



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC SUIT NO. 318 B OF 1996

SALIMU BAKARI NJOWA

ABDULLA BAKARI NJOWA

HASSAN BAKARI NJOWA.....APPLICANTS/PLAINTIFFS

VERSUS

EUGINE JOSEPH CHERNER

LAND REGISTRAR, KWALE.....RESPONDENTS/DEFENDANTS

RULING

1. By an ex-parte Notice of Motion application dated 16th March, 2016 made under Section 3A of the Civil Procedure Act and Order 5 Rules 2 and 17 of the Civil Procedure Rules, the plaintiffs seek orders:

- 1. That this matter be certified urgent and service thereof dispensed with at the first instance.**
- 2. That this Honourable Court do hereby re-issue and extend summons to enter appearance against the defendants herein.**
- 3. That upon grant of prayer (2) above, this Honourable Court do order that service of summons to enter appearance against the 1st defendant be effected by affixing a copy thereof in the notice board in the court house and another copy on the suit properties.**
- 4. That the costs of this application be in the cause.**

2. The application is based on the grounds on the face of the application and supported by the affidavit of Salimu Bakari Njowa that was sworn on 16th March, 2016.

3. The plaintiffs state that the suit was filed in 1996 and the summons to enter appearance were issued and taken by their then advocates. They further state that they lost contact with their said advocates and could therefore not take any step in the prosecution of this case. The plaintiffs aver that they have not been able to trace the summons issued and even the one which was in the court file is missing hence this application.

4. The plaintiffs further state that the whereabouts and even the postal address of the 1st defendant is unknown and they have been unable to effect service upon him, hence the prayer for substituted service. The plaintiffs aver that the matter cannot proceed unless summons are re-issued and service effected

against the 1st defendant.

5. Order 5 Rule 2 (1) and (2) of the Civil Procedure Rules provides as follows:

A summon(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.

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.

6. It is quite clear that the provisions of Order 5 Rule 2 (1) of the Civil Procedure Rules are in mandatory terms. It is only summons that are valid that may be extended. Summons which are no longer valid are incapable of being extended. Extending summons which are no longer valid is a nullity.

7. In the case of **UDYAKUMAR CHANDULAL RAJANI & 4 OTHERS –VS- CHARLES THAITHI (1997) eKLR**, the Court of Appeal held that:

“...the court had no power to extend the validity of summons beyond twenty four months, when in fact there were no valid summons in existence...”

This decision binds this court and I go by it. I am also persuaded and do concur with the decision in the case of **FINA BANK LIMITED –VS- SATYAM INDUSTRIES KENYA LIMITED & 4 OTHERS (2015) eKLR** in which Kamau, J held that:

“whereas the court has power under Order 50 Rule 6 of the Civil Procedure Rules to enlarge time within which to do an act or take proceeding , the provisions of Order 5 Rule 2 (1) of the Civil Procedure Rules cannot be any clearer on the mandatory nature of the same. Summons have to be valid before they can be extended. Extending summons which are no longer valid is a nullity...”

8. I further agree with the holding in the case of **JULIUS NJOROGE MUIRA –VS- HARRISON KIAMBUTHI MBURU (2011) eKLR** in which Rawal, J (as she then was) stated 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. ”

9. The present suit was filed in June 1996 and presumably the summons to enter appearance were issued soon thereafter. The application for re-issue and extension of summons is being made about twenty years later. No plausible explanation for such long delay was given by the plaintiffs. Even if the rules permitted, this court would not have exercised its wide and unfettered discretion in favour of the plaintiffs in this case. The inherent power of the court should be exercised judiciously and should not be used to aid a litigant who has slept on his rights for so long and deliberately sought to delay the course of justice. The overriding objective of the court would not come to the plaintiffs in this case.

10. For the above reasons, I find that the plaintiffs’ Notice of Motion dated 16th March 2016 lacks merit. The same is hereby dismissed.

11. Dated, signed and delivered at Mombasa this 13th day of JUNE 2017.

C. YANO

JUDGE

.....for the applicant

.....for the respondent