Makena v Nalwa (Civil Appeal E127 of 2024)
[2025] KEHC 1583 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E127 OF 2024

RE ABURILI, J

FEBRUARY 19, 2025

BETWEEN

FAITH MAKENA ..... APPELLANT

AND

WAFULA NALWA ..... RESPONDENT

(Being an Appeal from the ruling and/or orders of the Hon. E. A. Obina SPM in Kisumu Magistrate's Court MCCC NO. E230 of 2023 Wafula Nalwa vs. Faith Makena dated and delivered on 24th May 2024)

JUDGMENT

1. This appeal arises from the ruling and orders of Honourable E.A. Obina Principal Magistrate delivered on 24th May 2024 in MCCC No.E230 OF 2023 Wafula Nalwa v. Faith Makena. In the said suit, the appellant herein was the defendant. She lodged a preliminary objection to the suit seeking that it be dismissed on the ground that the suit had abated by virtue of time effluxion. She also urged for all pleadings and applications filed on behalf of the respondent herein be expunged as there had been change of advocates.

2. The lower court in the decision rendered on 24th May 2024 declined to allow the preliminary objection on account that the appellant before the court had actively participated in the proceedings and that she had also not suffered any prejudice.

3. Aggrieved by the said ruling, the appellant/defendant filed this appeal on 24th June 2024 setting out the following grounds of appeal:

    1. The Learned Trial Magistrate erred in law in holding that the suit had not abated by effluxion of time for failure to take out at all and serve Summons To Enter Appearance upon the Appellant as provided for under Order 5 rules 1,6,8 of The Civil Procedure rules 2010.

2. The Learned Trial Magistrate erred in law in failing to appreciate that failure to take out at all and serve Summons To Enter Appearance within the timelines set out in law or at all under Order 5 of The Civil Procedure Rules, 2010 went to the root of the jurisdiction of the court, and as a consequence, it was fatal and the suit was a non-starter.

3. The Learned Trial Magistrate erred in law and fact, and misapprehended the direct consequences of failing to comply with Order 5 Rule1 of The Civil Procedure Rules 2010, that is couched in mandatory terms, will result to the contravention of the constitutional right of the Appellant to a fair hearing as enshrined under Article 50 of *the Constitution* of Kenya, 2010 as the Appellant could not in law file any pleading or defence to the Respondent's claim against her in the subordinate court hence will be condemned unheard.

4. The Learned Trial Magistrate erred in law and misapprehended the decision of the Court of Appeal in Misnak International (UK) Limited v 4MB Mining Limited C/0 Ministry of Mining, Juba Republic of South Sudan & 3 others [2019)] eKLR, which was binding on him by dint of Article 162 of *The Constitution* of Kenya, 2010, on hierarchy of courts, on the pivotal core of service of summons upon a Defendant.

5. The Trial Court failed to appreciate the import of the decisions of the superior court on service of summons on arriving at its decision and misapprehended participation in proceedings when the Appellant had only filed a Notice of Appointment of Advocate only and no pleadings.

6. The decision of the subordinate court is in all respects bad in law and not in consonance with ratio decidendi of decided decisions of superior courts on the same issue.

7. The subordinate court lacks jurisdiction to hear a suit that has abated, and therefore, null and void.

4. The appellant therefore seeks orders that the appeal be allowed with costs and the preliminary objection dated 6 March 2024 be upheld. She also seeks that the costs of the suit in Kisumu MCCC No.E230 of 2023 be awarded to her.

5. The appeal herein was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that Summons To Enter Appearance is a crucial jurisdictional document in court proceedings, playing a significant role in fair hearings. She also submitted that the drafters of the Rules dedicated 34 rules to the issue and service of summons, emphasizing its importance and significance.

7. The appellant also submitted that the essence of summons is to call a party to submit to the jurisdiction of the court and that it does not matter that the defendant is aware of the existence of the suit.

8. Reliance was placed on the Court of Appeal case of Misnak International (UK) Limited vs. 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan & 3 Others [2019] eKLR wherein the Court held that the rules of natural justice emphasize that a party should not be condemned unheard, and proceedings should not be conducted to their detriment in their absence. This right according to the Court is realized through summons to enter appearance and service, which informs the sued party of the suit's existence and invites them to appear and defend if desired.

