



**Nyang'ori & another v Uniservitate (Service-Learning, Africa
Hub-Tangaza University) & another (Civil Case E036 of 2025)
[2025] KEHC 17236 (KLR) (Commercial and Tax) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17236 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E036 OF 2025
PM MULWA, J
NOVEMBER 20, 2025**

BETWEEN

JOHN OTENYO NYANG'ORI 1ST PLAINTIFF

HENRY MUTUGI KAMUNDI 2ND PLAINTIFF

AND

**UNISERVITATE (SERVICE-LEARNING, AFRICA HUB-TANGAZA
UNIVERSITY) 1ST DEFENDANT**

**ARCHDIOCESE OF NAIROBI, KENYA REGISTERED TRUSTEES 2ND
DEFENDANT**

RULING

1. This ruling concerns the Notice of Motion dated 6th May 2025 by the 1st Defendant Applicant brought under Sections 1A and 1B of the *akn ke act 1924 3 Civil Procedure Act*, and Orders 2 Rule 15, 5 Rule 1, 6 Rule 1 and 7 Rule 1 of the Civil Procedure Rules. The Applicant seeks that the suit be struck out or dismissed with costs to be borne by the 1st and 2nd Plaintiffs Respondents.
2. The gist of the application is that the Plaintiffs have failed to take the fundamental and mandatory steps in the prosecution of the suit, in that summons to enter appearance have never been served upon the Defendants. The Applicant contends that under Order 5 Rule 2 of the Civil Procedure Rules, a summons must be prepared, signed and sealed by the Court without delay and in any event within thirty (30) days of filing the suit. The failure to issue and serve a valid summons, it is argued, renders the entire suit incompetent.



3. The application is supported by the affidavit of Dr. Judith Pete, sworn on 6th May 2025, reiterating the above grounds.
4. The Plaintiffs opposed the application through the replying affidavit of Henry Mutugi Kamundi sworn on 28th May 2025. He avers that the Applicant, having been served with the plaint and other pleadings, duly instructed counsel who filed a Notice of Appointment dated 7th March 2025 and attended Court on 27th March 2025. He contends that the application is an abuse of process and amounts to a mere procedural technicality, as the Applicant, by its conduct, waived the right to challenge non-service of summons.
5. The 3rd Defendant Respondent did not file any response but indicated support for the present application.
6. The application was canvassed by way of written submissions. The 1st Defendant filed submissions dated 19th June 2025, the Plaintiffs filed theirs dated 9th July 2025, while the 3rd Respondent's submissions are dated 8th July 2025.

Analysis and determination

7. Having considered the pleadings, affidavits, and written submissions filed by the parties, the only issue for determination is whether the application is merited.
8. The relevant provision is Order 5, rule 1(1), (2), (5) and (6) of the Civil Procedure Rules, 2010, which provide as follows;
 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. ...
 4. ...
 5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (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 or notification, whichever is later, failing which the suit shall abate.”
9. The purpose of a summons is to notify the Defendant of the existence of a suit and to require them to appear and respond. Without proper issuance and service of a summons, the Court cannot assume jurisdiction over the Defendant. (See Florence Ngosia Masieyi (suing for and on behalf of the estate of the late Fredrick Masieyi Shitonda v George Gitau Mungai & 2 others (2015) eKLR).
10. The Defendants contend that, in the absence of a properly issued summons, they are unable to file their defence. On the other hand, the Plaintiffs argue that the Applicant waived the right to challenge service by filing a Notice of Appointment and attending Court.
11. The Court in *Diamond Trust Bank (K) Ltd v Prime Aluminium Casements Ltd* [2021] eKLR observed that where a Defendant actively participates in proceedings beyond a mere appearance, they are deemed to have submitted to the jurisdiction of the Court, even if summons were irregularly served



or not served at all. In the present case, the record shows that the Defendants were served with the plaint, instructed counsel to file a Notice of Appointment dated 25th February 2025, and attended Court on 27th March 2025, prior to filing the current motion dated 6th May 2025.

10. The overriding objective under Sections 1A and 1B of the *akn ke act 1924 3 Civil Procedure Act* mandates that the Court facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. The Court must balance procedural compliance with substantive justice. As the Supreme Court stated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR:

“Deviations from procedural requirements which do not go to the jurisdiction of the Court or cause prejudice to the other party should not necessarily lead to the striking out of proceedings.”

12. In the present case, it is not disputed that summons were not issued and served within the period prescribed under Order 5 Rule 2. The suit was filed on 23rd January 2025. That omission constitutes a procedural lapse attributable to the Plaintiffs. However, it is evident that the 1st Defendant had notice of the suit, instructed counsel, and participated in Court proceedings. The failure to serve summons, while irregular, did not occasion prejudice warranting the striking out of the suit.

13. The Court of Appeal in *Unga Limited v Magina Limited* [2014] eKLR held that:

“A procedural irregularity in the issuance or service of summons is curable under Article 159(2)(d) of *akn ke act 2010 constitution the Constitution* and should not defeat the cause of justice, unless it goes to the root of jurisdiction.”

14. It is well settled that dismissal of a suit is a draconian measure which deprives a litigant of access to the seat of justice and should only be done in extreme circumstances. In the instant case, the Applicant, having instructed counsel and participated in proceedings, effectively cured the irregularity committed by the Plaintiffs, and no prejudice has been shown to have been suffered.

15. Accordingly, the Notice of Motion dated 6th May 2025 lacks merit and is hereby dismissed. Costs in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI

THIS 20TH DAY OF NOVEMBER 2025.

P.M. MULWA

JUDGE

In the presence of:

Ms. Kamau h b for Mr. Wanjala for Plaintiffs Respondents

Mr Ogwel for 1st Defendant & h b for Mr. Okwoma for 2nd Defendant

Court Assistant : Carlos

