



**Biopharma Limited v Rapat Freight Kenya Limited (Civil Appeal
E020 of 2022) [2024] KEHC 11999 (KLR) (Civ) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 11999 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E020 OF 2022

JM OMIDO, J

OCTOBER 4, 2024

BETWEEN

BIOPHARMA LIMITED APPELLANT

AND

RAPAT FREIGHT KENYA LIMITED RESPONDENT

*(Being an Appeal from the Ruling and Orders of Hon. E.M. Kagoni, Principal Magistrate
delivered on 3rd November, 2021 in Nairobi Milimani CMCC No. 6904 of 2018)*

JUDGMENT

1. The Appellant, Biopharma Limited has brought this appeal, being aggrieved by the ruling and order of the Chief Magistrate's Court (Hon. E.M. Kagoni, Principal Magistrate) delivered on 3rd November, 2021 in Nairobi Milimani CMCC No. 6904 of 2018, against the Respondent, Rapat Freight Kenya Limited.
2. The Appellant has presented the following grounds of appeal vide the Amended Memorandum of Appeal dated 22nd January, 2024:
 1. That the learned Magistrate erred both in law and in fact by striking out the suit on the basis that summons to enter appearance were not lodged alongside the plaint vide Order 5 Rule 1(3) which finding was not supported by evidence.
 2. That the learned Magistrate erred both in law and in fact by failing to appreciate that the Respondent did not prove the allegation that summons to enter appearance were not filed alongside the plaint.
 3. That the learned Magistrate erred both in law and in fact by ignoring the fact that the court filing fees receipt, a duplicate of which is in the court file, reflects that the Appellant paid



Ksh.70,600/- on filing suit which was the then maximum chargeable filing fees including charges for summons to enter appearance.

4. That the learned Magistrate erred both in law and in fact by failing to take judicial notice of the fact that prior to the e-filing system, the court receipt book printed each receipt in triplicate, one of which was issued to the Appellant, the other filed in the specific court file and the third retained on the receipt book.
5. That the learned Magistrate erred both in law and in fact by finding that the suit had abated, which finding has no legal basis.
6. That the learned Magistrate erred both in law and in fact by failing to appreciate that the provisions of the Civil Procedure Rules cited in the face of the application could not avail the remedy sought therein.
7. That the learned Magistrate erred both in law and in fact by failing to appreciate the uncontroverted evidence in the replying affidavit, particularly at paragraph 3, explaining what transpired between filing of suit and issuance of summons to enter appearance.
8. That the learned Magistrate erred both in law and in fact by failing to appreciate and take judicial notice of the fact that the processing and issuance of summons to enter appearance was the exclusive responsibility of the court which the Appellant had no control over.
9. That the learned Magistrate erred both in law and in fact by failing to at the very least inquire from the concerned court officers including the Executive Officer as to the veracity of the averments in the replying affidavit regarding court process for issuance of summons to enter appearance.
10. That the learned Magistrate erred both in law and in fact by failing to appreciate that the court could not have signed and issued summons to enter appearance on 30th November, 2020 if it was not satisfied as to the veracity of the Appellant's averments summarized in paragraph 3 of the replying affidavit.
11. That the learned Magistrate erred both in law and in fact by ignoring the fact that the suit could not possibly have abated under order 5 Rule 1(6) since there was no evidence of the existence of issuance of other summons to enter appearance (rather than those dated 30th November, 2020) that were supposedly not collected for service within 30 days.
12. That the learned Magistrate erred both in law and in fact by failing to appreciate that the application before it did not specifically seek to set aside or otherwise challenge validity of the summons to enter appearance issued on 30th November, 2020.
13. That the learned Magistrate erred both in law and in fact by failing to appreciate that summons to enter appearance are not the life of a suit but rather a means of service to the suit to the Defendant(s).
14. That the learned Magistrate erred both in law and in fact by failing to appreciate the overriding objectives of the *Civil Procedure Act* and Rules made thereunder as codified in Section 1A and 1B of the *Civil Procedure Act* thus occasioning the Appellant grave injustice.
15. That the learned Magistrate erred both in law and in fact by failing to apply and consider the constitutional dictates in Article 159(2)(d) requiring that justice be administered without undue regard to procedural technicalities.