9. It was submitted that the Trial Magistrate erred in law and fact by failing to comply with Order 5 rule 1 of the Civil Procedure Rules, 2010, which contravened her constitutional right to a fair hearing under Article 50 of *the Constitution* of Kenya, 2010.

10. The appellant also relied on the case of Joseph Gachagua & Another vs. Alice C. Kalya & 4 Others [2015] eKLR, where the court held that a party can only enter appearance and file a defence after being served with summons to enter appearance.

11. The appellant submitted that she had only filed a Notice of Appointment of Advocate and she had never filed any statement of defence for want of service of summons.

12. The appellant relied on the case of Ephantus Wachira Ngochi vs. Cooperative Bank of Kenya Limited [2012] eKLR where the Court emphasised that it was mandatory for summons to be issued and sealed. Reliance was also placed in the case of Abdulbasit Mohamed Ahmed Dahman & Another vs. Fidelity Commercial Bank Limited [2016] eKLR where the court held that the suit had abated for lack of service of summons upon the defendant.

13. The case of Law Society of Kenya vs. Martin Day & 3 Others [2015] eKLR was also relied on where the court held that Order 5 of the Civil Procedure Rules is designed to enable the parties to follow certain procedures to achieve due process.

14. The appellant submitted that as held by the court in the Law Society of Kenya vs. Martin Day & 3 Others (supra), the failure to comply with the rules on service of summons, means that the jurisdiction of the court is not properly invoked.

15. On the issue of costs, the appellant relied on the Supreme Court case of Kombe v Karisa *& 3 others (Petition E020 of 2023*) [2024] KESC 25 (KLR) (31 May 2024) (Judgment) where the court held that costs follow the event but are at the discretion of the court.

The Respondent's Submissions

16. It was submitted that a suit can only abate under Order 5 rule 6 if the suit is filed, summons to enter appearance are prepared, signed by a judge, and the plaintiff is notified to collect the summons within 30 days but fails to do so.

17. The respondent also submitted that he filed a suit under a certificate of urgency on 24th August 2023, but later served the Appellant with pleadings without the summons to enter appearance as they were not ready since he had not been notified to collect them as provided under order 5 rule 1(6) of the Civil Procedure Rules, 2010.

18. It was also submitted that as was held by the court in the case of Paulina Wanza Maingi vs. Diamond Trust Bank Limited & Another [2015] eKLR as there was no issue/notification of the summons, the suit could not have abated.

19. The respondent further submitted that although the appellant was not served with the summons to enter appearance she was served with the plaint and notice of motion both of which were dated 24th August 2023 and a court order dated 17th October 2023. She subsequently filed a notice of appointment of advocate and an application under a certificate of urgency dated 5th December 2023.

20. It was also submitted that she also appeared before court on several occasions that is on 9th ,16th and 25th January 2024 after which a ruling date for her application was set for 27th February 2024.

21. The respondent heavily relied on this court's decision in Paulina Wanza Maingi v Diamond Trust Bank Limited & Another [2015] eKLR where it was held that it would be a traversity of justice to dismiss a suit on grounds that summons to enter appearance were not served yet the defendant has actively participated in the proceedings without protesting.

22. He also relies on several other decisions where the courts reiterate that where a defendant gets notice of a suit through other means other than summons and participates in the proceedings, there is no prejudice occasioned by the delay in issuing the summons to warrant a dismissal of the suit.

Analysis and Determination

23. I have carefully considered the grounds raised in the Memorandum of Appeal, the submissions, authorities and statutory provisions cited by both parties' advocates in their respective submissions. The only issue for determination in this application is whether failure to issue and serve summons to enter appearance upon the appellant is fatal to the respondent's suit.

24. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty is spelt out under section 78 of the *Civil Procedure Act* and as was interpreted in the case of Selle & Another v Associated Motor Boat Co. Ltd. & Others [1968] EA 123 and by the Court of Appeal or East Africa which took the same position in Peters v Sunday Post Limited [1958] EA. However, I am alive to the fact that the appeal herein arises out of a ruling on a preliminary objection determined on the basis of viva voce evidence hence no viva voce evidence was taken before the trial court.

25. Therefore, on whether failure to serve summons to enter appearance upon the defendant/appellant herein was fatal to the plaintiff/ respondent's case, the law relating to issuance and service of summons to enter appearance is Order 5 rule (1) of the Civil Procedure Rules which provides that:

    1. Issue of summons [Order 5, rule 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 plaint.

        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 plaint 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, failing which the suit shall abate.

    Subrule (2) concerns the validity of summons.

26. It is common practice that where no summons to enter appearance are issued within 12 months a suit abates. The validity of the summons may however be extended.

27. There are various interpretations of Order 5, rules 1, 2, 3, 5, and 7 of the Civil Procedure Rules regarding the issue of service summons to enter appearance, with different judges of the High Court and other courts of equal status offering differing views. Essentially, there are two main perspectives. The first holds that failure to issue and serve summons to enter appearance on the defendant within the prescribed period is a fatal error to the suit, affecting the court's jurisdiction. The second view, however, suggests that the impact of such failure depends on the specific circumstances of each case, and that it is not necessarily fatal to the suit unless it causes prejudice or undermines the court's jurisdiction.

28. In the instant case, the brief facts are that the respondent filed a suit against the appellant in the Civil Case No. E230 of 2023 Ben Wafula Nalwa vs. Faith Makena. Simultaneously, the respondent filed an application seeking an injunction to prevent the appellant and her agents from accessing or destroying the respondent's premises wherein the two parties hereto operated a hospital facility until the main suit is heard and determined on merit. The application was considered ex parte in the first instance and interim orders of injunction were issued on 17th October 2023 against the appellant.

29. The appellant upon being served with the application and the pleadings, she filed a notice of appointment of advocates and an application to set aside and vacate the exparte orders issued against her and upon the court hearing her application, it reserved 27th February 2024 as the date when a ruling on her application would be delivered. However, before the court could deliver its ruling the appellant on 1st February 2024 allegedly violated court orders by entering the hospital premises, disrupting activities and causing patients to leave.

30. This prompted the respondent to file a contempt of court application and in response to this application, the appellant filed a preliminary objection, arguing that the suit abated due to time effluxion.

31. Her preliminary objection was heard and on 24th May 2024 the lower Court dismissed it stating that the suit had not abated due to the defendant's active participation and defense of her position, and that no evidence of prejudice or suffering had been presented to court to warrant dismissal of the suit.

32. The respondent's contention is that he did prepare and file together with the plaint, summons to enter appearance. However, that by the time of serving the plaint and his application wherein he sought and was granted exparte injunctive orders, the summons to enter appearance were not ready as he had not been notified to collect them as stipulated under order 5 rule 1(6) of the Civil Procedure Rules.

33. The terms under Order 5 Rule 1 of the Civil Procedure Rules are couched in mandatory terms.

34. Under Subrule 2 of Order 5 it is provided as follows:

> 2(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of the validity of the original summons which is unexpired at the date of issue of the concurrent summons.
>
> 2. Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.
>
> 7. where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.

35. In this case, the summons to enter appearance according to the respondent, were filed together with the plaint but they have never been signed/issued or served upon him. There is no contrary evidence.

On the other hand, the appellant, upon being served with the plaint and interlocutory application filed under certificate of urgency, she filed a notice of appointment of advocates and proceeded to also file an application seeking for the court to vacate/set aside the injunctive orders issued against her. The filing of the notice of appointment of advocate was prompted by issuance of the injunction orders against her which was served on her together with the pleadings.

36. From the provisions of Order 5 of the Civil Procedure Rules and which I have reproduced above, it is understood clearly that whereas it is the duty of the plaintiff to file summons to enter appearance together with the plaint while instituting suit, the issuance/signing of summons is the duty of the court, which also directs the defendant to enter an appearance within the time specified therein.

37. Accordingly, in my consistent understanding, since I have had occasion to determine a similar issue in the past, the summons to enter appearance must be issued or the plaintiff must be notified that the said summons to enter appearance are ready for collection before the said summons are collected for service.

38. In this instance, the summons to enter appearance that the respondent states were submitted with the plaint were not issued and neither was there a notification given to the respondent. Therefore, in my humble view, since the summons to enter appearance were not issued for collection for service, the suit could not have abated. It is only when the summons to enter appearance have been signed or issued that they become valid for service and if not served within the period stipulated in law, the suit would abate.

