

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC CASE NO. 101 OF 2019

**VIVO ENERGY KENYA LIMITED (Formerly known as
KENYA SHELL LIMITED)**
PLAINTIFF/RESPONDENT

VERSUS

GAMASIL COMPANY LIMITED
DEFENDANT/APPLICANT

RULING:

1. The Defendant/ Applicant filed the present Application vide the Notice of Motion dated 16th July, 2025 against the Plaintiff/Respondent, seeking the following orders: -
 - i. THAT the Honourable Court do hereby issue Witness Summons and Order the attendance of POLYCARP IGATHE, PAUL MUEMA and PETER MURUNGI for purposes of examination by the court.
 - ii. THAT the costs of this Application be in the cause.
2. The application is premised on the 6 grounds on its face and supported by the Affidavit of Gamaliel Lilan, one of the defendant's directors, sworn on even date.
3. He deponed that there is need to summon in court the said persons; Polycarp Igathe, Paul Muema and Peter Murungi for the purposes of examination as pertains to the veracity of the lease agreement that was entered into between the

parties, determining the circumstances surrounding the forfeiture of the lease as well as to answer the real questions in controversy between the parties.

4. He further averred that the court may at any time on its own motion or on the application of a party, order the attendance of a witness provided the said attendance shall be necessary for the purpose of determining the real questions or issues subject to costs.
5. He also stated that on advice by his advocate, that a witness summoned by the court may also be intended to fill any void identified in the course of the proceedings and which void if not filled, may undermine a just, objective and concise determination. He added that the onus is on the party making the application to lay basis for the relevance of the witness.
6. He therefore maintained that it was necessary for the court to summon the aforementioned witnesses as they are indispensable to the just and effectual determination of the suit and that the timelines set by the court for hearing will not be affected. He thus urged the court to allow the application.
7. The application was opposed. The plaintiff/respondent filed Grounds of Opposition dated 5th August, 2025. It was their

claim that the honourable court has no jurisdiction to grant the orders sought since the application was filed in violation of the mandatory requirements of Order 1 Rule 1 of the Civil Procedure Rules.

8. In the alternative and without prejudice to the foregoing, it was further their claim that the parties have since filed witness statements and the matter has a hearing date and further that no just and/or legal basis has been laid by the applicant to warrant the grant of the orders sought.
9. They further contended that the plaintiff has no obligation, in an adversarial system, to assist the defendant in proving its case and that the summons cannot be issued against the officers of a party to a suit compelling them to be witnesses for the adversary. He maintained that the proposed witnesses were at all material times employees of the plaintiff.
10. In conclusion, they deponed that the orders sought are an attack on the plaintiff's right to a fair trial. They dismissed the application as being an abuse of the court process and urged the court to dismiss the same with costs.
11. The application was canvassed by way of written submissions. The defendant/applicant filed their submissions dated 16.07.2025 while the plaintiff/respondent filed their

submissions dated 03.10.2025 together with authorities which I have read and duly considered.

Analysis and Determination:

12. I have carefully considered the grounds in the Notice of Motion Application, the Supporting Affidavit and Grounds of Opposition in response thereto as well as the rival submissions and the various authorities cited. Consequently, the following issues arise for determination: -
- i. Whether the application as filed is competent and the court is vested with the requisite jurisdiction to determine the same.*
 - ii. Whether the applicant has proved their application to warrant the grant of the orders sought*
 - iii. Who shall bear the costs of the Application.*

Whether the application as filed is competent and the court is vested with the requisite jurisdiction to determine the same;

13. The first issue touches on the jurisdiction of this court to entertain the application as filed and whether the application as filed is competent.
14. The plaintiff/applicant has raised the question of jurisdiction of this court on account of the violation of the mandatory requirements provided in Order 16 Rule 1 of the Civil Procedure Rules.

15. Counsel for the plaintiff/respondent submitted that the main suit was certified ready for hearing on 11.08.2021 over 4 years ago and has been scheduled for hearing. He therefore contended that the application had been filed outside the prescribed timelines under Order 16 Rule 1.
16. Consequently, he submitted that as a result of the said non-compliance with the prescribed mandatory timelines and further failure to obtain the requisite leave before the filing of the present application deprives this court of its jurisdiction to hear and determine the matter.
17. The defendant/applicant on its part did not comment on the issue of jurisdiction and the mandatory timelines envisaged under Order 16 Rule 1 or even submit on the same.
18. It is not in dispute that the present application has been brought pursuant to the provisions of Order 16 Rule 1 of the Civil Procedure Rules, which provides as follows: -

“1. At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.” (emphasis added)

19. From the above provision, it is evident that an application seeking to summon the attendance of a person as a witness should be made at any time before the trial conference and the matter being certified ready for hearing under Order 11 of the Civil Procedure Rules.
20. The plaintiff contends that the suit herein was certified ready for hearing on 11.08.2021. From a perusal of the court record, particularly the proceedings of 11.08.2021 before Hon. Onkoba, the Deputy Registrar ELC, it is clear that the court certified the matter ready for hearing having been satisfied that the defendants were duly served as per the Affidavit of Service dated 19.07.2021. I do therefore confirm that the averments made by the plaintiff/respondent is the actual position.
21. This matter having been certified ready for hearing on 11.08.2021, it is clear that the application herein was filed outside the prescribed timelines outlined under Order 16 Rule 1 and has thus been made in contravention of clear provisions of the law.
22. In **Joel Tirop Busienei vs David Randichi [2016] eKLR** the Court held: -
- “The timelines prescribed under this Court’s Rules are not ornamental, they are important if timely dispensation of justice is to be achieved. They provide predictability and level playing***

field. Where a party has been unable to comply with the same, he has to offer an appropriate explanation before the Court can allow extension of time...”

23. Be that as it may, Order 50 Rule 5 of the Civil Procedure Rules provides a remedy for such non-compliance with the strict and mandatory timelines, by allowing the extension of time and empowering the court to enlarge time. It states as follows: -

“6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

24. Having established that the present application was filed outside the prescribed timelines contrary to the provisions

the law and after the main suit had been certified ready for hearing and fixed for hearing, the question that therefore follows is whether the applicant sought leave of the court to enlarge time before filing the application.

25. The answer to the above is in the negative. From a perusal of both the court record/proceedings and the application herein, no such leave was ever sought by the applicant. There is no prayer in the body of the application seeking leave for the enlargement of time within which to seek the prayers under Order 16 Rule 1.
26. What then is the effect of such non-compliance with the prescribed timelines under Order 16 Rule 1 and the subsequent omission to seek the enlargement of time as provided under Order 50 Rule 5? Does the same go to the root of the jurisdiction of this court to entertain the application as filed?
27. The importance of jurisdiction cannot be overstated. Jurisdiction is what gives the court the authority and power to entertain a matter before it. It is therefore important to settle the question of jurisdiction in light of the foregoing circumstances.
28. R. E. Aburili J. in the case of **Republic v Retirement Benefits Authority & 3 others; Nyakwara (Exparte**

Applicant) [2025] KEHC 4246 (KLR) cited with authority the decision in the case of in the case of **Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers [2022] KEHC 15545 (KLR)** where the court observed as follows:-

“Where a proceeding or appeal like this particular one is filed out of the stipulated statutory timelines the court is deprived of jurisdiction to hear and determine the appeal on its merits. The appeal is stale. It is incompetent before this court and without jurisdiction, a court of law cannot make any one more step as its decision amounts to a nullity.

The Court went on to state at paragraph 71 that:-

These cases reinforce the principle that statutory timelines are mandatory and jurisdictional. Non-compliance with such timelines deprives the relevant tribunal or court of jurisdiction to hear and determine the matter.”

29. Thus, associating myself with the findings in the case above, it is apparent that the non-compliance by the applicant with the mandatory provisions under Order 16 Rule 1 deprived this court of the jurisdiction to entertain the application.

30. In essence therefore, this court is bereft of jurisdiction to entertain the application as filed and must therefore down its tools.

Who shall bear the Costs of the application;

31. The general rule is that costs follow the event unless the court directs otherwise.

32. In this case, having held that the present application was filed in contravention with clear provisions of the law as outlined under Order 16 Rule 1 of the Civil Procedure Rules and without leave of the court, it is the finding of this court that the plaintiff/respondent is entitled to the costs of defending the application.

Conclusion:

33. In view of the foregoing, it is the finding of this court that the Notice of Motion Application dated 16th July, 2025 is **not merited** and is hereby **struck out** with costs to the plaintiff/respondent.

34. It is so ordered.

DATED, SIGNED and virtually **DELIVERED** at **ELDORET** this **20th** day of **NOVEMBER, 2025.**

HON. C.K. YANO

ELC, JUDGE

Ruling delivered virtually in the presence of: -

Ms. Mwangi for Plaintiff.

Mr. Wesonga for Defendant.

Court Assistant - Laban

ORIGINAL