16. That the learned Magistrate erred both in law and in fact by arriving at a manifestly unjust and unconstitutional finding that robs the Appellant of its right to be heard under Article 159(2) (d) of *the Constitution*.
3. This being the first appellate court, I am required under Section 78 of the *Civil Procedure Act* and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate’s Court and draw my conclusions while bearing in mind that I did not see or hear the witnesses when they testified.
4. In *Sielle*, Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
5. The matter before the lower court was a liquidated claim arising out of alleged breach of contract in which the Appellant (the Plaintiff in the lower court), vide a plaint dated 3rd July, 2018 and filed on 31st July, 2018 sought for judgement against the Respondent (the Defendant) in the sum of Ksh.2,374,296/- together with costs of the suit and interest at court rates.
6. By an application by Motion on Notice dated 1st April, 2021, the Respondent moved the lower court under Order 2 Rule 15(1)(b) & (d), Order 5 Rule 1(3), (5) & (6) and Order 41 Rule 1 of the Civil Procedure Rules in which the following substantive prayers were sought:
 - a. That the Plaintiff’s suit be struck out.
 - b. That the costs of this application and the suit be borne by the Plaintiff.
7. The Respondent’s contested application proceeded before the trial court and was determined vide the ruling that was rendered on 3rd November, 2021 in which the trial court found in favour of the Respondent and proceeded to allow the application resulting in the suit being struck out with costs.
8. It is the above ruling that gives rise to this appeal. The Appellant, through the instant appeal proposes that the appeal be allowed and the ruling and order of the lower court be set aside and be substituted with an order dismissing the application dated 1st April, 2021.
9. From the perusal of the lower court file, particularly the Motion dated 1st April, 2021, the grounds upon which the Respondent proffered its application were as follows:
 - a. That the suit had abated.
 - b. That the Appellant was irregularly before the court.
 - c. That the Appellant failed to file the suit together with the summons to enter appearance.
 - d. That the Respondent was served with summons to enter appearance more than 2 years after the filing of the suit and when the suit had abated.
 - e. That it was in the interest of justice, fairness and expediency that the orders sought be granted.



10. The Respondent supported the application by filing an affidavit that was sworn on 1st April, 2021 by Patroba Omundi, who described himself therein as the Respondent's Airfreight Imports Manager.
11. The said deponent expounded in his affidavit the above grounds. In particular, he set out the following:
 - a. That the suit was filed on 31st July, 2018.
 - b. That summons to enter appearance were issued on 30th November, 2020, more than 2 years after the filing of the suit.
 - c. That service of summons to enter appearance upon the Respondent was effected on 7th December, 2020, more than 2 years after the filing of the suit.
 - d. That as a result of the foregoing reasons, the Appellant's suit was irregularly before the trial court as the Appellant failed to file the suit together with the summons to enter appearance and further that the same abated as the summons to enter appearance were served more than 2 years after the filing of the suit.
12. The Appellant resisted the Respondent's Motion and to that end filed a replying affidavit sworn on 3rd September, 2021 by Wambui Wahome, the Appellant's Advocate, through which she presented the position on the matter as follows:
 - a. That summons to enter appearance were presented to the court together with the Plaint and other documents for filing on 31st July, 2018.
 - b. That when the Advocate's representative went to the registry to collect the endorsed and/or executed summons from the registry one week after filing, the same were missing at the registry. The copy in the court file had not been endorsed.
 - c. That soon thereafter, the court file and the summons went missing from the court registry until sometime in January, 2019 when the Appellant's Advocates were informed from the court registry that the file had been located.
 - d. That as the original set of summons were missing from the court file, the Appellant prepared a fresh set and presented the same to the registry on 21st February, 2019 for execution.
 - e. That once again, the court file went missing and the summons could not be endorsed.
 - f. That sometimes in February, 2020, the court registry informed the Appellant's Advocates that the file had been transferred to the Commercial sub-registry owing to the nature of the suit.
 - g. That as a result the Covid-19 pandemic following which court operations were downscaled in March 2020, the Appellants' Advocates could not access the court registry to follow up on the matter.
 - h. That ultimately, the summons which were lodged in 2019 were issued after endorsement on 30th November, 2020 following which the Respondent was served on 7th December, 2020, in line with Order 5 Rule 1(6) of the Civil Procedure Rules and that as such, the suit had not abated.
 - i. That the Respondent failed to enter appearance and file its defence within the prescribed time and upon a formal request for judgement in default was made by the Appellant but was withdrawn on the request of the Appellant.



