



**Maingi v Housing Finance Corporation (K) Company Ltd (Commercial Case E781 of 2021)
[2024] KEHC 10552 (KLR) (Commercial and Tax) (27 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E781 OF 2021
A MABEYA, J
AUGUST 27, 2024**

BETWEEN

ZACHARIA MOENGA MAINGI PLAINTIFF

AND

HOUSING FINANCE CORPORATION (K) COMPANY LTD DEFENDANT

RULING

1. This is a ruling on the defendant’s application dated 3/5/2023. It was brought under Order 5 Rules 1(3), 5 and 6 of the Civil Procedure Rules and sections 1A, 1B and 3A of the *Civil Procedure Act*. It sought the striking out of the plaint dated 30/8/2021 for failure to take out summons within the stipulated time.
2. It was supported by the affidavit of Hedaya Malesi sworn on 3/5/2023. The grounds were that the suit was commenced vide the plaint dated 30/8/2021 which was accompanied with a Motion on Notice of even date. The Motion sought injunctive orders against the defendant restraining it from dealing with Molo/Sachangwani Block1/79 (“suit property”).
3. That the two documents were served on 2/9/2021. That the defendant’s advocates on record filed a Notice of Appointment and replying affidavit to the Motion. That to-date, no Summons to enter appearance have ever been served upon the defendant as provided under Order 5 Rules 1 and 5 of the *Civil Procedure Rules*. That in the premises, the suit has abated by operation of law.
4. The application was opposed vide a replying affidavit of Joy Othieno Ochieng sworn on 29/6/2023. It was contended that as at the date of swearing the affidavit, 3 years had not lapsed since the date of filing suit and the suit had therefore not abated. That failure to take out summons to enter appearance was an inadvertence of counsel and was caused by the urgency in the plaintiff’s application dated 30/8/2021 seeking to injunct re-advertisement and auction of the suit property.



5. Counsel stated that immediately after the injunction application was heard, she would have taken out the Summons but she fell sick and her staff failed to bring the file to her attention. That the suit is based on a Charge made over 30years ago. That the failure to take out the summons was a technicality. She urged that the application be dismissed as no prejudice was caused by failing to include summons in the pleadings.
6. The parties filed submissions which I have considered. I have also considered the many authorities cited by Learned Counsels. The defendant cited no less than 8 authorities in its contention that the failure to serve the summons was not a mere procedural step but a mandatory step which goes to the root of the suit.
7. This is an application to strike out the suit on the grounds that summons were not taken out and that the suit has abated by dint of Order 5 Rule 1(6) of the [Civil Procedure Rules](#).
8. There are two schools of thought that exist on this matter. The first school of thought is that, by the use of the term ‘shall’ it is mandatory and the failure to comply therewith leads to the striking out of the suit. That the suit shall abate on failure to take out and serve the summons within 30days. Some of these cases include [Grace Wairimu Mungai v Catherine Njambi Muya](#) [2014] eKLR, [Karandeep Singh Dhillon & Anor v Nteppes Enterprises Ltd & Anor](#) [2010] eKLR and [Tana Trading Ltd v National Cereals and Produce Board](#) [2014] eKLR.
9. The second school of thought is that, notwithstanding the use of the word ‘shall’, the suit does not nevertheless abate, the failure is curable and that each case has to be considered on its own peculiar circumstances. Some of the case under this school include [Paulina Wanza Maingi v Diamond Trust Bank Ltd & Anor](#) [2015] eKLR, [Tropical Foods International & Anor Eastern and Southern African Trade and Development Bank & Anor](#) [2017] eKLR, [Nairobi Aviation Ltd v Nation Media Group Ltd](#) [2020] eKLR, [Fredrick Kibet Chesire v Raymond W. Bomet](#) [2006] eKLR.
10. In [Paulina Wanza Maingi case](#) (*supra*), Aburili J held: -

“In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, ... and six years having elapsed since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit.”
11. In [Amina Hersi Mogbe & 2 Others v Diamond Trust Bank Kenya Ltd & Anor](#) [2021], Tuiyot J (as he then was) held that: -

“This Court identifies itself with the latter views. It takes the position that where, even without the issuance and service of summons, a Defendant enters appearance or files defence or otherwise actively participates in defending its position in proceedings without protesting that it has not been served then it will be taken to have waived its right to challenge the validity of the suit on account of failure to comply with Order 5 rule. Unless, and this is the condition, it can demonstrate that non-adherence to those provisions has prejudiced or caused it hardship which cannot be compensated in costs.”
12. After careful consideration and soul searching, I will depart from the position I held in 2014 at the time of [Tana Trading Ltd v National Cereals and Produce Board](#) (*supra*). It is clear that the issuance and service of summons is meant to notify a defendant of the plaintiff’s claim and require the defendant to defend its position. If a defendant comes to know of the suit and appears and actively participates thereon, what prejudice does it suffer for not having been served with summons? I see none. No doubt



the issuance and service of summons cannot be said to be insignificant in the prosecution of a suit, but in the interests of justice, its purpose should be considered in the overall administration of justice.

13. In the present case, the suit was lodged on 30/8/2021. The plaint and Motion were served on 2/9/2021. Were the defendant not having participated subsequent thereto by appearing and filing its responses to the Motion, the suit would have abated on 2/10/2021. However, there was active participation by all the parties culminating in the ruling of 14/10/2022 which allowed the injunction application.
14. What is at stake is land. The parties entered into a loan agreement whereby certain facilities amounting to Kshs.300,000/- were advanced to the plaintiff in 1993. The plaintiff alleges that he has since paid the same in full yet the defendant was demanding a sum of Kshs.1,372,806/- as at June, 2021. What prejudice has the defendant suffered with the failure to serve the summons? I see none. On the other hand, if the application is allowed, the plaintiff will not only suffer the monies he has already paid to the defendant but he will also lose the suit property.
15. Further, the active participation of the defendant in the interlocutory proceedings coupled with the explanation of the sickness of the advocate for the plaintiff appeals to this Court to exercise its discretion in favor of sustaining the suit. In any event, the summons has since been issued and served, albeit after the filing of the present application. There is already a defence on record, though filed under protest.
16. In view of the foregoing, I am inclined to support the second school of thought, that where a defendant actively participates in proceedings where summons have not been served, it would be unjust and unfair to allow such a defendant to turn around and seek the dismissal of such suit. The defendant should be taken to have been aware of the suit and be having participated as such, waives his right to seek the remedies under Order 5 Rule 1 of the Civil Procedure Rules.
17. Accordingly, I find that the application lacks merit and is dismissed. I will however, allow the costs in favor of the applicant of Kshs.15,000/-. Let the parties undertake pre-trials expeditiously before the Deputy Registrar.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

