



**Chirag Builders Limited v Greenview Develoers Limited (Commercial Case E391 of 2020)  
[2023] KEHC 18251 (KLR) (Commercial & Admiralty) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18251 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
COMMERCIAL CASE E391 OF 2020  
DO CHEPKWONY, J  
APRIL 25, 2023**

**BETWEEN**

**CHIRAG BUILDERS LIMITED ..... PLAINTIFF**

**AND**

**GREENVIEW DEVELOERS LIMITED ..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion application dated October 27, 2022, the Applicant seeks to have the suit deemed as having abated for want of collection and service of Summons to enter Appearance.
2. The application is premised on the grounds on its face and Supporting Affidavit sworn by Darshna Mukeshi Savla. It is averred that the suit was filed vide a Complaint in October, 2020 but the Plaintiff has never collected and served Summons to enter Appearance upon the Defendant as required under Order 5 Rules (1) and (2) of the *Civil Procedure Rules*.
3. That by their mandatory nature, these rules obligate the Plaintiff to prepare Summons to enter Appearance, collect the same and thereafter serve them alongside a Complaint upon the Defendant as an invitation to appear in the suit.
4. However, in this case, it is the deponent's further averment that the applicant was only served with the Complaint which was accompanied with application for injunction brought under Certificate of Urgency and was responded to vide a Replying Affidavit by the Applicant's former advocates on record.
5. The Applicant claims that there has never been any Memorandum of Appearance or defence filed because of this and its contention is that since they were never served in accordance with the rules hence the court is without jurisdiction to hear the matter. It has urged that the suit against the Defendant be deemed as abated and struck out forthwith.



6. On October 31, 2022 when the matter came up for hearing of the main suit, the issue of the application dated October 27, 2022 came up. On this day, counsel for the Plaintiff, Mr Githui, in opposing the application by the Defendant, pointed out that the belated filing of the application was clearly a scheme to delay the disposal of the suit. He stated that the Defendant has always been represented in the matter whereby it actively participated in an application for injunction wherein parties were directed to set down the suit for Case Management. That the suit was then slated for Case Management on October 19, 2021, December 20, 2021, February 3, 2022 and February 24, 2022, when it was certified ready for hearing. He urged the court to dismiss the application.
7. The hearing was adjourned and the Plaintiff directed to file a formal response to the application. The parties were then directed to canvass the application by filing skeleton submissions. I have only seen the submissions filed by the Defendant dated November 21, 2022.
8. To determine the application dated October 27, 2022, I have read and considered the grounds upon which it is premised on its face, Supporting Affidavit thereof and the Defendant's submissions alongside the oral response thereto by the Plaintiff's counsel. This Court is clear that the only issue for determination is whether the suit should be deemed as having abated for want of collection of Summons to enter Appearance by the Defendant.
9. The legal framework for issue and service of Summons is set out under Order 5 of the [Civil Procedure Rules](#).  
Order 5 Rule (1) provides as follows:-
  1.
    - (1) When a suit has been filed a summons shall issue to the Defendant ordering him to appear within the time specified therein.
    - (2) Every summons shall be signed by the Judge or an officer appointed by the Judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
    - (3) Every summons shall be accompanied by a copy of the Plaintiff.
    - (4) The time for appearance shall be fixed with reference to the place of residence of the Defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
    - (5) Every summons shall be prepared by the Plaintiff or his advocate and filed with the plaintiff to be signed in accordance with subrule (2) of this rule.
    - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate."
10. From this provision, the Plaintiff is obligated to ensure that Summons for the purpose of instructing a Defendant to enter Appearance before a court of law at a definite time are extracted upon filing a suit. The structure and timelines are set out under Rule 2 thereof. Rule 6 provides mandatory terms on the role of the Plaintiff in ensuring the Summons have been collected for service within 30 days of issue or notification, failure to which the suit shall abate.
11. According to the Applicant/Defendant, the Plaintiff filed the suit vide a Plaintiff dated September 28, 2020 seeking special damages for the construction of 11 Apartments at Green-View Estate. However,