13. Before determining the application dated 1st April, 2021, the learned trial Magistrate set out the issues that were in dispute as arising out of the application which were: whether the issuance of summons, more than two years after filing the suit is justified; and, whether the suit should be struck out the suit was filed out of time.
14. In respect of the first issue, the learned trial Magistrate was persuaded to rule that the issuance of summons, more than two years after filing the suit was not justified. With regard to the second issue, the trial court reached the finding that the suit had abated and that the fate that should befall the suit was for it to be struck out and the court proceeded to strike it out.
15. Now to this appeal, directions were issued that the same proceeds by way of written submissions and the parties complied with those directions. I have perused and considered the record of the lower court, the present record and the rival submissions and I discern the issues for determination in the present appeal to be in precis, as follows:
 - a. Whether the trial court erred in reaching the finding that the summons to enter appearance were issued more than two years after the filing of the suit before the lower court.
 - b. Whether the trial court erred in striking out the suit.
16. In the present case, the Appellant's claims before the lower court was that on 31st July, 2018, it took out and presented to the court registry the summons to enter appearance for endorsement, together with the plaint but learnt about a week later that the same had gone missing from the summons folder at the court registry. The copies in the court file had by then not been endorsed.
17. That upon following up on the matter one week later, the Appellant's advocates were this time round informed that the court file had gone missing. A search for the file did not yield any positive results until sometimes in January, 2019 when the Appellant's Advocates were informed that the file had been traced, but with the copies of the summons missing, following which the Appellant's Advocates prepared a new set of summons which they presented for endorsement.
18. That once again, the court file went missing until sometimes in February, 2020 when it was traced and the Appellant's Advocates informed that the file had been transferred to the Commercial Division. That what then followed was that in March, 2020, court operations were scaled down due to the Covid-19 pandemic and the Advocates could not access the registry.
19. The summons were eventually endorsed on 30th November, 2020 and served upon the Respondent on 7th December, 2020.
20. The Appellant urged then that the suit did not abate and that the delay, if any, was not occasioned by the Appellant as the same was attributed to the missing summons, the disappearance on two occasions of the court file and the scaling down of court operations as a result of the Covid-19 pandemic.
21. Having perused the record, what is not in dispute is that the summons that were served upon the Respondent on 7th December, 2020 were issued or endorsed on 30th November, 2020, a period of 2 years and 4 months after the filing of the suit on 31st July, 2018.
22. What does the law relating to summons to enter appearance provide? Let us read it.
Order 5 Rule 1 of the Civil Procedure Rules.
Issue of summons



- (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 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, failing which the suit shall abate.
23. Through the above provision, the language used in these rules (the word “shall”) suggests that the provisions of Order 5 Rule 1 of the Civil Procedure Rules are mandatory. But then, it has been held in *Standard Chartered Bank Limited v Lucton (K) Limited HCC 462 of 1997 (unreported)* that:
- “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 statute 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”.
24. In *Fredrick Kibet Chesire v Paymond W. Bomet [2006] eKLR* it was the court’s holding that the sole purpose of issuance 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 statement of defence. It also informs him of the consequences for failure to comply.
25. In the present matter, the Appellant stated in the lower court that there was compliance with Rule 1(5) of Order 5 in that the summons were presented together with the plaint. The Appellant proceeded to state that the summons and the court file went missing on occasions as highlighted above. The Appellant’s position was resisted by the Respondent who took the position that the rule was not complied with.
26. In civil matters, the burden of proof lies on the party that alleges a fact.
27. Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.



