT/ RESPONDENT

RULING

1) What is before me for ruling is notice of motion application expressed to be brought under Order 5 Rule 2, Order 50 Rule 6 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law for orders;

1. That this honourable court be pleased to renew and extend the validity of the summons to enter appearance dated 22nd May, 2017.

2. That this honorable court be pleased to grant leave to effect service a fresh upon the Defendant/Respondent.

3. That the costs of this application be in the cause.

2) The application is dated 12th July, 2018 and was filed in court on 31st July, 2018. It is predicated on the grounds on its face and is supported by the affidavit of Benjamin Mutua Muema, the Applicant herein sworn at Machakos on the 12th day of July, 2018.

3) The court directed that this application be disposed off by way of written submissions.

4) The Applicant has deposed in paragraphs 2,3, and 4 of his supporting affidavit that he is informed that the Defendant/Respondent herein was served on the 12th July, 2017 to enter appearance. He further deposes that he has been informed by his advocate on record that failure to file an affidavit of service was not deliberate. That on the 12th August, 2018 the court deemed the said summons to have expired and he therefore applied for renewal of the summons to enter appearance and leave to effect service a fresh.

5) The Applicant's counsel in his submissions reiterated the Applicant's deposition in his affidavit regarding service of summons upon the Defendant/Respondent and added that the mistake of an advocate should not be visited upon his client. The counsel urged the court to invoke the provision of orders 50 Rule 6 of the Civil Procedure Rule, 2010 and enlarge time upon such terms as the ends of justice of case may require.

6) The counsel further referred the court to the cases of *Gulam Rasul Murdat V Datma Enterprise Limited [2015] eKLR* and *James Muniu Muchere V Natinal Bank of Kenya Limited (2010) eKLR* in the latter case, H.M Okwengu, J(as she then was) held that;

“ I do note that under Order V of the Civil Procedure Rules, there is a provision for extension of the validity of the original summons to enter appearance, but there is no provision for re-issue of fresh summons to enter appearance. In my considered view, that does not inhibit the court from re-issuing fresh summons to enter appearance. Since the court has powers under order IV Rule 3 of the Civil Procedure Rules, to issue summons to enter appearance that power extends to re-issue of summons to enter appearance where this is necessary for the ends of justice to be met. Re-issue simply means to issue simply means to issue summons to enter appearance again”.

7) In the latter case, PJO Otieno, J held that:-

“The ultimate goal of this court is to determine the dispute between the parties. That cannot be achieved unless the Defendant shall have been notified of the existence of the case and given a chance to say his side of the story. That can only be achieved by having summons, now expired, being given life by an order for reissue. I so order in the interest of justice for that is the only order that will ensure the matter proceeds on the merits the order sought by the Plaintiff is not available as summons which have

expired cannot be injected with new lifely order of extension. I hold on the view the summons once expired cannot be extended. Extension is only available during the life of the summons not after.”

I fully associate myself with the findings in the two rulings. It follows therefore that there is no provision to extend the summons issued by this court on the 22nd May, 2017. However there is nothing to prevent this court from re-issuing summons to the Defendant herein since the circumstances of this case shows it is the Plaintiff's advocate who is to blame for the failure to ensure that the summons in question were served upon the Defendant. In the circumstances, I allow the application in terms of prayers 2 and 3.

SIGNED, DATED and DELIVERED at MAKUENI this 3RD day of DECEMBER, 2018

MBOGO C.G

JUDGE

IN THE PRESENCE OF:

- 1) No appearance for the Applicant
- 2) Mr. Kwemboi Court Assistant

MBOGO C.G, JUDGE

3/12/2018