



**Kathilu v Co-operative Bank of Kenya Limited & 2 others (Environment and Land Case E028 of 2023) [2025] KEELC 18409 (KLR) (16 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 18409 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE E028 OF 2023  
NA MATHEKA, J  
DECEMBER 16, 2025**

**BETWEEN**

**MATHEW MUSAU KATHILU ..... PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LONEVIEW DEVELOPERS LTD ..... 2<sup>ND</sup> DEFENDANT**

**SURAYA PROPERTY GROUP LTD ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application is dated 11<sup>th</sup> April 2025 and is brought under Order 5 Rule 2(1) and (2), Order 5 Rule 17, Order 51 Rule 1 and Order 50 Rule 6 of the Civil Procedure Rules, 2010, Section 3A of the [Civil Procedure Act](#) seeking the following orders;
  1. This application be certified urgent and heard ex-parte at the first instance.
  2. This Honourable Court be pleased to enlarge the time within which the summons to enter appearance ought to have been served upon the Defendants/Respondents.
  3. This Honourable Court be pleased to re-issue the summons to enter appearance for service upon the Defendants/Respondents.
  4. This Honourable Court be pleased to grant leave to the Plaintiff to serve the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants by substituted service by sending a copy to their registered last known post being P.O. Box No. 76069-00508, Nairobi.
  5. The costs of this application be provided for.
2. It is based on the grounds that the Plaintiff/Applicant instituted this suit through his former Advocates on record, Mogeni & Company Advocates. In August, 2024, the Applicant instructed his current



Advocates on record to take over the matter from the former Advocates on record and represent him. The current Advocates on record have perused the court record in view of submissions made in court on 5<sup>th</sup> February, 2025 by the Advocates on record for the 1<sup>st</sup> Defendant/Respondent that the 1<sup>st</sup> Defendant has never filed a Defence because it had never been served with summons to enter appearance and confirmed the assertion to be true. This Hon. Court issued summons to enter appearance on 28<sup>th</sup> September, 2023 which expired on or about 28<sup>th</sup> September, 2024. It is therefore, in the interest of justice that this Hon. Court re-issues the summons to enter appearance for service upon the Defendants/Respondents and extends the statutory timeline within which the summons to enter appearance should have been served. In the interest of justice, the Hon. Court may make an order that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be served with the Summons to enter appearance and Amended Plaintiff via registered post to their last known address because he Applicant is unable to trace any of their offices or email addresses. There will be no prejudice suffered by the Respondents as they will still have a chance to defend the Applicant's claim as contained in the Amended Plaintiff already served upon them.

3. The Respondent opposed the application stating that the summons have expired and hence there is nothing for this court to reissue. That under order 5 rule 1(6) of the civil procedure Rules there is no competent suit as the suit is deemed to have abated.
4. This court has considered the application and the submissions therein. The Applicant's motion is anchored on the provisions of Order 5 of the Civil Procedure Rules. Order 5 Rule 2 of the which provides as follows;
  - “(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve 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 twenty-four months from the issue of the original summons.”
5. The law is that summons to enter appearance shall be valid in the first instance for twelve months and the court has discretion to extend the validity of summons from time to time if satisfied it is just to do so. There seems to be two schools of thought on the question whether expired summons to enter appearance can be “revived” through an application such as the instant one.



6. In the case of *Karachi Walla Nairobi Ltd Vs Sanji Van Mukherjee* (2015) eK.L.R, Hon. F. Ochieng J. stated as follows:-

J. Kamau J. made the following observation when determining that application:-

Courts have wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitation have been given and to proceed to determine matters without undue regard to technicalities as provided in Article 159 (2) (d) of *the Constitution* of Kenya, 2010. However, Courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period, in particular, where there are express and clear provisions of the law regarding those time lines”. I am in complete agreement with pronouncement of my learned sister .....

7. Again in the case of *Elegant Colour Labs Nairobi Limited Vs Housing Finance Company (K) Ltd & 2 others* (2010) e K.L.R, Onyancha J. also faced with a similar conundrum held as follows;

It seems to me proper and correct to say that extension of summons aforesaid can only logically be made while the original summons is still valid. If the original summons is left to expire, in my view it would be legally impossible to extend it when it has so expired and therefore ceased to exist ..... the summons under the said order which have capacity to be extended by the Court on the application by the plaintiff, are the summons that are still valid. This means an application to extend can only be made within the duration of 12 months under Rule 1 fore cited, or under any duration allowed in the extension of original summons”.

8. In the case of *Unday Kumar Chandulal Rajani & 4 others Vs Charles Thaithi* (1997) e K.L.R, the Court of Appeal in a decision which is binding on this Court held as follows:-

Order V Rule 1 provides a comprehensive code for the duration and renewal of summons and therefore non-compliance with the procedural aspect cause by failure to renew the summons under this rule is such a fundamental defect in the proceedings that inherent powers of the Court under Section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service could not have in the circumstances re-issue fresh summons. The Court had no power to extend the validity of summons beyond 24 months, when in fact there were no valid summons in existence.....”

9. Be that as it may, on the purport of the above provision, the Court has previously in *Kale Foundation v Alpharma Limited & Polycarp Njenga Kamoche* (2021) KEHC 1090 (KLR) and *Patrick Mukiri Kabundu v Nation Media Group Limited* [2022] KEHC 2317 (KLR) recognized the existence of two schools of thought on the question whether expired summons to enter appearance can be “revived”. As stated in the two cited decisions, the court’s considered view is that the provisions of Order 5 Rule 2 CPR as read with other relevant provisions of the CPR and Section 95 of the CPA give wide discretion to the Court to extend the life of expired summons in proper cases.



10. Order 5 Rule 2 are couched in permissive terms so far as the time within which to apply is concerned and the only apparent time limitation in the Rule is found in subrule 7 which states that;

Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.”

11. This means that the suit does not become liable for dismissal after 12 months (which is the period of validity of original summons) but only after 24 months have lapsed since issuance of the original summons. In the case of Kale Foundation vs Alpharma Limited & Polycarp Njenga Kamoche (Supra) the court stated that;

And even then, the permissive phrase used is that the court “may without notice dismiss the suit”. Therefore, read together the rules appear to anticipate that a suit may well continue to subsist outside the 24 months since issuance of original summons, even where no application in terms of sub-rule 2 has been made. And that a plaintiff in such a case could potentially apply, subject to sub-rules 5 and 6 and the general rules on extension of time, for the extension of summons “and the court may extend the validity of the summons from time to time if satisfied it is just to do so.” In sum, the provisions give a wide discretion to the court.”

12. I find that the Court has power under Section 95 of the *Civil Procedure Act* and Order 50 Rule 1 of the Civil Procedure Rules to extend time for the doing of any act notwithstanding that the application for extension is made after the time for the doing of the act has lapsed. This court is persuaded that under these provisions, the life of expired summons can be extended in proper cases. In the instant case summons were issued on the 23<sup>rd</sup> September 2023 but the same were never served on the Defendants. This application is dated 11<sup>th</sup> April 2025 which is within the 24 months period. I find this application is merited and I grant it as prayed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY OF DECEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