28. Section 108 of the same statute is to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while Section 109 thereof states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
29. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal (see *Alice Wanjiru Ruhiu v Messiac Assembly of Yahweh* [2021] eKLR and *Mark Otanga Otiende v Dennis Oduor Aduol* [2021] eKLR).
30. A look at the affidavit that was relied on by the Appellant to oppose the Respondents application that resulted in the ruling and orders from which this appeal emanates informs this court that other than just alleging that the file and summons went missing on the stated occasions, the Appellant did not provide any evidentiary material to substantiate that claim.
31. It would ordinarily be expected that there would be an exchange of correspondence between the Appellant's Counsel and the court in a situation where summons and the court record go missing severally. Consequently, it would have been prudent for the Appellant to provide such correspondence evidence to prove the fact that indeed the summons and court file went missing on the occasions alleged.
32. Without such evidence, I cannot fault the trial court for reaching the finding that the Appellant did not provide evidence of its allegations on the disappearance of summons and the file. In fact, the trial court went on to note that even the payment/filing receipt would have aptly sustained the Appellant's claims as the same would have shown that summons were paid for together with the plaint.
33. I agree with the trial court that there is no evidence provided to show that there were any other previous summons presented by the Appellant, other than those issued or endorsed on 30th November, 2020 a period of 2 years and 4 months after the suit was filed.
34. It is therefore the persuasion of this court that the only summons to enter appearance that were taken out by the Appellant, in the absence of evidence to prove otherwise, are those that were issued and/or endorsed on 30th November, 2020 and that the same were taken out 2 years and 4 months after the filing of the suit (on 31st July, 2018) and served upon the Respondent on 7th December, 2020. That resolves the first issue.
35. With regard to the second issue, we have seen above that under Order 5 Rule 1(5) the law places an obligation upon the Plaintiff and/or his Advocate to prepare summons and file the same together with the plaint. What course then should a matter take where the rule is not complied with and there is a substantive period that lapses (in this case 2 years and 4 months) before summons are taken out?
36. Although the provisions of Order 5 are set out in a comprehensive manner, I note that there is no penalty provided under the law for non-compliance with Order 5 Rule 1(5). In particular, the law does not state that the suit abates where summons are not prepared by the plaintiff or his advocate and filed with the plaint. In the circumstances, I opine that the correct position for me to take is to ascribe the meaning of the word "shall" in the manner held in *Standard Chartered Bank Ltd v Lucton* (supra) that the word is in this case directory, rather than mandatory.
37. Although there was delay on the part of the Appellant to take out summons, which were ultimately served upon the Respondent, I take the view that as no prejudice has been shown to have been occasioned against the Respondent, the overriding objectives of the *Civil Procedure Act* and Rules as



well as Article 159(2)(d) of *the Constitution* which provides that justice shall be administered without undue regard to procedural technicalities, cure the delay.

38. It is to be noted that under Order 5 Rule 2(1), summons, once issued, remain valid in the first instance for twelve months beginning with the date of issue. In this case, as I have reached a finding that summons were first issued on 30th, November, 2020, the same had a validity lifespan until 29th November, 2021. The suit had therefore not abated as the summons were valid at the time that the Respondent was served (on 7th December, 2020) and that in any event, the Respondent entered appearance without protestations and even participated actively in the suit.
39. I therefore reach the findings that the learned trial Magistrate fell into error by reaching the decision that the issuance of summons after the Plaintiff had been filed and service thereof after two years and four months after the filing of the suit, with the result that that there was non-compliance with Order 5 Rule 1(5), resulted in the suit abating as there is no such penalty provided by the rules for non-compliance.
40. Being of the foregoing inclinations, I find that the appeal herein has merit and proceed to allow it. I set aside the trial court's order striking out the suit issued on 3rd November, 2021 and substitute the same with an order dismissing the Notice of Motion dated 1st April, 2021 with costs to the Appellant (the Plaintiff in the lower court matter).
41. I further order that the lower court file be placed before the Head of Station/Chief Magistrate, Milimani Commercial Courts on 28th October, 2024 for purposes of allocating the file to another Magistrate, other than Hon. Kagoni, so that the matter proceeds apace.
42. The Respondent shall bear the costs of this appeal, as dictated by Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 4TH DAY OF OCTOBER, 2024.

JOE M. OMIDO

JUDGE

For the Appellant: Ms. Wahome.

For the Respondent: Mr. Kiprono.

Court Assistant: Ms. Njoroge.

