**Kenya Industrial Estates Limited v Ogana and another**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 22 January 2004

**Case Number:** 1259/01

**Before:** Kasango J

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*Civil procedure – Summons – Extension of validity of summons – Party waiting for summons to expire*

*before applying for extension – Whether summons may be extended – Application not indicated as* ex

parte *– Whether application valid if argued* ex parte *– Order V, rule 1 – Civil Procedure Rules.*

**RULING**

**Kasango J:** The application before the Court is the one brought by the Plaintiff and is dated 27 August 2003. The application seeks the following prayers:

(1) That this Honourable Court be pleased to enlarge the time set out in the summons issued on the 13 August 2001 for a further twelve months. (2) That costs of the application be in the cause

. The said application is brought under Order XLIX, rule 5 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all the enabling provisions of the law. The application although argued *ex parte* a closer look at the body of the same there is no indication that the same would be heard *ex parte*. Indeed the Plaintiff had indicated on that application that the Defendants would be served with the said application. The Plaintiff’s failure to indicate that the application is *ex parte* would on its own defeat the application because the court in entertaining an application is guided by the prayers sought by a party. The Plaintiff however in coming to court sought an order of extension of the validity of the summons and the Court wishes to examine whether the Plaintiff is entitled to that prayer. The application is supported by an affidavit of Christine Adhiambo Oraro. She depones that once the summons were issued her firm embarked on the issue of service and promptly sought advice from the Plaintiff. The Plaintiff did not know the Defendants’ whereabouts and an investigation was instituted. The Court was not able to find amongst the exhibits any evidence of such investigation. Order V, rule 1(5) states that:

Application for an order under subrule (2) shall be made by filing an affidavit setting out the attempts made at service and their result

. It is therefore obvious that for a plaintiff to obtain an order of extension of summons he must provide to the court evidence of attempts to serve the defendants and the result of those attempts. The Plaintiff has failed to satisfy this Rule. The Plaintiff’s counsel in her submission quoted two cases of the Court of Appeal which were not of assistance to the Court because they were dealing with extension of time to file and serve a notice of appeal. Order V, rule 1 states that a summons shall be valid in the first instance for 12 months. Subrule 2 of the same order states that the court may extend the validity of the summons from time to time. In the present case the summons were issued on 13 August 2001. It therefore follows that on 14 August 2002 the summons were expired. There is no evidence that those summons were ever extended in their validity. The Court relies on the case of *Rajjani and others v Thaithi* [1996] LLR 443 (CAK) that states:

Order V, rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the non-compliance 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

. A further quotation from the said case states:

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 has no power to extend the validity of the summons beyond 24 months, when in fact there was no valid summons in existence

. This case as it can obviously be seen was decided before the amendment to Order V which amendment allowed extension from time to time. It therefore follows that as seen in the quotation herein above Order V, rule 1 provides the mode and time when summons can be extended. The Plaintiff here waited for one year since the summons expired to make the present application. In the Court’s view the summons expired in August 2002 and they are at present incapable of being extended. Indeed in Order V, rule 1(7) it is provided that once the summons expire without extension, the court may without notice dismiss the suit at the expiry of 24 months. The Court’s holding in this matter is that the summons expired in August 2002 and since that expiry they are incapable of extension. The Court’s order therefore is that the Plaintiff’s application dated 27 August 2003 is dismissed.

For the Plaintiff:

*Information not available*

For the Defendant:

*Information not available*