



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kenya National Highway Authority v Kariuki & 8 others (Civil Appeal  
130 of 2020) [2023] KEHC 17352 (KLR) (Civ) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17352 (KLR)

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

**CIVIL**

**CIVIL APPEAL 130 OF 2020**

**AA VISRAM, J**

**MAY 11, 2023**

**BETWEEN**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... APPELLANT**

**AND**

**TITUS GATTITU KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK MUNYINGI MBOGO ..... 2<sup>ND</sup> RESPONDENT**

**MARY KWAMBOKA ..... 3<sup>RD</sup> RESPONDENT**

**KEGA ONYURO ..... 4<sup>TH</sup> RESPONDENT**

**PITALIS OPONDO ..... 5<sup>TH</sup> RESPONDENT**

**MARGARET WAMBUI ..... 6<sup>TH</sup> RESPONDENT**

**LUCY NYAMBURA ..... 7<sup>TH</sup> RESPONDENT**

**JULIUS KANJUYU ..... 8<sup>TH</sup> RESPONDENT**

**PAUL RONO ..... 9<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Ruling delivered on 24<sup>th</sup> February,  
2020 by Hon. L. L. Gicheha CM in CMCC No. 4020 of 2018)*

**JUDGMENT**

1. In a ruling dated and delivered on 24<sup>th</sup> February, 2020, the Chief Magistrate's Court at Milimani declined to declare that the Plaintiff's suit had abated for failure to serve Summons to Enter Appearance and have the suit struck out with costs to the Appellant (Respondents in the lower court).



2. The lower court found that although the Appellant had not been served with summons, the Respondents (Plaintiffs in the lower court) had made sufficient efforts to extract the summons, but had not been able to do so through no fault of their own. Further, the lower court found that the Appellant had been aware of the proceedings against it, and had appointed its advocates on record to duly represent it in various interlocutory applications arising out of the suit. Finally, the court was of the opinion that no prejudice had been occasioned to the Appellant arising out of the Respondents' failure as stated above. Accordingly, the lower court concluded that it was in the interests of justice to disallow the Appellant's application and allow the suit to be determined on its merits.
3. The Appellant being dissatisfied with the said ruling of the lower court preferred this appeal. The Memorandum of Appeal raises four grounds summarized as follows:-
  - a. The Learned Trial Magistrate erred in law and in fact in holding that the suit had not abated by operation of law;
  - b. The Learned Trial Magistrate erred and misdirected herself by finding that failure to extract and serve Summons to Enter Appearance was a technicality capable of being remedied by Article 159(2) (d) of the *Constitution*;
  - c. The Learned Trial Magistrate erred and misdirected herself by finding that by filing a Notice of Appointment, the Appellant had waived its right to challenge the Respondents' said failure to extract and serve the said Summons;
  - d. The Learned Trial Magistrate failed to properly evaluate the facts of the case as set out in the Appellant's application and supporting affidavits.
4. The appeal was disposed of by way of written submissions, duly filed by the Appellant only.
5. In relation to the first ground, the Appellant relied on the decision of the High Court in *Juja Coffee Exporters Limited v National Bank of Kenya Limited & 3 others* [2018] eKLR, where the court stated as follows:-

“I consider a summons to enter appearance to be an integral part of the proceedings and pleadings for it is the issuance and service of summons that is the ultimate accelerator and conductor of how fast the defendant moves to file own pleadings with serious repercussions and consequence in the event of failure to act within the timelines commanded by the summons.

- [1] Where no summons to enter appearance are lodged, issued and served, the court has no inherent power to save the suit.
- [2] Where there being no summons issued due to non-compliance with Order 5 Rule 1(5) there is no obligation upon the defendant to enter appearance and file defence. One may even say that before summons are issued the suit remains yet to the property instructed.
- [3] I say that summons to enter appearance are not mere decoration or unmerited disturbance to the plaintiffs. They are very important for the matter to be moved forward, particularly in this era of active case management and the constitutional dictate that court disputes be handled expeditiously for justice delayed is justice denied.



For this matter, the default by the plaintiff to prepare and lodge summons have invited the operation of Order 5 Rule 1(6). Summons have not been issued some 41 days after the suit was filed. The only reason the same have not been issued and served is the plaintiff's default. No plausible reason has been advanced to merit excuse for the default. It can only be said that the plaintiff may be content with the fact that it enjoys some interim orders issued by the court. To remove it from that conformant it must be reminded that failure to comply with the law and court orders invite sanctions. The sanctions provided for this matter by the law is that the suit has abated.”

6. Further to the above, the Appellants relied on the decision of the High Court in *Lee Mwatbi Kimani v National Social Security Fund & another* [2014] eKLR where that court cited the words of my sister Hon. Justice Gacheche L in the following terms:-

“The guidelines in this country are very well laid down in the aforementioned Rule (referring to order 5 Rule 2 of the *Civil Procedure Rules*) and in my mind, our legal provisions are very clear in that unless summons are renewed within the first 12 months, they expire. A party who does not seek to have the validity of his summons extended within the first twelve months does so at his peril, and it is my humble opinion no court would have discretion to extend what is no longer alive”.

7. In relation to the second ground, the Appellants cited the decisions of the Court of Appeal in *Charles Wanjohi Watbuku v Gitbinji Ngure & another* [2016] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR and the decision of the Supreme Court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR in support of its submission by and large that timelines are not technicalities of procedure to be accommodated under Article 159 of the Constitution.

8. Finally, in relation to the final grounds, the Appellants submitted that to date, it has never been served with a Summons to Enter Appearance, and neither has it filed a Memorandum of Appearance or Statement of Defence. Further, that filing its Notice of Appointment in no way relinquished its right to challenge the Respondents' failure as stated above.

9. I have considered the applicable law and the relevant facts to the present matter.

10. Order 5, rules (1) and (6) read as follows:

- (1) When a suit has been filed, summons shall issue to the defendant ordering him to appear within the time specified therein.
- (6) Every summons, except where the court is to effect service, shall be collected for service within 30 days of issue, failing which the suit shall abate.

11. Further to the above, on duration and renewal of summons, Order 5, rule 2 reads as follows:

- (1) A summons (other than a concurrent summons) shall be valid in the first instance for 12 months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of 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.



- (3) Where the validity of a summons has been extended under sub-rule (2) before it may be served, it shall be marked with an official stamp showing the period for which its validity has been extended.
  - (4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.
  - (5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.
  - (6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.
  - (7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons.
12. Order 5 is clear beyond peradventure. It stipulates the period of validity of the summons; provides for its renewal; and outlines the consequences for non-renewal. Sub-rule (7) gives the court discretion to dismiss the suit where no application to renew the summons has been made. Here, by its own admission the Respondent has never extracted the Summons to Enter Appearance or served on the Appellant with the same to date.
  13. Considering the provisions of Order 5 together with the decisions in *Juja Coffee supra* and *Lee Mwathi Kimani supra* as set out above, I am persuaded that not only did the suit abate, but also that there is no longer anything left to extend or renew in present circumstances because the summons has since expired.
  14. As regards the question of whether or not, the Notice of Appointment cured or waived the Appellant's right to challenge, in short, I do not think so. The Appellant had no option but to appoint an advocate to represent it in the various interlocutory applications. This action did not absolve the Respondents of their duty to serve the summons in accordance with the *Civil Procedure Rules*. Further, I am guided by the decision of the Court of Appeal in *Udaykumar Chandulal Rajani & 3 Others v Charles Thaiti* [1997] eKLR where the court stated as follows:-
 

“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the *Civil Procedure Act* cannot cure... Neither did the entry of appearance by the defendants revive the summons which had expired..” (emphasis my own)
  15. It is therefore clear to me that beyond filing a Notice of Appointment, even entry of appearance after a summons has expired is a nullity. A Notice of Appointment therefore has no bearing on the provision of Order 5 in the present circumstances.
  16. Finally, I am satisfied that the Magistrate misapprehended the applicability of Article 159 of the *Constitution* to the substantive timelines provided in Order 5 of the Civil Procedure Rules. I do not think the lower court was correct in its interpretation that the said provisions may be construed as 'technicalities' and curable under Article 159.



17. To construe substantive provisions under such a broad -based category of ‘technicalities’ would defeat the purpose of Order 5. In this regard, the Court of Appeal has already articulated with finesse, the consequence of such an interpretation in its decision in Nicholas Salat (*supra*), where the court stated as follows:-

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned”

18. Based on the reasons above, I find and hold that the Appellant’s appeal is with merit. The orders of this court are as follows:

- a. The Ruling of the Hon. L.L. Gicheha (Mrs) Chief Magistrate delivered on 24<sup>th</sup> February, 2020 in CMCC No. 4020 of 2018 at Milimani Commercial Courts is hereby set aside.
- b. The Appellant’s Application dated 2<sup>nd</sup> August, 2019 is allowed and the suit is hereby marked as having abated.
- c. Costs are awarded to the Appellant.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 11<sup>TH</sup> DAY OF MAY 2023.**

**ALEEM VISRAM**

**JUDGE**

**In the presence of;**

..... for the Appellant

..... for the Respondents