39. Additionally, albeit the provisions of Order 5 of the Civil Procedure Rules are detailed and stated in mandatory terms, it is important for parties to comprehend the purpose behind the issuance of summons to enter appearance, which, in this case, has been rendered unnecessary due to subsequent events. These events include the appellant's acknowledgment of the suit, through the filing of a notice of appointment of advocate, and an application filed under certificate of urgency asking the court to vacate the earlier orders granting an injunction against her.

40. I have had occasion to determine this very issue in the case of Paulina Wanza Maingi v Diamond Trust Bank Limited & another [2015] eKLR, which holding was also accepted by Majanja J (RIP) in Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another [2021] eKLR, agreeing with Jeanne Gacheche J in Fredrick Kibet Chesire V Paymond W. Bomet [2006] eKLR- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply.

41. Majanja J elaborately put is as follows, in his ruling in the above cited case of Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another:

> " In Paulina Wanza Maingi (Supra) Aburili J held:-
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> "35. 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 the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, 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. Albeit the 1st defendant alleges that its key witnesses left employment and that it shall be prejudiced by the delay, this court notes that the 1st defendant has not sought for dismissal of this suit for want of prosecution as is required under Order 17 rule 35 of the Civil Procedure

Rules. They have invoked very specific provisions of the law and it would be unfair and unjust if this court were to dismiss this suit for delay in its prosecution when no such application is before it for determination and or when the court has not heard the parties on a notice to show cause why the suit should not be dismissed for inaction. I am in total agreement with Honourable Jeanne Gacheche J (as she was then) in Fredrick Kibet Chesire V Paymond W. Bomet (supra) case (2006) e KLR- that the sole purposes of summons to enter appearance is to notify the defendant that a suit has been filed against him in a particular court, particulars of which are contained in the plaint, which should be served together with the said summons. The summons to enter appearance also serve as a notice to inform a defendant of the mode of action to take and the time within which he should enter appearance and file his defence. It also informs him of the consequences for failure to comply."

9. In reaching that outcome, the Hon. Judge (Aburili J) observed:-

> "42. As earlier stated, there are two schools of thought on this issue of whether failure to issue and serve summons to enter appearance is fatal to the plaintiff's case and having considered the circumstances of this case, I am not persuaded by the decisions relied on by the 1st defendant namely; Wairimu Mungai V Catherine Njambi Munya, Karandeep Singh Dhillon & Others V Nteppes Enterprises Ltd & Another, Tana Trading Limited V National Cereals & Produce Board; Anthony Wechuli Odwisa V Alfred Munyanganyi [supra], which are all decisions of this court hence none of them is binding on me and circumstances for each case are different. Although the rules are couched in mandatory terms, each case has to be decided on its own merits and circumstances vary. While in one case the court may proceed and dismiss the suit for want of summons, in another, the circumstances may dictate otherwise. As was held by Ringera J (as he then was) on issues of the mandatory or directory language used by the statutes and or rules, in Standard Chartered Bank Ltd V Lucton (K) Ltd HCC 462 of 1997 (unreported).
>
> "There appears to be a common belief by many in those courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word " shall" in a stature only signifies that the matter is prima facie mandatory . The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only."

10. <u>This Court identifies 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 1. 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</u>." [emphasis added]

42. In this case, the issue of whether the summons to enter appearance were served seems to have been raised quite late, as the appellant had already filed a notice of appointment of advocates and an application seeking to vacate interim orders issued by the court. The matter had also been listed multiple times, during which, both parties were ably represented by advocates.

43. W. Okwany J agreeing with the positions taken by this Court in the above cited cases and also citing Majanja J above had this to say in Flightsource International v Nation Media Group Limited; Family Bank Ltd (Interested Party) (Civil Appeal E003 of 2021) [2022] KEHC 11947 (KLR) (Commercial and Tax) (28 July 2022) (Judgment):

> " The suit herein was instituted on 18th February 2016. The 2nd respondent filed a notice of appointment of advocates on 20th February 2016 while the 1st respondent filed a notice of appointment of Advocates on 24th March 2016. The respondents participated in the application dated 18th February 2016 after which the suit was fixed for hearing. It is at this point that the 1st respondent filed the application dated 31st July 2019 to strike out the suit for having abated.
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> 16. I find that the respondents, having actively participated in the suit, were aware of the suit and that their conduct therefore precludes them from invoking the provisions for Order 5 of the Civil Procedure Rules. It is also noteworthy that the respondents have not demonstrated the prejudice that they will suffer if suit is allowed to proceed and if such prejudice cannot be cured by as award of costs."

