



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC . CASE. NO. 631 OF 2011

MAURICE NDAMBUKI KITIVO.....PLAINTIFF

VERSUS

THOMAS KINYUA MBAEU.....1ST DEFENDANT

JOSPHAT KAMAU NJOGU.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

LANDS REGISTRAR, NAIROBI.....4TH DEFENDANT

RULING

The application for the Court's consideration is the plaintiff's ex-parte Notice of Motion dated 4th November 2014 brought under **Order 5 Rule 2 & 17 of the Civil Procedure Rules, 2010 and section 1A, 1B, 3A and 63(e) of the Civil Procedure Act** seeking for orders that the summons to enter appearance to the 2nd Defendant be extended for a further period of twelve (12) months and that the court does allow the service of summons upon the 2nd Defendant by way of advertisement in one of the local daily newspapers or in any manner directed by the court.

This Application is based on the grounds stated on the face of it together with the Supporting Affidavit of Crispin Wainaina, an advocate of the High Court of Kenya who has the conduct of this suit sworn on 4th November 2014. He averred that this suit was filed on 11th November 2011 and summons to enter appearance was issued by the court against the Defendants on 3rd May 2012. He further stated that the 2nd Defendant's sister was served with summons to enter appearance together with other court documents on his behalf in his rural home in Mathioya Division, Muranga County, Kiriti sub location and an affidavit of service was filed. He averred further that the 2nd Defendant did not enter appearance or file defence. He indicated that the application by the Plaintiff to obtain an interlocutory judgment was rejected as the Deputy Registrar indicated that there was no indication that the documents were indeed served upon the 2nd defendant. He further stated that he was not able to serve the 2nd Defendant personally as ordered by the court because despite numerous trips to the 2nd Defendant's rural home, he has not been able to trace the 2nd Defendant. He further stated that the court directed the Plaintiff to file a formal application to seek leave for the 2nd defendant to be served with summons by way of an advertisement in the local press and

it is in the interest of justice that the summons against the 2nd Defendant be reissued and the summons be effected by way of substituted service.

The Plaintiff filed his written submissions on 3rd March 2015 where he stated that he had been able to serve the 1st, 3rd and 4th defendants with summons to enter appearance together with the plaintiff and the said defendants have filed their respective defences. He further submitted that he had been unable to personally serve the 2nd Defendant. He therefore seeks to substitute service as provided in **Order 5 Rule 17 of the Civil Procedure Act**. He relied on the case of **Simon Gichangi Mugo –vs- Pierre Asambi Misambi & 2 others [2013]e KLR** where Ongundi, J held that,

“...since the most important consideration is to bring the suit to the attention of the 1st defendant I do find that substituted service would be a better option and in any event if the 2nd and 3rd defendants have any information that would assist the plaintiff trace the 1st defendant the court urges them to offer that assistance.....The application for substituted service is therefore allowed”

I have carefully considered the Application together with the submissions made by the Plaintiff. The issues for determination are whether the court should extend the time for service of summons to enter appearance on the 2nd Defendant and whether the Plaintiff can substitute service by advertisement in a local daily.

This Court is granted discretion under **section 95 of the Civil Procedure Act** to extend time fixed for doing any act. The said section provides as follows,

“ Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

Under **Order 5 Rule 2(1) and (2) of the Civil Procedure Rules, 2010**, the life of a summons is twelve months from the date of issue but the same can be extended from time to time. **Rule 2(7)** of the same Order provides that if no application is made for extension of the validity of summons, at the expiry of 24 months of the date of the original summons then the suit may be dismissed. The original summons was issued on 3rd May 2012 and a reissue was made on 13th January 2014. Accordingly, the validity was to expire on 13th January 2015. **Order 5 Rule 2(2)** provides that the validity of a summons to enter appearance may be extended on application but the rules do not specify at what time such an application may be made. In **Elegant Colour Labs Nairobi Limited vs Housing Finance Company (K) Limited & 2 Others [2010] eKLR**, Onyancha J held that,

“ It seems to me proper and correct to say that extension of Summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist...the summons under the said order which have capacity to be extended by the court on the application by the Plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 fore cited or under any duration allowed in the extension of original summons...”

The Plaintiff made this Application on 4th November 2014 which was two months before its expiry therefore my opinion is that their application on the extension of the summons to enter appearance should and is hereby allowed.

The Plaintiff also sought to have the summons to enter appearance served by substituted service by way of advertisement. I have examined the affidavit of service of Willis Agayi sworn on 4th November 2014. He averred that he visited the 2nd Defendant’s rural home two times and only found the 2nd Defendant’s

sister. He further averred that the Plaintiff did not know who the 2nd Defendant was as they had never met. The Plaintiff's counsel, Chrispin Wainaina in his affidavit in support of the Application averred that he was unable to personally serve the 2nd Defendant and the court made an order that the Plaintiff do make a formal application requesting for an order to serve the 2nd Defendant by substituted service. My opinion is that the Plaintiff has met the threshold for the grant of leave to serve the 2nd Defendant by way of substituted service by advertisement in one of the daily newspapers with wide circulation. Under **Order 5 Rule 17**, the court is allowed to grant leave to a party to effect service upon another party who cannot be served in an ordinary way by way of substituted service by advertising in one of the daily newspapers with wide circulation after it is satisfied that for any reason that the service of summons cannot be served in the ordinary way upon the concerned party. I therefore do grant the Plaintiff the order to serve the 2nd Defendant by way of advertisement.

The upshot of the foregoing is that this Application is hereby allowed. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE