Kimutai v Kuria (Civil Appeal E204 of 2023)
[2025] KEHC 13836 (KLR) (Civ) (3 October 2025) (Judgment)

Neutral citation: [2025] KEHC 13836 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E204 OF 2023

WM MUSYOKA, J

OCTOBER 3, 2025

BETWEEN

HILLARY BKOIN KIMUTAI .... APPELLANT

AND

DAVID KURIA .... RESPONDENT

(An appeal arising from the ruling and order of Hon. LB Koech (Mrs.), Principal Magistrate, PM, delivered on 25th August 2022, in Nairobi CMCCC No. 2686 of 2016)

JUDGMENT

1. The suit, at the primary court, was initiated by the appellant, against the respondent, for special damages, with respect to damage alleged wrought on his motor vehicle, registration mark and number KBS 393L, which had been in collision with another, owned by the respondent. There were allegations of negligence on the part of the respondent, or the driver of his vehicle. The amount claimed was in respect of repair costs, and allied expenses.

2. In response to the claim, the respondent filed a defence, denying liability, and attributing negligence on the appellant, for either wholly causing the collision, or substantially contributing to it.

3. No formal hearing on the main suit was conducted in the matter. The issue herein arises from an interlocutory order, made in a ruling delivered on 25th August 2022, founded on a preliminary objection, dated 7th February 2022, that the suit had been filed outside the 3 years allowed by section 4(2) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya. The trial court did not uphold the preliminary objection, on the finding and holding that the suit had been filed within the permitted limitation period, but it found and held that the summons to enter appearance had not been collected within the 30 days allowed by Order 5 Rule 2 of the Civil Procedure Rules, which was ruled to be mandatory, and it was concluded that the suit had abated on that account.

4. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 14th March 2023, revolve around the trial court addressing matters that were outside the scope of the preliminary objection dated 7th February 2022; the trial court erring in finding that the suit had abated on account of the appellant failing to collect the summons to enter appearance within the period required in law for that collection; the trial court failing to afford an opportunity to the partis to address it on that issue; among others.

5. Directions, on the disposal of the appeal, were given, on 6th February 2025, for canvassing by way of written submissions.

6. The matter was initially placed before me on 5th May 2025, during service week, for hearing, by which date none of the parties had filed their written submissions. I gave them time to do so. The file was placed before the Deputy Registrar, on 29th May 2025. Both sides indicated that they had filed written submissions. The file was thereafter forwarded to me, for judgement writing, but I do not see copies of the written submissions allegedly filed.

7. Whatever the case. The issue for determination, in the appeal, is whether the trial court properly exercised discretion when it ruled, on 25th August 2025, that the appeal had abated, given that that issue was not raised in the preliminary objection dated 7th February 2022.

8. The original trial court records were not availed, and I only have the material in the record of appeal dated 6th September 2023. I have no way of satisfying myself that the said record truly reflects or represents what transpired at the trial court. What I deduce, from that record, is that the ruling of 25th August 2022, was not attuned or aligned to the proceedings. The proceedings that preceded the said ruling, conducted between 18th October 2019 and 11th July 2022, related to the application dated 17th October 2019, and not the preliminary objection dated 7th February 2022.

9. Yet, the ruling of 25th August 2022 was predicated on the said preliminary objection of 7th February 2022, and it made no mention of the application dated 17th October 2019. The trial court did not consider the process for which it had conducted proceedings between 18th October 2019 and 11th July 2022, but another process altogether, in respect of which directions had not been taken, for its disposal. Clearly, the ruling of 25th August 2022 was not related to the business that was conducted by the trial court between 18th October 2019 and 11th July 2022. There would be merit in the argument that the trial court considered material and matter that did not relate to what it was in fact supposed to be handling.

10. Even if the trial court was entitled to consider the preliminary objection dated 7th February 2022, in that ruling, which I do not believe it should have, given the proceedings recorded between 18th October 2019 and 11th July 2022, the issue of Order 5 Rule 2 of the Civil Procedure Rules should not have been considered, as it was not raised in the said preliminary objection dated 7th February 2022. It was an issue that the trial court was not entitled to consider, with respect to an objection founded on the *Limitation of Actions Act*.

11. It could be that the reference to Order 5 Rule 2 of the Civil Procedure Rules, in the ruling of 25th August 2022, could have had something to do with the application dated 17th October 2019, which cannot be vouched, for there is no reference to that application at all in the said ruling. Summons to enter appearance had already been served on the respondent, who was named as 1st defendant in the suit. The application, dated 17th October 2019, related only to the summons meant for service on the person named in that suit as the 2nd defendant. The summons, whose validity was sought to be extended, was that relating to the 2nd defendant.

12. The respondent, upon being served with the summons, had entered appearance and filed defence. In the defence filed by the respondent, dated 22nd July 2020, he had not raised issue with the summons served upon him having been collected outside the 30 day-period envisaged in Order 5 Rule 2. The pleadings, with respect to the respondent/1st defendant had closed, and the trial court was not entitled to re-open the matter relating to the suit as between the appellant and the respondent. It should have limited itself to the matter between the appellant and the 2nd defendant.

13. If any suit was to abate, on the basis of Order 5 Rule 2, it could only be that between the appellant and the 2nd defendant, but not that between the respondent and the appellant. The summons, with respect to the respondent had been served, and had been acted upon, in terms of appearance being entered, and defence filed. Directions, with respect to compliance with Order 11 of the Civil Procedure Rules had been taken. The horse had bolted, with respect to the respondent, and there could be no going back, by ruling that the suit against him had abated. The matter, as to the abatement of the suit against the respondent, should have been handled on 6th October 2016, when directions, under Order 11, were taken.

14. Talking about Order 5 Rule 2, it will be noted that this provision is not in the *Civil Procedure Act*, Cap 21, Laws of Kenya, but the Civil Procedure Rules. It is a rule of procedure, which was not made by Parliament. It is not a substantive matter, therefore, but a mere technical rule of procedure, which Article 159(2) of *the Constitution* can override, as it was not made by an entity established and mandated by *the Constitution* to make law, for the purpose of promoting access to justice, and the need to have courts delve into the substance of the case, rather than getting mired in technicalities of procedure.

15. The ruling of 25th August 2022 was muddled up, and it could not possibly provide foundation or basis for the orders made in it. The trial court does not appear to have been clear on what process it was handling. The orders made in that ruling, declaring that the entire suit had abated, ought not to have been made.

16. Consequently, I find and hold that the appeal herein has merit. I hereby allow it. The resultant effect shall be that the order, made on 25th August 2022, rendering the suit at the trial court abated, is hereby vacated, and substituted with an order allowing the application, dated 17th October 2019, which should have been the subject of that ruling. Each party shall bear their own costs. Orders accordingly.

DELIVERED, VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 3RD DAY OF OCTOBER 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyne Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

Ms. Wambui, instructed by Julia Kariuki & Company, the Advocates for the appellant.

Mr. Otieno, instructed by Naragwi & Associates, the Advocates for the respondent.