



*No.26/2014*

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO. 200 OF 2011**

**PATRICK DAUDI KIMULI ..... PLAINTIFF**

**VERSUS**

**KATELEMBO ATHIANI FARMERS AND**

**RANCHING CO. LTD..... 1<sup>ST</sup> DEFENDANT**

**JULIANI MATEE MATAKI..... 2<sup>ND</sup> DEFENDANT**

**MARTIN KYALO MALILA..... 3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF TITLE..... 4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL..... 5<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The Plaintiff filed this suit on 4.8.2011 seeking the cancellation of the title deeds of the subject matters herein and injunctive reliefs thereof inter alia.
2. On 19.8.2011 the 5<sup>th</sup> Defendant entered appearance and filed grounds of opposition to the Plaintiff application which had been contemporaneously filed together with the plaint. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed notice of appointment of advocate together with replying affidavit sworn by Juliana Matee Mataka on 29.8.2011 in which she swore on her own behalf and that of the 3<sup>rd</sup> Defendant.
3. The 1<sup>st</sup> Defendant filed defence on 31.9.2011 along with replying affidavit and preliminary objection dated 30.8.2011. On 30.7.2013 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants filed application seeking orders that:

(a) Suit be struck out as abated by operation of the law and costs.

4. The application is supported by the affidavit of Martin Kyalo Malila sworn on 29.7.2013. The application is anchored on provisions of Section 1, 2 and 3 Civil Procedure Act and order 5 rule 2 and 6 of Civil Procedure Rules 2010. The application is opposed by the plaintiff via the affidavit sworn by Martin Mutisya Muthengi on 11.9.2013.

5. The applicant case is that the suit was filed on 4.8.2011 but summons have never been served as by the time the application dated 29.7.2013 was filed. The Applicant submits that the above omission or failure offends the provisions of order 5 Rule 1(5) and (6) Civil Procedure Rules. According to the Applicants, if summons are not collected and served upon Defendants within 30 days from the date of filing suit, the suit abates. The Applicant submits that the rules are couched in mandatory terms leaving court with no discretion.
6. According to the Applicants, the suit then effectively abated on the 5.9.2011 and all the events which followed on the court record thereafter are all exercises in futility. The Applicants submit that court is not deciding whether or not suit abated but rather declaring whether in line with order 5 rule 1(2) and (6) Civil Procedure Rules, the suit abated in 30 days from 4.8.2011.
7. The Applicants submit that it is not contested that summons were never issued and an attempt by the Plaintiff to sneak copies later did not succeed. The Applicants rely on the authority of **KENYA BRIDGE ASSOCIATION & 2 OTHERS VS. SAMINA ESMAIL & 4 OTHERS (2007) eKLR** which held that the suit was incompetent as 24 months had lapsed without summons being issued to the defendant and thus dismissed the suit. The Applicants urge court to do likewise in the instant suit as since 4.8.2011 no summons have issued nor served upon Defendants.
8. The Plaintiff case is that since the filing of the suit and the day of the filing of the application herein dated 29.7.2013 there was no Environment and Land Court (ELC) and thus all matters related to land in Machakos Law Courts were stood over to await the establishment of the ELC Court. The Plaintiff submits that ELC courts were established in 2012 via ELC Act of 2012 only a few months after the suit was filed which were circumstances beyond the Plaintiff's control.
9. The Plaintiff submits that the summons are signed by the judge or designated persons under order 5 rule 2 Civil Procedure Rules. He relies on Article 159 (2) (d) to urge the court to ensure justice is administered without undue regard to procedural technicalities. He also cites the provisions of Section 3A Civil Procedure Act and urge the court to invoke its inherent powers for the ends of justice and prevent abuse of the court process.
10. He cites the authority of **ELC NO.77/2010 GEORGE MUIRURI NJENGA & ANOTHER VS. PAUL KAGUNDA NJENGA & OTHERS (2014) eKLR**. This is in a scenario, where the summons were issued after 2 years without courts extension of time or validation of extension of issue of summons. The court invoked the provisions of Section 95 Civil Procedure Act and orders 5 rule 6 to extend time to serve summons in lieu of declaring the case to have abated. The Plaintiff urges the court to hear matters on merit for the wider interest of justice taking to account the circumstances of the case and the subject matter.
11. I have perused the court record and the parties' affidavits and their written submissions. I find the issues for determination are:

- **Whether the suit has abated?**
- **Whether the suit should be dismissed for having abated?**
- **What is the order as to costs.**

12. Order 5 Rule 1 (2) states that:

***“Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of court without delay and in any event not more than 30 days from date of filing.”***

Sub rule 5 states that:

***“Every summons, except where the court is to effect service, shall be collected for service within 30 days of issue or notification whichever is later, failing which the suit shall abate”***

13. In our case herein, the summons were not issued nor has the notification ever been done. It is incumbent upon the court administrative machinery to issue summons to the Plaintiff and/or notify the Plaintiff of the issuance of the summons. It is upon the above happening that the time span of

- 30 days starts to run. The provisions of order 5 Rule 1 (6) is to the effect that, summons shall be collected 30 days of issue or of notification.
14. The question is; is there evidence that the court ever issued the same? Is there evidence that the Plaintiff was notified of the summons issuance? This is because the provisions say that it is after being issued or notified of the summons issuance that failure to collect them for service, the suit abates.
  15. In respect of the CASE OF KENYA BRIDGE ASSOCIATION (SUPRA) the authority was decided on 28.2.07 before the enactment of Section 1A, 1B (on overriding objective) Civil Procedure Act and the new Constitution and specially the creation of Article 159 (2) (d), which lays emphasis on substantive justice in lieu of procedure technicalities. Further Mutungi J, seem not to have considered as to what triggers the running of time under order 5 rule 1 (2) and 5 Civil Procedure Rules.
  16. On authority of GEORGE MUIRURI NJENGA (SUPRA) Nyamweya J. also did not consider the effect of order 5 rule 1 (5) as to what triggers the running of the 30 days though she invoked the provisions of Article 159 (2) to save the suit in lieu of striking it and on the ground that no prejudice could be occasioned upon the Defendant. In our case, the Deputy Registrar has not acted on the draft summons on record by sealing and signing them to enable the plaintiff to collect and serve.
  17. In our case herein, the running of the time of 30 days which could lead to the suit abating has not commenced. Same shall be triggered by the issuance of summons and/or notification of the summons issuance to the Plaintiff. I find in the matter herein that some parties have filed their defence and/or appearance and the matter is still actively ongoing on the interlocutory applications.
  18. The delay in processing the summons could be attributed to the transitioning of the old legal regime to the new legal, Constitutional and Institutional dispensation and the reorganization which cannot be visited on the Plaintiff.
  19. Taking to account the circumstances of the matter herein and the subject matters involved and the delay occasioned, I find it is just and in line with Article 159 (2) (d) of the Constitution to make the following orders:

1. **The Deputy Registrar shall issue Plaintiff with summons within a period of 30 days.**
2. **The Plaintiff shall serve the summons upon the Defendants within 14 days.**
3. **The Defendants are at liberty to file defence within 14 days of service.**
4. **The Application herein is therefore dismissed but with no order as to costs.**

**Signed and Delivered at Machakos this 21<sup>st</sup> day of November, 2014.**

**CHARLES KARIUKI**

**JUDGE**