

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELCA NO. 1 OF 2024

CHARLES KIPKEMBOI CHERUIYOT..... APPELLANT

VERSUS

MASHINANI STAR LIMITED 1ST RESPONDENT

TESSY JERUTO RONOKIPYATOR 2ND RESPONDENT

JOYCE CHEPKOSKEI

SANG (Sued as the Administrator of the

Estate of Stephen Malakwen Sang).....3RD RESPONDENT

CHIEF LAND REGISTRAR.....4TH RESPONDENT

JAVAN TUITOEK.....5TH RESPONDENT

*(Being an appeal from the ruling delivered by Hon. K. I Orenge Principal
Magistrate (PM) on 29th March, 2023 in Nakuru CMCC No. 679 of 2021)*

JUDGMENT

1. This appeal arises from a ruling delivered on 29th March, 2023, in Nakuru CMCC ELC No. 679 OF 2021. The Appellant being aggrieved by the said ruling, filed a Memorandum of Appeal dated 12th April, 2023, and listed the following grounds:

1) THAT the Honourable Magistrate erred in law and fact in arriving at a decision that the Plaintiff's suit had abated for reasons that the Plaintiff did not extract summons.

2) THAT the Honourable Magistrate erred in law and in fact by reaching a finding that the Plaintiff's suit had abated on an issue of technicality, which could be cured by the court's inherent jurisdiction to make necessary orders for ends of justice to be met.

- 3) *THAT the trial Magistrate erred in law and in fact in making a finding whose effect was to unjustly enrich the respondent.*
- 4) *THAT the Honourable Magistrate erred in law and fact in failing to reach a finding that the purpose of summons is to notify the other parties of the existence of a suit and that all the Defendants were duly served with court pleadings and were well notified of the existence of the suit.*
- 5) *THAT the Honourable Magistrate erred in law and fact by failing to reach a finding that the 2nd and 3rd Defendant had fully participated in the suit and filed pleadings and could not therefore prove any prejudice suffered for reasons of non-service of summons.*
- 6) *THAT the Honourable Magistrate erred in law and in fact in failing to analyze, contextualize and appreciate the circumstances of the case and the application before him.*
- 7) *THAT the Honourable Magistrate erred in law and fact by failing to exercise his discretion in favour of sustaining the Plaintiffs suit for it to be heard on merit as opposed to having the same struck out.*
- 8) *THAT the Honourable Magistrate erred in law and in fact in failing to appreciate that the Respondents had extensively taken part in the proceedings before court.*

2. A brief background to this appeal is that the 2nd Respondent had filed an application dated 9th November, 2022 before the trial court, and sought

orders that the suit be marked as having abated for failure by the Appellant to take out summons to enter appearance.

3. The application was heard and the trial Magistrate in his ruling dated 29th March, 2023, allowed the application and found that the suit had abated, which led to the filing of this Appeal.

APPELLANT'S SUBMISSIONS

4. Counsel for the Appellant identified two issues for determination, whether the appeal is merited and whether this Honourable Court ought to set aside the Ruling delivered on 29th March 2025, and direct that the matter be heard and determined on merit.
5. It was counsel's submission that the suit was dismissed since the Appellant inadvertently failed to extract summons and argued that a suit could only abate where the summons was extracted and not collected. He relied on **Civil Appeal No. E003 of 2021 Flightsource International V Nation Media Group Limited [2022]**.
6. Counsel further submitted that the Respondents actively participated in the proceedings for 2 years thus aware of the case and relied on the cases of **Civil Appeal No. E127 of 2024 Faith Makena V Wafula Nalwa [2025] eKLR** and **Amins Hersi Moghe & 2 Others V Diamond Trust Bank Kenya Limited and Another [2021] eKLR**.

7. According to counsel, the trial court was in error in finding that failure to take out summons was fatal to the suit, and submitted that due to the active participation in the proceedings, the same ought not to have been struck out for want of summons and urged the court to allow the appeal as prayed.

2ND RESPONDENT'S SUBMISSIONS

8. Counsel for the 2nd Respondent identified three issues for determination:
- 1. Whether the trial court erred in finding that the suit had abated for want of summons.*
 - 2. Whether the trial court erred in treating the omission as substantive rather than technical.*
 - 3. Whether the 2nd Respondent's limited participation in the matter amounted to submission to jurisdiction.*
9. On the first issue, he relied on Order 5 Rule 1(1) and (6) of the Civil Procedure Rules and submitted that in the instant case, summons were neither extracted, sealed nor served upon the 2nd Respondent.
10. Counsel submitted that the trial court rightfully held that the suit abated by operation of the law since the Appellant never took steps to properly bring the 2nd Respondent before the court, and relied on the case of **Royal Media Services Ltd V Ominde & Another [2024] KEHC 9124 (KLR)**.
11. On the second issue, counsel submitted that the requirement to extract and serve summons was not a technicality but a jurisdictional step that brought

the Respondent properly before the court and relied on the case of **Freeze Investment Ltd V Kenya Way Limited (2001) eKLR**.

