Odhiambo & another v Kariuki & 2 others (Civil Appeal 423 of 2019) [2025] KECA 147 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 147 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 423 OF 2019

K M'INOTI, LA ACHODE & WK KORIR, JJA

FEBRUARY 7, 2025

BETWEEN

RUTH ANYANGO ODHIAMBO ..... 1ST APPELLANT

KENNEDY ADUOL ..... 2ND APPELLANT

AND

STEPHEN MUNGA KARIUKI ..... 1ST RESPONDENT

CHARLES MUKHWANA WANYAMA ..... 2ND RESPONDENT

SHINSAKURA ENTERPRISES LIMITED ..... 3RD RESPONDENT

(An appeal against the Ruling of the High Court at Nairobi (L. Njuguna, J.) dated 23rd February 2017 in HCCC No. 518 of 2007)

JUDGMENT

1. On 5th July 2007, Ruth Anyango Odhiambo and Kennedy Oduol, the 1st and 2nd appellants respectively, filed Nairobi High Court Civil Case No. 518 of 2007 against Shinsakura Enterprises Ltd, Stephen Munga Kariuki and Charles Mukhwana Wanyama, the respective 1st to 3rd respondents, and summons to enter appearance was subsequently issued on 19th July 2007. It was not until 6th September 2011 that the appellants' service through registered post solicited a response from the 1st respondent, whose advocates entered appearance on 19th September 2011. Fast forward to 25th February 2016, the appellants filed a motion asking the trial court to validate the summons dated 19th July 2007 and served on 6th September 2011. This application was dismissed by L. Njuguna, J. in a ruling delivered on 23rd February 2017. It is this ruling that has given rise to this appeal.

2. In the memorandum of appeal, the appellants fault the learned Judge for failing to invoke the overriding objective to allow the validation of the summons, arguing that the 1st respondent had already entered appearance and pretrial directions had been issued.

3. At the hearing of this appeal, learned counsel Mr. Sumba appeared for the appellants while there was no appearance for the respondents, nor did they file any submissions.

4. In the submissions dated 13th July 2020, Mr. Sumba urged that the learned Judge should have invoked the Court's inherent power to see that substantive justice was done to the appellants. Counsel argued that dismissing the application amounted to dismissing the appellants' entire suit. Counsel referred to Article 159(2)(d) of the *Constitution* and sections 1A, 1B, and 3A of the *Civil Procedure Act* to urge that the learned Judge should have overlooked procedural technicalities and invoked the overriding objectives, thereby allowing the application. Counsel also submitted that because the matter had proceeded at length and the 1st respondent had entered appearance it was just to validate the summons. Counsel therefore urged that the appeal be allowed.

5. This appeal turns on the singular question as to whether the trial court could validate the summons dated 19th July 2007. The relevant law guiding the extension of summons at the material time was found in Order V rules 1 (1) and (2) of the repealed *Civil Procedure Rules* as follows:

> "1.
>
> (1) A 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 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 so to do."

6. We note that in her judgment, the learned Judge applied the provisions that existed prior to the amendment carried out to the sub-rule on 9th February 1996 through Legal Notice No. 5. Prior to that amendment sub-rule (2) read as follows:

> " 1.
>
> (2) Where a summons has not been served on a defendant the court may by order extend the validity of the summons from time to time for such period not exceeding in all twenty-four months from the date of its issue if satisfied that it is just so to do." [Emphasis ours]

7. This Court in *Udaykumar Chandulal Rajani & 3 Others vs. Charles Thaithi* [1997] eKLR enunciated the law as applicable both pre and post the 1996 amendment as follows:

> " *Order V rule 1* provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the defendants revive the summons which had expired.
>
> The original summons in an action is only valid for the purposes of service for 12 months from the date of its reissue. The court, before 1996, could only by order extend its validity

from time to time for such period not exceeding 24 months from the date of its issue if satisfied that it was just to do so. However, in this case, neither the plaintiff nor his advocate did exhaust the provisions of Order V rule 1(5) by making any application for extension of the validity of the original summons; and consequently, the court had no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence. It follows, therefore, that the alleged service upon the defendants was ineffective and invalid and so were the summons issued on 28th August, 1992."

8. The above excerpt clearly illustrates the boundaries within which a court could validate an expired summons at the time material to this appeal. Extension of summons was therefore allowable, first, where the existing summons was yet to expire, and secondly, where the court had been moved to extend summons. Indeed, Order V rule 1(7) authorized the court to suo moto dismiss a suit where summons had not been served within twenty-four months by providing that:

> " 1.
>
> (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."

9. It is therefore apparent that even though the limitation of a revival of a summons to twenty-four months under sub-rule (2) had been removed, the drafters of the rules through sub-rule (7) maintained that a summons was dead and buried if not served within twenty- four months. As was the case in *Udaykumar Chandulal Rajani & 3 Others vs. Charles Thaithi* (*supra*), the appellants before us did not utilize sub-rule (5) which required them to make a formal application for extension of the summons supported by an affidavit setting out the attempts made at service and their result. Indeed, the appellants' counsel Mr. Nicholas Sumba freely admitted in the affidavit sworn on 25th February 2016 in support of the application for validation of summons that he had not renewed the summons prior to serving the same upon the respondents. This concession confirms that there was no valid summons served upon the respondents because, by virtue of sub-rule (1), the summons had lapsed within twelve months of its issuance in 2007. There was therefore no valid summons in 2011 when service was done. Even worse, in this case, the application to extend the summons was made in February 2016, approximately eight years from the date of the lapse of the summons. The application was therefore made after unexplained inordinate delay and the learned Judge cannot be faulted in the manner in which she exercised her discretion.

10. The appellants' counsel strongly urged us to invoke the overriding objectives and Article 159 of the *Constitution* to overlook the fate that befell the summons. In the circumstances of this appeal, we respectfully decline this invitation by counsel because Article 159 cannot be used to override statutory prescriptions. Where the procedure is provided, parties should adhere to it. In *Barclays Bank of Kenya Ltd v Patrick Njuguna Kubai* (HCCC No. 52 of 2012, the High Court was invited to invoke Article 159(2) (d) of the *Constitution* to validate summons that had expired. In rejecting the argument, the court held as follows, with which we agree:

> "The objective of Article 159 (2)(d) of the *Constitution* of Kenya, 2010 or Order 50 Rule 6 of the *Civil Procedure Rules, 2010* cannot be extended to validate actions which are null and void but disguised as procedural technicalities. These particular provisions of the law cannot be invoked by a party who has been indolent and fails to comply with the laid down provisions of the law to ride on a ground of a mere irregularity or procedural technicality."

11. Additionally, Article 159 (2) (b) provides that justice shall not be delayed, yet as we have already pointed out, the appellants were guilty of an unexplained inordinate delay of about eight years. We, therefore, find no merit in the appellants' plea.

12. Consequently, we find the appeal to be unmerited and we dismiss it. The respondents, having not participated in this appeal, we make no order as to costs.

DATED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY, 2025.

K. M'INOTI

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JUDGE OF APPEAL

K. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.