44. I hold the view that the appellant is attempting to use procedural technicalities to defeat this suit and, in turn, deny the respondent justice. She also in my view, is not addressing the allegations that she was in breach of the injunctive court orders issued against her. This is unacceptable as it goes against the very purpose of the overriding objectives of the *Civil Procedure Act* and Rules, as well as Article 159(2)(d) of *the Constitution*, which mandates that justice be administered without undue regard to procedural technicalities. I say so because the appellant only raised this issue of the suit having abated for want of service of the summons to enter appearance, which summons, she has not demonstrated to this court that they were issued and signed, when it became apparent that she was being cited for contempt of court orders which barred her from entering the hospital and or damaging the properties of the hospital which her and the respondent jointly operated. To my mind, therefore, the appellant filed the application in bad faith.

45. In my humble view, to dismiss the respondent's suit under the given circumstances that I have outlined would be a grave injustice in this constitutional era, effectively denying the respondent his right to access justice, as guaranteed under Article 48 of *the Constitution*. It would also infringe upon his right to a fair hearing which is guaranteed under Article 50(1) of *the Constitution*. Courts are called upon to administer justice and not to perpetuate injustice, and I am not about to do so in this case.

46. Long before 2010, Ringera J had the occasion to progressively state as follows in matters of similar nature where one party insisted that the Rules were mandatory and that therefore there was no discretion as far as strict adherence thereto was concerned, The Standard Chartered Bank Ltd V Lucton (K) Ltd HCC 462 of 1997 (unreported):

> " There appears to be a common belief by many in those courts that the use of the word "shall" in a statute makes the provision under construction a mandatory one in all circumstances. That belief in my discernment of the law is a fallacious one. As I understand the canons of statutory interpretation, the use of the word " shall" in a stature only signifies that the matter is prima facie mandatory . The use of the word is not conclusive or decisive. It may be shown by a consideration of the object of the enactment and other factors that the word is used in a directory sense only."

47. *The Constitution* of Kenya requires courts, in the exercise of judicial authority derived from the people, to administer justice impartially, without regard to status or procedural technicalities. All persons are equal before the law, and so, I must consider the potential prejudice to either party if this suit were to be dismissed on such grounds.

48. Furthermore, prematurely terminating a suit and ousting the respondent party from the seat of justice should usually be a measure of last resort and in exceptional circumstances, not the ones described in this case. the court acknowledges the fact that removing a party from the seat of justice should.

49. Thus, although the rules cited are framed in mandatory terms, each case must be considered on its own facts, with the circumstances varying. While in some cases the court may dismiss a suit for lack of summons, in others, the specific circumstances may lead to a different conclusion. The latter position applies to this case.

50. Given the two competing positions, each backed by compelling authority from this court, I choose to adopt the reasoning in Standard Chartered Bank Ltd v. Lucton (K) Ltd (supra), where the Learned Judge drew guidance from the "principles of statutory interpretation" by G.P. Singh, a former Chief Justice of the Madhya Pradesh High Court in India, as stated on page 242:

> " The use of word "shall" raises a presumption that the particular provision is imperative; but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word "shall" has, therefore, been construed as merely directory."

51. Therefore, based on all the foregoing analysis, I find this appeal lacking in merit in all respects. It is hereby dismissed. The ruling of the Hon. E.A.Obina delivered on 24th May 2024 in Kisumu CM CC NO. E230 of 2023 dismissing the appellant/ defendant's preliminary objection is upheld.

52. Costs follow the event and to the successful party. However, considering the relationship between the appellant and the respondent as described in the proceedings, and as the main suit is yet to be heard on its merits in the lower court, I order that each party bear their own costs of the appeal.

53. The judgment to be uploaded and the lower court file be returned to the Chief Magistrate's Court at Kisumu for expeditious disposal of the dispute between the parties. The trial Magistrate to be supplied with copy of the judgment.

54. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI VIA MICROSOFT TEAMS THIS 19TH DAY OF FEBRUARY 2025

R. E. ABURILI

JUDGE