12. On the third, counsel submitted that the Appellant's contention that the Respondents fully participated in the proceedings was unfounded, as the 2nd Respondent's actions were purely defensive and not an admission of jurisdiction.
13. According to counsel, even though the 2nd Respondent was aware of the suit, such knowledge did not cure the Appellant's omission to serve the summons, and relied on the case of **Benard Ochola Ngani & Others V Muthayo Ndo & 2 Others (2001)**.

3RD RESPONDENT'S SUBMISSIONS

14. Counsel identified one issue for determination as to whether the trial Magistrate erred in law and in fact in dismissing the Appellant's suit for failure to extract summons to enter appearance, and relied on Order 5 Rule 1 of the Civil Procedure Rules and submitted that service of summons was a fundamental requirement at the institution of a suit.
15. It was his submission that the Appellant failed to comply and this went to the root of the proceedings as opposed to it being a procedural technicality. Counsel relied on the cases of **Kenya Deposit Insurance Corporation (As the liquidator of Dubai Bank of Kenya Limited) V Zubeidi & 5 Others (Civil Case 467 of 2015) [2002] KEHC 13285 (KLR)** and **Kenya**

National Highway Authority V Kariuki & 8 Others (Civil Appeal 120 of 2020) [2023] KEHC 17352 (KLR), and urged the court to dismiss the Appeal with costs

ANALYSIS AND DETERMINATION

16. The issue for determination in this appeal is whether the Trial Magistrate erred in law in dismissing the Appellants suit in the trial court on the ground that it had abated for lack of extraction and service of summons.

17. Extraction and service of summons is governed by Order 5 rule 1 of the Civil Procedure Rules which provides 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. Every summons shall be accompanied by a copy of the plaint.***
 - 4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.***
 - 5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (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, failing which the suit shall abate.”

18. The suit was commenced by way of a Plaint dated 30th June, 2021, where the Appellant sought a permanent injunction restraining the Defendants from interfering with his peaceful possession of land known as PLOT F NAKURU MUNICIPALITY. The record shows that there were no Summons to Enter Appearance annexed to the Plaint which fact has been admitted by the Appellant that he neither extracted nor served the Summons to Enter Appearance upon the Respondents. Counsel submitted that failure to serve summons was a technical issue, which can be remedied under the oxygen principles and Article 159 of the constitution.

19. In the case of **Law Society of Kenya v Martin Day & 3 others [2015] eKLR**, the court held as follows:

“It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked and therefore

the 1st and 2nd defendants may choose never to appear or respond to the suit and nothing can happen to them. Consequently, the suit will never proceed against them and neither can the plaintiffs obtain interlocutory judgment against them nor set down the suit for hearing against the defendants since no interlocutory judgment can be entered in such a suit as this in default of appearance or defence.”

20. The provisions of Order 5 Rule 6 state that every Summons, except where the court is to effect service, shall be collected for service within thirty (30) days of issue or notification, whichever is later, failing which the suit shall abate. The Appellant did not comply with this mandatory procedure for the commencement and notification that a suit had been filed against a party who is required to submit to the jurisdiction of the court and answer to the claim.

21. In the case of **Komen V County Land Registrar, Uasin Gishu & another [2025] KEELC 8276 (KLR)**, the court held as follows:

“Once again, the use of the word ‘SHALL’ in the provisions of Order 5 Rule 1 (6) makes it of a mandatory nature and the Court has no alternative but to declare the Plaint in this suit to have abated due to failure to take out Summons to Enter Appearance within the period provided under Order 5 Rule 1(2).”

22. Similarly, in the case of **Abdulbasit Mohamed Ahmed Dahman & another v Fidelity Commercial Bank Limited [2016] eKLR**, the court held that:

*“From the civil dispute perspectives, it is clear that without being served with the summons, one need not enter appearance or file a defence. That is why Order 5 rule 3 provides that every summons shall be accompanied by a copy of the plaint. It is the summons which calls upon the defendant or defendants to enter appearance and not the plaint. The plaint simply states a party’s case. The summons calls upon the cited party to enter appearance within the period stated in the summons.....
The plaintiffs’ suit has abated for lack of service of summons upon the defendant.”*

23. The Appellant cannot be heard to state that the suit was dismissed on a technicality which could have been remedied by Article 159 of the Constitution. This was a mandatory procedure that went to the root of the justice system where a person has a right to be notified of a claim filed against him/her and be given adequate time to respond. This is not an issue to be wished away as it is couched in mandatory terms.

24. Notably, the Appellant failed to give reasons for failure to extract and serve the summons within the stipulated period, although that is now water under the bridge as it would not have changed the outcome of this appeal.

25. I have considered that Appeal, the submission by counsel and find that the Trial Magistrate did not err in his finding that the case had abated hence

there would be no need to interfere with the decision. The upshot is that the appeal is without merit and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21ST DAY
OF JANUARY 2026.**

**M. A. ODENY
JUDGE**