



**Keith & 3 others v Monari & 3 others (Civil Appeal E278 of 2020)
[2024] KEHC 11134 (KLR) (Civ) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
CIVIL APPEAL E278 OF 2020
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

**KENNETH HAMISH WOOLER KEITH 1ST APPELLANT
ASHIWI BHANDARI 2ND APPELLANT
NIGELVAUGHAN JEREMY 3RD APPELLANT
JULIUS WAKO 4TH APPELLANT**

AND

**EVANS MONARI 1ST RESPONDENT
ANTHONY NJOGU 2ND RESPONDENT
SEAN OMONDI 3RD RESPONDENT
NJAU MUKUHA 4TH RESPONDENT**

*(An Appeal from the Order of the High Court of Kenya at
Nairobi, Hon S Githogori, Ms (DR), issued on 19/03/2021)*

RULING

Introduction and Background

1. This interlocutory appeal arises from a suit filed in this court by the respondents, through a plaint dated 5/8/2020. The appellants contend that the said plaint and the summons to enter appearance were served upon them in the course of two days, specifically on 20/01/2021 and 21/01/2021. Although the summons were issued and sealed on 13/01/2021 as evident from their face, upon further enquiry



by the appellants, it became apparent that the only summons in the suit were those dated, issued and sealed on 27/11/2020.

2. The plaintiff confirms that the summons of 13/01/2021 were not in the court file nor was there any annotation on the court file that summons in respect of the main suit were issued on 13/01/2021. This position was confirmed by the Deputy Registrar on 2/02/2021 when the matter came up for case management.
3. For these reasons the appellants contend that the summons for the purposes of the main suit are the summons of 27/11/2020 which have never been collected for service upon the appellants. As such, it is the appellants case that the said suit had abetted by dint of the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules, 2010. On this basis the appellants filed the application dated 1/03/2021 on 2/03/2021 seeking to have the main suit marked as abated.
4. Contrary to the appellants' expectations that the matter would be heard by the Deputy Registrar at first instance, the said Deputy Registrar on 19/03/2021 issued an order directing that the application would be heard by a Judge of the High Court on 28/04/2021. It is this order (the impugned order) that is the subject of the appeal before this court. The appellants seek to set aside the said orders vide a Memorandum of Appeal dated 25/3/2021.

Analysis and determination

5. I have carefully considered the record of appeal, the submissions and authorities cited by the parties in support of their arguments. In my view, the grounds of appeal can be condensed into a single issue for determination which is whether the impugned orders made by the Deputy Registrar ought to be set aside.
6. In summary, the appellants contend that the impugned order represents an abdication of the Deputy Registrar's duty and that the order prejudiced the appellants' right to a fair hearing by denying them the opportunity to appeal at the High Court.
7. In response, the respondents note the delay caused by the application, which has lasted over two years due to the stay of proceedings that was issued so as to pave way for the determination of this appeal. They argue that Order 49 Rule 7 of the Civil Procedure Rules is not expressed in mandatory terms, and thus, the Deputy Registrar was not obligated to hear the application before her.
8. The respondents further assert that the Deputy Registrar acted within her rights by referring the matter to a Judge, as it involved the authenticity of court documents, a matter beyond the Deputy Registrar's power to strike out or expunge the summons.
9. The respondents also argue that the powers exercised by the Deputy Registrar are delegated and cannot deprive a Judge of jurisdiction over any judicial matter. They consider the appellants' argument that the Deputy Registrar's decision denied them two levels of appeal to be hypothetical and speculative.
10. It is not disputed that the application that led to the impugned order was brought under Order 5 Rule 1(6) of the Civil Procedure Rules which requires that:

“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.”
11. The jurisdiction of the Deputy Registrar to hear matters arising from Order 5 is provided for under Order 49 Rule 7(1)(b)(iii) as correctly pointed out by the parties.



12. Even though the language of the rule is not couched in mandatory terms, I believe that the norm, rather than the exception, is for the Deputy Registrar to exercise the jurisdiction as conferred. I say this because Rule 7(2) stipulates that an appeal from a Registrar's decision under the Orders mentioned in sub rule (1) shall be to a Judge in chambers. This provision is ideally intended to guarantee that any party dissatisfied with the Registrar's decision has the opportunity to appeal, thereby preserving the critical right to two levels of judicial scrutiny. To hold otherwise would be to undermine the purpose of the rule.
13. In this regard I would agree with the finding in *Peter Ngoge T/A P Ngoge & Associates V Ammu Investment Company Limited*, [2012] eKLR, which both sides have cited. The crux of that decision is that there must be a valid reason for deferring the matter to a Judge instead of hearing it at the Registrar level. No such reason has been demonstrated here.
14. One of the fundamental principles of justice is ensuring that every party is given a fair opportunity to present their case. By referring the matter to a Judge without first allowing the Deputy Registrar to exercise jurisdiction, the appellants were effectively deprived of an important procedural step. This could set a dangerous precedent where matters that should be resolved at the Registrar level are escalated unnecessarily, thereby bypassing crucial stages that guarantee fairness.
15. The respondent's argument that the Deputy Registrar was justified as she lacked authority to determine a matter that dealt with the authenticity of court documents and expunge the summons is speculative. This is because a cursory look at the record confirms that no such reason was given. In any case, this argument is unsubstantiated.
16. It should be emphasized that the power granted to Registrars under Order 49 Rule 7(1)(b) to hear and determine applications under Order 5 is broad and not limited to specific rules within Order 5. If such were the intention of the Rules Committee, nothing would have been easier than to delineate those limitations. The absence of such restrictions clearly indicates that the Registrar's jurisdiction under this rule is intended to be comprehensive, to consider all relevant matters within the scope of Order 5.
17. The respondents' further submission that the application is a mere technicality is, in my view, both unpersuasive and dismissive of the significant legal issues at hand. While it is indeed regrettable that this matter remains unresolved four years after the suit was filed, this delay cannot justify undermining the integrity of the judicial process by ignoring crucial procedural requirements. The respondents' suggestion to expedite proceedings by having this court entertain the application is without due consideration of the appellants' concerns and risks precipitating an unjust outcome.
18. The courts have repeatedly noted that procedural rules are not mere formalities but are designed to ensure fairness and due process for all parties involved. The question of the validity of the summons is not a trivial matter; it strikes at the very core of the appellants' right to be properly informed and to respond to the claims against them. The summons serve as the foundational notice that initiates the legal process, and any irregularity in their issuance or service can have far-reaching implications, potentially nullifying the entire suit.
19. Noting this, the application filed before the Deputy Registrar directly challenges the authenticity and procedural propriety of the summons, issues that could decisively influence the outcome of the case. I do agree with the appellants that the Deputy Registrar would be at a better position to evaluate the factual issues surrounding the issuance and service of the summons at the first instance, given their administrative role.
20. It would further ensure that the application is thoroughly considered, and uphold the parties' rights in the event of an appeal against the decision of the Deputy Registrar by either party.



21. Given these considerations, and recognizing that the validity of the summons may ultimately determine the outcome of the entire case, I believe it is crucial to proceed with caution. The application before the Deputy Registrar strikes at the core of this matter, and any rush to bypass essential procedural safeguards risks compromising the fair administration of justice.

Disposition

22. Accordingly, the appeal is allowed. The Order of the Deputy Registrar placing the appellant's Notice of Motion application dated 1/3/2021 before a Judge for hearing and determination is hereby set aside. The appellant's Notice of Motion dated 1/03/2021 is hereby referred back to a Deputy Registrar in the Division, other than Hon. Stephany Githogori for hearing and determination on priority basis. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