- the Plaintiff failed to take out Summons to enter Appearance and it is now two years since. The Applicant has submitted that the failure to comply with the requirements of Order 5 of the Civil Procedure Rules has been inordinate and being procedural rules, the same are not of technical nature to warrant this Court invoke its inherent/discretinary powers under Section 3A of the Civil Procedure Act.
12. The Plaintiff on the other hand has attributed its indolence in failing to comply with the provisions of Order 5 Rule 1 and 2 of the Civil Procedure Rules to not being notified of the issuance of the Summons on the e-filing platform, which excuse has been dismissed by the Applicant.
  13. This Court confirms the provisions under Order 5 of the Civil Procedure Rules as obligating the Plaintiff to take out Summons to Enter Appearance once a suit is filed for service upon the Defendant, which then has the effect of bringing the Defendant into the suit. It is not in dispute that in this case, the Summons were not taken out and served upon the Defendant.
  14. However, upon reading through the record, it is clear that the Defendant became aware of the existence of the suit through other means and filed a Notice of Appointment of Advocate on October 14, 2020 and the Replying Affidavit was sworn on December 15, 2020 in response to the Plaintiff's application dated September 28, 2020 seeking injunctive orders as against the Defendant from dealing with Units Nos 1, 3, 10 and 11 erected on Land Reference No 1870/VIII/268, Nairobi. The application was heard and a ruling delivered by the Honourable Court on September 23, 2021. The instant application is dated October 27, 2022.
  15. It is this Court's considered view that the Applicant having participated in the suit since 2020, and it is only in October, 2022 that they felt the need to file the current application seeking to have the suit deemed as abated for non-service of Summons to Enter Appearance, by this conduct, they have failed to demonstrate the prejudice they have or stand to suffer. Also, the claim by the Plaintiff that they were not notified of the collection of Summons by the court registry has not been rebutted by the Applicant.
  16. In view of all these, this Court holds the same view that Musinga, J (as he then was) had in the case of Laserview Systems Limited vs Crissam Acres Limited & Another [2012]eKLR, where he held that:-

“... in the case no Summons have been issued and consequently there cannot be any notification by the registry regarding the collection of the same. Even though thirty (30) days have since lapsed from the date the suit was filed, it is doubtful whether in the circumstances the court can declare that the suit has abated. The Plaintiff's advocate cannot entirely bare the shame for failure to have Summons issued. The consequences of making a finding that the suit has abated are drastic. If the court were to reach such a finding, the Plaintiff may be punished for a mistake which is not of his own making”.
  17. So that even though the wording of Order 5 Rule (1) and (6) is that failure to serve the Summons within thirty (30) days render the suit as abated, the court is expected to diligently exercise its discretion by evaluating the facts of each case, before dismissing a suit in accordance with the spirit of Article 159(2) (d) of the Constitution of Kenya, 2010, so that a party is not shunned away from the seat of justice due to a procedural technicality. Further, in the interest of justice for all, the court is urged to invoke the provision of Sections 1A, 1B and 3A of the Civil Procedure Act which require that it facilitates the just, expeditious, proportionate and affordable resolution in civil disputes, and equally, the parties to a dispute are as well required to assist the court in furtherance to the overriding objective.
  18. Having evaluated the facts of this case, it is this Court's view that if this suit is found to have abated for non-compliance with the provisions of Order 5 Rules (1), (2) and (6) of the Civil Procedure Rules, then justice will be deemed not to have been served on the Plaintiff, who from the nature and issues



raised in his suit deserves to be heard and the said issued determined on merit. In the upshot thereof, the application dated October 27, 2022 is found unmeritorious and is accordingly dismissed.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 25<sup>TH</sup> DAY OF APRIL, 2023.**

**D. O. CHEPKWONY**

**JUDGE**

