



**Ambala & 2 others v Butt & another (Environment & Land Case 67 of 2020) [2022] KEELC 15152 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15152 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 67 OF 2020  
MD MWANGI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**ODUOR HAWI AMBALA ..... 1<sup>ST</sup> PLAINTIFF  
ODHIAMBO TAABU AMBALA ..... 2<sup>ND</sup> PLAINTIFF  
OGOLA KODHEK AMBALA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**HADIJA ASIF BUTT ..... 1<sup>ST</sup> DEFENDANT  
FAROOK ASIF BUTT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

(In respect of the plaintiff's application dated March 23, 2022)

1. The application before me for determination is the plaintiff's application dated the March 23, 2022 brought under the provisions of order 5 and order 51 rule 1 of the *Civil Procedure Rules*, section 1A, 1B and 3A of the *Civil Procedure Act*. The plaintiffs seek for orders that the court be pleased to extend and re-issue summons to enter appearance for service upon the defendants herein. Further that the costs of the application be in the cause.
2. The plaintiff's application is premised on the grounds that when the suit was filed, draft summons to enter appearance were provided to the court, but apparently, due to the various interlocutory applications that have been filed in this matter, the summons to enter appearance have inadvertently not been signed by the court. That no prejudice will be occasioned to the defendants as they have already been served with all the pleadings and have been aware of this suit. In fact, they have even instructed counsel to represent them. That the application has been made without any undue delay and it is in the interest of justice that the orders sought be granted.



3. The application is supported by the annexed affidavit of MN Ng'ang'a Advocate deponed on the March 23, 2022. The deponent reiterates the averments contained in the grounds on the face of the application. He asserts that when the suit was filed, draft summons to enter appearance were provided to the court for signature alongside the pleadings. That the delay in signing the summons to enter appearance was occasioned by the interlocutory applications because the file was in judges' chambers most of the time awaiting rulings.
4. The application is opposed by the defendants who filed grounds of opposition erroneously dated March 1, 2022 instead of March 31, 2022. In their grounds of opposition, the defendants argue that the plaintiffs' suit is fatally defective, vexatious, scandalous and abuse of court process as it offends the provisions of section 6 of the *Civil Procedure Act*, cap 21 laws of Kenya. They contend that there is another suit pending for determination between the same parties relating to the same subject matter being ELC No 511 of 2018; *Hadija Asif Butt -vs- Oduory Hawi Ambala & others*. That the honourable court lacks jurisdiction to entertain, hear and/determine the suit herein.
5. The application was disposed of by way of written submissions. The plaintiffs filed their written submissions dated May 31, 2022 whereas the defendants' submissions are dated June 6, 2022. Counsel for both parties highlighted their submissions on the September 29, 2022 in open court.

### **Issues for Determination**

6. I have perused the court record, the application and the supporting affidavit thereof, the grounds in opposition and parties' submissions; both written and oral, and the key issue for determination in my view is whether the plaintiffs' suit should be declared to have abated or dismissed for failure to serve summons pursuant to order 5 rule 1(6) of the *Civil Procedure Rules*. Secondly whether the orders sought by the plaintiffs should be issued.

### **Analysis and Determination**

7. It is not in dispute that the summons to enter appearance herein have not been signed; in other words, they are yet to be issued by the court.
8. The defendants submit that it was the responsibility of the plaintiffs to make sure that summons were filed alongside the plaint, extract the summons, collect and serve them within 30 days of issuance or upon notification by the court. By their failure to do so, their suit herein has abated.
9. Order 5 rule 1 of the *Civil Procedure Rules* provides for the issue and service of summons as follows: -

“

- “(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 the suit.
- (3) Every summons shall be accompanied by a copy of the plaint.
- (4) The time for the 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 summon shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (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. It is clear from the above provisions of the law that once a suit is filed, it is the duty of to court to issue summons to enter appearance which must be dated, signed by the judge or officer appointed by the judge (usually the Deputy Registrar of the court) and sealed with the seal of the court without delay. 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 only then that the time span of 30 days starts running. The provisions of order 5 rule 1(6) is to the effect that, summons shall be collected within 30 days of issue or notification.
11. In the instant matter, the summons have not been issued.
12. My understanding of order 5 rule 1(6) is that the 30 days within which the summons must be collected starts running after the issuance of summons or notification to the plaintiff of the issuance of summons, whichever is later. In this case the summons have not been issued and the rule cannot therefore apply
13. I agree with the findings in the case of *Patrick Daudi Kimuli vs Katelembo Athiani Farmers And Ranching Co Ltd & 4 others* [2014] eKLR where the court held that;
- “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.”
11. The defendants submit that there are no valid summons on record. Although the plaintiffs seek re-issuance of summons, it is evident that summons were never signed nor issued in the first instance. The court cannot direct re-issuance of what was never issued in the first place.
12. The defendants have cited the case of *Abdulbasit Mohamed Ahmed Dahman & another - vs- Fidelity Commercial Bank Limited* (2016) eKLR. The facts therein are distinguishable from the instant case as the summons therein were signed but never served within the requisite time. The cited authority is therefore not applicable to the instant suit.
13. The defendants have also raised an issue of sub judice as provided for under section 6 of the *Civil Procedure Act*, cap 21 in their grounds of opposition. The plaintiffs mistakenly, in their submissions refer to it as a preliminary objection. There is no such preliminary objection on record.
14. If at all there is another matter pending before a court of competent jurisdiction, over the same subject matter between the same parties, then the defendants should file an appropriate application attaching the said proceedings for the court’s perusal and determination on whether the suit is subjudice or not facts have to be ascertained.
15. In the case of *Margaret Wachu Karuri –Vs- John Waweru Ribiro* (2021) eKLR, the court held that,
- “For the court to determine whether the issues herein were directly and substantially in issue with the other suit, it is the court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the



ones in the appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is *sub-judice*, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by the defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited. Consequently, the court finds and holds that the notice of preliminary objection dated August 30, 2019 by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/respondent.”

11. Besides the provisions cited by the plaintiffs herein, this court is enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. According to section 1A (2) of the [Civil Procedure Act](#);

“The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective”

11. Section 1B of the [Civil Procedure Act](#) elaborates on aims of the said overriding objective as follows;

“The just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”

11. Therefore, taking into account the circumstances of this matter, and in order to give effect to the overriding objective, I find it is fair and just in line with article 159(2)(d) of the [Constitution](#) to make the following orders:
- a. The Deputy Registrar of this court is hereby directed to issue the summons to enter appearance in this case within 14 days from the date hereof.
  - b. The plaintiffs shall upon issuance of the summons serve the defendants in accordance with the provisions of order 5 of the [Civil Procedure Rules](#).
  - c. The costs of this application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER 2022**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Ng’ang’a for the Plaintiffs/Applicants.

No appearance for the Defendants/Respondents.

Court Assistant: Hilda/Yvette

**M.D. MWANGI**

**JUDGE**

