



2. The application is supported by the affidavit of Daniel Njoroge Kihiko sworn on 26<sup>th</sup> March 2024 and written submissions filed on 17<sup>th</sup> April 2024. The Applicant contends that a Re- amended plaint dated 24<sup>th</sup> November 2022 together with summons issued on 1<sup>st</sup> December 2022 were served upon him on 4<sup>th</sup> December 2023, outside the twelve (12) months period after issuance, without leave of the Court extending their validity, thereby rendering the service invalid and all subsequent proceedings a nullity, despite challenging service and filing an application dated 27<sup>th</sup> February 2024, judgment was entered against the 5<sup>th</sup> Defendant on 28<sup>th</sup> February 2024 for the sum of Kshs. 28,000,000/-. That in his defence, the defence raises triable issues which the court ought to consider before making a final judgment. He contends the cause of action against him is *res judicata* as the court of appeal sanctioned the sale of the suit property to the 5<sup>th</sup> Defendant at a public auction by the 1<sup>st</sup> Defendant in its statutory power of sale, and that the 5<sup>th</sup> Defendant was an innocent purchaser for value. The property has been sold to third parties. He contends that the court lacks jurisdiction as the matter relates to ownership of land and that no prejudice will befall the plaintiff if the orders are granted

3. The Plaintiff opposed the application through a Replying Affidavit sworn by Bhavna Harishchandra Jobanputra on 8<sup>th</sup> April 2024. He contends that the application is frivolous, and deliberately made to delay and drag the matter. That the

Applicant has confirmed being served with the pleadings and summons, but ignored and made assumptions to the competence of the suit. The Applicant filed a memorandum of appearance on 28<sup>th</sup> February 2024 without filing a defence, and upon the lapse of the statutory time of filing a defence, an interlocutory judgment was entered. The Plaintiff further argues that Article 159(2)(d) of the Constitution militates against striking out the suit on technical grounds. He avers that the court is vested with the jurisdiction to entertain the matter which relates to a commercial transaction.

### **Analysis and determination**

4. Having considered the pleadings, affidavits and submissions on record, the following issues arise for determination:
- i. Whether the summons to enter appearance served upon the 5<sup>th</sup> Defendant were valid in law;*
  - ii. Whether the interlocutory judgment entered on 28<sup>th</sup> February 2024 was regular; and*
  - iii. What orders commend themselves to the Court?*

#### **(i) Validity of summons to enter appearance**

5. Order 5 Rule 2(1) of the Civil Procedure Rules, 2010 provides that a summons shall be valid in the first instance for twelve months from the date of its issue. Under Rule 2(2), the Court may extend the validity of summons where it has not been served, provided such extension is sought.

6. It is common ground, and indeed not seriously controverted by the Plaintiff, that the summons served upon the 5<sup>th</sup> Defendant on 4<sup>th</sup> December 2023 had been issued on 1<sup>st</sup> December 2022, and that no application for extension of their validity had been made before service.

7. The legal consequence of serving expired summons is now well settled. In **Udaykumar Chandulal Rajani & 4 Others v Charles Thaithi, Court of Appeal Civil Appeal No. 82 of 1996 [1997] eKLR**, the Court stated:

***“Order V rule 1 provides a comprehensive code of the duration and renewal of summons, and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure...The original summons in an action is only valid for the purposes of service for twelve months from the date of its issue...Neither did the entry of appearance by the defendants revive the summons which had expired.”***

8. Similarly, in **Zakaria Somi Nganga v Kenya Commercial Bank Limited & 3 Others [2008] eKLR**, the High Court held:

***“The summons to enter appearance in this case expired twelve months from the date of issue and were never renewed. It was therefore not possible to revive them.”***

9. In **Lee Mwathi Kimani v National Social Security Fund & Another [2014] eKLR**, the Court emphasized the centrality of service of summons in the following terms:

***“Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the defendant, the defendant has no valid invitation to defend the suit...The provisions of Order 5 Rule 1 are elaborate and comprehensive and are couched in mandatory terms.”***

10. Guided by the foregoing authorities, this Court is persuaded that the summons served upon the 5<sup>th</sup> Defendant was stale and invalid, and that the Plaintiff failed to invoke the procedure provided under Order 5 Rule 2 to regularize it. Alleged knowledge of the suit or evasion of service cannot cure an invalid summons.

**(ii) Regularity of the Interlocutory Judgment**

11. The interlocutory judgment entered on 28<sup>th</sup> February 2024 was predicated on the alleged failure by the 5<sup>th</sup> Defendant to enter an appearance and file a defence.

12. The law is settled that where a default judgment is entered in the absence of valid service of summons, such judgment is irregular and must be set aside *ex debito justitiae*, as of right (See **James Kanyita Nderitu v Marios Philotas Ghikas & Another [2016] eKLR**).
13. In **Nagendra Saxena v Miwani Sugar Mills Limited & 3 Others [2011] eKLR**, the Court of Appeal further stated:

***“There was no valid summons which could have been served upon anybody and the purported service was itself void ab initio...The ex parte judgment as a consequence of the foregoing was itself void ab initio and the Judge was entitled to set it aside ex debito justitiae.”***
14. There is an additional difficulty in the present case. The re-amended plaint discloses mixed claims, including injunctive relief and damages. Entry of interlocutory judgment under Order 10 Rules 6 and 7 is only permissible where the claim is purely for liquidated or pecuniary damages. Where a suit contains other substantive reliefs, the matter must proceed to formal proof (See **Josphat Muthuri Kinyua & Others v Fabiano Kamanga M’etirikia [2021] eKLR**).
15. For all the foregoing reasons, the interlocutory judgment entered against the 5<sup>th</sup> Defendant cannot stand.

16. In the result, the Court finds that the summons to enter appearance served upon the 5<sup>th</sup> Defendant was invalid for having been served outside the statutory period without extension. The continuation of the suit against the 5<sup>th</sup> Defendant in its current form would occasion grave prejudice and offend settled principles of civil procedure.
17. Accordingly, the Court makes the following orders:
- i. The interlocutory judgment entered on 28<sup>th</sup> February 2024 against the 5<sup>th</sup> Defendant is hereby set aside.***
  - ii. The suit against the 5<sup>th</sup> Defendant is hereby struck out for want of a valid summons.***
  - iii. The costs of the application shall be borne by the Plaintiff.***

**RULING** delivered virtually, dated and signed at **NAIROBI**

This **12<sup>th</sup>** day of **February** 2026.

**P.M. MULWA**

**JUDGE**

**In the presence of:**

*Mr. Kassimu h/b for Mr. Ouma for Plaintiff/Respondent*

*Ms. Mutonyi h/b for Mr. Ogunde for 1<sup>st</sup> Defendant*

*Mr. Ogango h/b for Mr. Mutugi for 5<sup>th</sup> Defendant/Applicant*

*Court Assistant: Carlos*