



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, TUNOI & SHAH, JJ.A.)
CIVIL APPEAL NO. 85 OF 1996

BETWEEN

UDAYKUMAR CHANDULAL RAJANI

RUXMANI W/O CHANDULAL J. RAJANI

DIPAK CHANDULAL RAJANI

INUJ CHANDULAL RAJANI

Trading as LIT PETROL STATION APPELLANTS

AND

CHARLES THAITHI RESPONDENT

(Appeal from an Order of the High Court of Kenya at
Nairobi (Mr. Justice Ringera) dated the 26th day of
October, 1995

in

H.C.C.C. NO. 1300 OF 1987)

JUDGMENT OF THE COURT

This appeal by the defendants from the ruling of the superior court (Ringera, J.) delivered on 26th October, 1995 whereby it dismissed the defendants' preliminary objection raises a short but interesting question whether the court before the enactment of Legal Notice No. 5 of 1996 had power under Order V rule 1 to extend the validity of summons beyond twenty-four months from the date of its issue.

By plaint dated 26th March, 1987 the plaintiff, the respondent herein, claimed special and general damages for personal injuries sustained by him as a result of a road accident which occurred on 7th March, 1985 along Limuru Road whilst he was travelling as a passenger in a motor vehicle registration number KQB 295 owned by the defendants and driven by their agent or servant. It is alleged in the plaint that the said motor vehicle overturned and caused severe injuries to the plaintiff due to the negligent manner in which it was driven. Summons to enter appearance to the suit was issued by the

superior court on 2nd April, 1987 and was served upon some unnamed manager of the defendants' firm on 3rd February, 1988. A return of service was filed on 21st July, 1989 and on the same day the plaintiff's advocates applied for interlocutory judgment in default of appearance. However, on 10th August, 1989 the Deputy Registrar apparently being not satisfied with the mode of service endorsed on the application for judgment that the defendants should be served severally. It would appear then that there arose a confusion as to which firm of advocates would act for the plaintiff and nothing of relevance to this appeal occurred until 27th March, 1992 when the Deputy Registrar upon request by the plaintiff's lawyers re-issued summons to enter appearance which was served upon the defendants on 28th August, 1992. Promptly on 9th September, 1992 their counsel entered appearance on their behalf.

On 20th September, 1994 when the suit was called to hearing Mr. Bhaskar Sheth for the defendants took a preliminary objection to the suit, which was pleaded, on the grounds that there can only be one summons to enter appearance and that it was only valid for 12 months from the date of its issue as provided for in Order V rule 1(1) of the Civil Procedure Rules. That summons which was issued on 2nd April, 1987 expired on 1st April, 1988 and no application was made to extend it within its year of validity. He argued that even if it is assumed that the re-issued summons was an extension of the original first summons it is still invalid as it did not show the period in respect of which it was extended contrary to rule 1(3) of Order V. Accordingly, he contended, there being no valid extension of the first summons the suit should be dismissed.

The learned judge was least impressed by this submission. He termed the objection rather pedantic. He was of the view that any irregularity in the issuance of summons was cured by the fact that the defendants had entered appearance without protest and that under section 3A of the Civil Procedure Act the court had inherent power to issue such orders as may be necessary for the ends of justice. From that decision the defendants appealed to this court and Mr. Sheth, who also appeared for them in this appeal, adopted his earlier submissions canvassed for in the superior court. Order V rule 1 then read:

- "1.(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 of 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 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.
- (3)Where the validity of a summons has been extended under subrule (2), before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.
- (4)Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same sum which has not been served so as to extend its validity until the period specified in the order.
- (5)Application for an order under subrule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.
- (6)As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.

(7)Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons."

Mr. Gikonyo for the defendants admitted that the first summons died a natural death and its validity could not be extended, but, he was at pains to persuade us that the Deputy Registrar properly issued fresh summons on 27th March, 1992. He submitted that the second summons was not a re-issue. He averred that Order V did not limit the court's power to issue fresh summons after the expiry of the original summons.

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.

Accordingly and, for the reasons above stated, the learned judge was plainly wrong in the decision to which he came. Consequently, this appeal is allowed. The preliminary objection made in the superior court is sustained and the suit, H.C.C.C. NO. 1300 of 1987, stands dismissed with costs. The defendants will have the costs of this appeal.

Dated and delivered at Nairobi this 29th day of May, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

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