

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT AT KERICHO

CAUSE NO. E008 OF 2023
(Before Hon. Lady Justice Anna Ngibuini
Mwaure)

GEORGE MOMANYI MORARA.....
.....CLAIMANT

VERSUS
MAHAN ROAD CONSTRUCTION
LIMITED.....RESPONDENT

RULING

Introduction

1. The Respondent filed a Notice of Preliminary Objection (P.O.) dated 18th July 2025 on the following grounds that:

1. This claim is fatally defective and has abated for failure by the Claimant to take out and serve Summons to Enter appearance for over two years from the date of filing, in violation of mandatory provisions of Order 5 of the Civil Procedure Rules and Rule 11 of the Employment and Labour Relations Court (Procedure) Rules (now repealed), and re-enacted as Rule 25 of the Employment and Labour Relations Court (Procedure) Rules 2024.

Claimant's replying affidavit

2. The Claimant opposed the P.O by filing a replying affidavit dated 15th August 2025.
3. The Claimant argues that the P.O. alleging the suit is fatally defective due to the delayed summons is unfounded.
4. The Claimant avers that the case originated from Kisii ELRC No. 14 of 2021, where summons were initially effected before the matter was transferred to Kericho ELRC.
5. The Claimant avers that service delays occurred due to the Respondents' relocation, but were resolved once their new address was found.
6. The Claimant contends that the preliminary objection involves disputed facts and thus cannot be resolved as a pure point of law, citing the case of ***Mukisa Biscuit V West End Distributors [1969] EA 696*** in support of that proposition.
7. Furthermore, the Claimant avers that abatement applies only in specific legal contexts, not procedural delays, and invokes ***Article 159(2)(d) of the Constitution*** to argue against dismissing the suit on

technical grounds. The Claimant seeks dismissal of the P.O with costs.

8. Parties canvassed the P.O by way of written submissions.

Respondent submissions

9. The Respondent submitted that the Notice of Preliminary Objection dated 18.07.2025 is merited, stating that the Claimant's failure to take out and serve Summons to Enter Appearance within six months of filing the claim on 27.04.2023, as required under **Rule 11 of the Employment and Labour Relations Court Procedure Rules 2016**. The use of "shall" in the rule denotes mandatory compliance. In the absence of a specific penalty under the ELRC Rules, the Respondent relies on **Order 5 Rule 1(6) of the Civil Procedure Rules**, which provides that failure to collect summons within 30 days of issue results in abatement of the suit. In **TNT Express Worldwide Kenya Ltd V Timothy Graeme Steel [2022] KECA 881 (KLR)**, the Court of Appeal stated that:

"In effect, the inference that can be drawn from the above cases is that courts have not shied away from applying relevant provisions of the Civil Procedure Act and rules, where

necessary, to employment disputes, which is in line with their duty to ensure that the ends of justice is served, and to prevent the making of orders in vain. So that where it is established that the ELRC rules and relations have come up short of provisions that would aid in the making of such orders, nothing precludes the ELRC from relying on available Civil Procedure provisions to address the existing gaps. Furthermore, since section 12 (3) of the Employment Act provides that where appropriate, the court can assess the case and make such orders as it deems fit, and rule 17 of the Employment and Labour Relations Court Procedure Rules empowers the court with ‘jurisdiction to address applications and issue interlocutory orders it does so without these provisions when coupled with relevant provisions of the Civil Procedure rules grant the court the necessary leeway to make orders that would ensure that the ends of justice served.’

10. Similarly, in ***Kaiga V Co-operative Bank of Kenya Ltd [2024] KEELRC 2218***, the court held that non-compliance with summons requirements

was fatal and led to abatement. This interpretation has since been codified in **Rule 25 of the ELRC Procedure Rules 2024**. The Claimant's assertion that the matter originated from Kisii MCELRC No. 14 of 2021 does not excuse the failure to comply with mandatory summons procedures in the current suit.

11. The Respondent submitted that the Chief Magistrate's Court lacked jurisdiction to transfer the Claimant's case to the ELRC, as only the High Court or ELRC itself, being courts of equal status, have such authority under **section 18 of the Civil Procedure Act**. This principle was affirmed in **TNT Express Worldwide Kenya Ltd V Timothy Graeme Steel(supra)** and **Baka V Harambee Cooperative Savings & Credit Society Ltd [2025] KEELRC 254**, where the court held as follows:

“Section 18 of the Civil Procedure Act provides for the power of the High Court to withdraw and transfer a case instituted in a subordinate court. It is notable that the ELRC Act and ELRC (Procedure) Rules 2024 does not expressly provide for the transfer of a suit instituted in a subordinate court. Thus, the question that comes to the fore is

whether the provisions of section 18 of the Civil Procedure Act apply in the circumstances...It should be appreciated that there are procedural aspects that have been left unaddressed by the ELRC Act and ELRC (Procedure) Rules. In this regard, this court holds the view that where there is lacuna in the ELRC Act and ELRC (Procedure) Rules, the Court should, where necessary and in the interest of justice, borrow from the relevant provisions of the Civil Procedure Act and Rules.”

12. The Respondent submitted that no transfer order from the ELRC exists, and that the Judiciary e-filing system shows no record of such a transfer, rendering the current suit jurisdictionally defective. In ***Kenya Engineering Workers Union v Rift Valley Engineering Works Ltd [2024] KEELRC 378***, the court held that unauthorized registry transfers are null and void. Furthermore, the Claimant’s own pleadings and verifying affidavit deny any prior proceedings, barring contradiction under the principle that parties are bound by their pleadings, as stated in ***D.E.N V P.N.N [2015] KECA 819*** in support of that proposition. The Respondent

also submitted that under **Order 5 Rule 1 of the Civil Procedure Rules** and **Diamond Trust Bank Kenya Ltd v Maina & Another [2023] KECA 712**, service of summons is a mandatory prerequisite for inviting a defence, and failure to prepare and serve them within 30 days results in abatement. Thus, the suit is procedurally defective and should be dismissed.

13. The Respondent submitted that the Claimant failed to comply with mandatory provisions under **Rule 11 of the ELRC Procedure Rules 2016** and **Order 5 of the Civil Procedure Rules 2010**, which require preparation, filing, and service of Summons to Enter Appearance within prescribed timelines. The Respondent submitted that no evidence exists in the Judiciary's e-filing portal to show that summons were ever extracted or served, and the Claimant cannot shift this responsibility to the court. The suit, having remained dormant for over two years without proper service, has abated by operation of law. The Respondent submitted that the Claimant's explanation referencing a prior Magistrate's Court case is unsupported by any transfer order and contradicted by his own pleadings and verifying affidavit.

14. On costs, the Respondent relied on **section 27 of the Civil Procedure Act** and relied on the cases of **Stanley Kaunza Nkarichia V Meru Teachers College [2016] KEHC 6806** and **Peter Muriuki Nure V Equity Bank Ltd [2018] KEHC 10038**, which affirm that costs follow the event unless the court finds good reason to depart.
15. Accordingly, the Respondent urged the court that the suit be struck out with costs awarded against the Claimant.

Claimants submissions

16. The Claimant relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969] EA 696** where Law JA stated:

“A preliminary objection consists of a point which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.”

Further, Sir Charles Newbold P added:

“A preliminary objection should not deal with disputed facts and should not itself

derive its foundation from factual information which stands to be tested by evidence.”

17. The Claimant contended that the matter was initially filed as Kisii CMELRC No. 14 of 2021, where summons were duly issued and the case had progressed significantly, with hearings concluded and only submissions pending. Upon transfer to Kericho ELRC, efforts to serve the Respondent were hindered due to difficulty in locating them, though service was eventually effected after persistent follow-ups. The Claimant argues that the alleged failure to issue summons in the current case involves factual disputes concerning procedural compliance and actions taken post-filing. As such, these issues require evidentiary examination and cannot be resolved as a preliminary point of law.

18. The Claimant relied on the case of ***Kenya Plantation & Agricultural Workers Union V James Finlay(K) Limited [2018] eKLR*** the court declined to strike out a claim on purely technical grounds, noting that ELRC procedure emphasizes substantive justice over rigid technicalities:

“The concept of 'abatement' in law generally arises in circumstances such as:

Death of a party without substitution within statutory timelines (Order 24 CPR); or lapse of statutory limitation periods.

Delay in taking out or serving summons under the CPR does not automatically result in abatement in the ELRC context. The proper course is for a party to apply to set aside expired summons or seek regularized of service.”

19. In ***Salat V Independent Electoral and Boundaries Commission & 7 others [2015] KESC 31 (KLR)***, the court stated as follows:
- “Article 159(2)(d) of the Constitution commands that:***
- “Justice shall be administrated without undue regard to procedural technicalities.”***
- Further, sections 1A and 1B of the Civil Procedure Act (overriding objective)-which guide all superior courts require the facilitation of the just, expeditious,***

proportionate, and affordable resolution of dispute.”

20. In ***DT Dobie & Company (Kenya) Ltd V Muchina [1982] KLR***, the court held that no suit ought to be summarily dismissed unless it is so hopeless that it plainly discloses no cause of action.
21. The Claimant submitted that the Respondent has not shown any actual harm resulting from the procedural delay, and therefore urges the court to prioritize substantive justice by allowing the claim to proceed and remedying any technical defects.
22. The Claimant urged this court to dismiss the P.O. with costs.

Analysis and determination

23. The court has considered the P.O together with the rival submissions by both parties. The issue for determination by this court is whether the P.O is merited.
24. The court relies on the case of ***Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd(supra)***, which was reiterated in the earlier part of the ruling, stating that a

preliminary objection should be purely on a point of law.

25. *Rule 25 of the Employment and Labour Relations Court (Procedure) Rules 2024*

provides that the Court shall issue a summons in the prescribed Form 2, which must be served by the claimant or their authorized representative through a qualified process server along with the statement of claim. Summons are initially valid for six months and may be extended by the Court, but not beyond twelve months from the date of issue. If this period lapses without service, the suit is deemed abated and may be struck out with notice. Parties responding to a suit must serve their pleadings within 14 days and file an affidavit of service in Form 3, accompanied by proof of receipt or an explanation if a signature is not obtained. Service via registered courier must include a certificate of mailing, and the Court may also effect service upon written request and payment of the required fee.

26. The Black's Law Dictionary, 9th Edition, defines abatement as follows:

“The suspension or defeat of a pending action for a reason unrelated to the merits of the claim.”

27. **Order 24 Rule 7 of the Civil Procedure Rules** governs the abatement of suits, particularly where a party dies, becomes bankrupt, or fails to take necessary steps to continue proceedings. A suit may abate if substitution of a deceased party is not made within the prescribed time, but courts retain discretion to revive such suits upon sufficient cause being shown.

28. The court reiterates the Supreme Court case of **Salat V Independent Electoral and Boundaries Commission & 7 others(supra)**, the Supreme Court held that Article 159(2)(d) of the Constitution commands that justice shall be administered without undue regard to procedural technicalities.

29. In **Njoroge V Fujo; Marie (Interested Party) [2024] KEHC 10948 (KLR)**, the court cited the case of **Investment Limited V G4S Security Services Limited (2015) eKLR** where the court held: -

“...This is well understood in the legal reality that dismissal of a suit without hearing it on merit is such draconian act comparable only to the proverbial “Sword of the Damocles”. But in reality should be checked against yet

another equally important constitutional demand that the case should be disposed of expeditiously, which is founded upon the old adage and now an express Constitutional Principle of Justice under Article 159 (2) of the Constitution of Kenya that justice delayed is justice denied. Here I am reminded that justice is to all the parties, not only to the Plaintiff...”

30. In this instant case, the court has perused the pleadings in this suit and noted that this suit was filed on 27th April 2023, and thereafter, the Deputy Registrar issued a notice to show cause dated 17th March 2025 and 15th April 2025 why the suit should not be dismissed for want of prosecution. Both parties stated that the matter was initially filed in Kisii MCELRC No. 14 of 2021 and later transferred to Kericho. The reason brought out is that the Respondent has relocated, and thus the Claimant had a difficult time serving the Respondent. The court, on the other hand, settled the matter to proceed for formal proof.
31. The case having been filed on 8th April 2023 the Claimant should have served summons within 6 months of issuance. ***Section 11 of the***

Employment and Labour Relations Procedure Rules provides as follows: -

“The Court shall issue summons in Form 2 as set out in the First Schedule.

Each claimant, the claimant’s advocate or other person authorized by the claimant shall, through a qualified process server, serve the summons issued under sub-rule (1) on the respondent together with the statement of claim.

A summons shall be valid, in the first instance, for a period of six months beginning on the date of its issue, and the Court may extend the validity if satisfied that it is just to do so.

For purposes of sub-rule (3), a summons shall not be extended if twelve months have lapsed from the date of its issue.

Where period of the validity of a summons has lapsed, the suit shall be deemed to have abated and the Court may strike it out with written notice to the claimant.”

32. What is surprising is that the Claimant filed this suit way in April 2023. There was no action taken and twice the court issued Notice to show why the suit should not be dismissed for want of prosecution on 7th March 2025 and on 15th April 2025.

The Claimant did not ask for leave to re-issue the summons as provided by the rules. It is clear he served the said summons which had been issued in April 2023. The said summons had now expired and the Claimant should have sought the leave of the court to apply for fresh summons.

33. In that case, the court is persuaded by the case of ***Kaiga -VS- Co-Operative Bank of Kenya Ltd (2024) KEELRC 2218*** Where the court held: -

“Clearly, the rules have no provision on the effect of failure by the Claimant to take out and serve summons. As the rules demand mandatory compliance, non-compliance is fatal. The court is persuaded by the Respondent’s counsel’s argument that in the absence of an express provision in the Employment and Labour Relations Court (Procedure) Rules, the court is free to apply the Civil Procedure Rules, 2010 to fill the lacuna. Under Order 5 Rule 1(6) of the Civil Procedure Rules, 2010, if summons are not collected

within thirty days of issue or notification, whichever is latter, the suit abates. In the instant suit, the Claimant has not availed any scintilla of evidence to prove that he not only took out summons but served the same on the Respondent and the Court found none on the e-filing portal. From the foregoing, and it is the finding of the court that the Claimant's suit abated."

34. The Claimant avers he transferred the case from Kisii to Kericho and in the process lost contact of the Respondent. As that as it may be, there is no evidence of such a transfer. Secondly, even if there was a transfer once the six months expired there was nothing to stop the Claimant from approaching the court to pray for re-issuance of the summons.
35. The court agrees that serving summons which were issued over two years ago automatically abates the suit. The court holds that the Preliminary objection dated 18th July 2025 is therefore merited. It is granted and hence the suit is struck out.
36. Each party will meet their respective costs.

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 28th Day of November, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and

the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE