



Mohamed v Suakei & 5 others; Kilonzo & 2 others (Interested Parties) (Environment and Land Case E234 of 2024) [2026] KEELC 601 (KLR) (6 February 2026) (Ruling)

Neutral citation: [2026] KEELC 601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E234 OF 2024
TW MURIGI, J
FEBRUARY 6, 2026**

BETWEEN

MOHAMED AHMED MOHAMED PLAINTIFF

AND

LEPOSO SUAKEI 1ST DEFENDANT

PETER LEPARAKUO 2ND DEFENDANT

NESIRI PETER MULA 3RD DEFENDANT

VITALIS J LUNYOLO 4TH DEFENDANT

RAJAB AKIDA 5TH DEFENDANT

RICHARD MUKOYA 6TH DEFENDANT

AND

VINCENT MUELA KILONZO INTERESTED PARTY

CHARLES MUTAVI KILONZO INTERESTED PARTY

MARGARET NTHENYA KILONZO INTERESTED PARTY

RULING

1. By a Notice of Motion dated 14th July 2025, brought under Orders 5 and 51 of the Civil Procedure Rules, the Defendants/Applicants seek the following orders:
 - i. The Plaintiff's suit has abated.
 - ii. In the alternative, the Plaintiff's suit against the Defendants herein be struck out for want of summons to enter appearance.



- iii. The costs of this Application and the suit be borne by the Plaintiff.
 - iv. Such other or further orders and directions as may appear to this Honourable Court to be just and convenient to grant.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Nesiri Peter Mula, sworn on even date.

The Applicants Case

3. The Defendants contend that they were not served with summons to enter an appearance as required by Order 5, Rule 1 of the Civil Procedure Rules. Consequently, they were unable to enter appearance or file a defence, thereby preventing the suit from proceeding to hearing.
4. The deponent averred that more than thirty days elapsed after the filing of the plaint without summons being prepared, issued, or taken out, contrary to Order 5 Rule 1(6) of the Civil Procedure Rules. He further averred that under Order 5 Rule 2, summons are valid for twelve months, and that more than twelve months have elapsed since the suit was instituted without any summons having been issued.
5. The deponent asserted that the issuance of summons falls within the Court's jurisdiction and that failure to issue summons within the prescribed period results in the abatement of the suit by operation of law. Based on the foregoing, the Defendants urged the Court to dismiss the suit for abatement due to the Plaintiff's non-compliance with the mandatory requirements relating to the issuance summons.

Plaintiff's Case

6. The Plaintiff filed a replying affidavit sworn on 16th July 2025 in opposition to the application. He averred that the purpose of summons to enter appearance is to notify a Defendant of the suit and invite them to defend it. He contended that the Defendants had already filed a Notice of Appointment of Advocates, which was not entered under protest, and had actively participated in the proceedings for over a year since the suit was instituted. In light of the foregoing, he asserted that it would be a travesty of justice to dismiss the suit for want of summons.
7. He argued that even if summons are neither issued nor served, a Defendant who appears, defends, or otherwise actively engages in legal proceedings without objecting is deemed to have waived the right to contest the suit's validity on the basis of non-compliance with Order 5 Rule 1 of the Civil Procedure Rules. He further argued that such a challenge is valid only if the Defendant proves prejudice or hardship resulting from the non-compliance that cannot be remedied by costs.
8. According to the Plaintiff, the issue concerning the summons was raised belatedly, well after the Defendants had filed a Notice of Appointment of Advocates and had actively participated in the proceedings. He deposed that the matter had been scheduled before the Court on numerous occasions, with both parties represented by Counsel, and that no objection was raised regarding the summons.
9. He contended that the present application is an attempt to rely on procedural technicalities to defeat the suit and deny the Plaintiff justice. He further contends that such an approach offends the overriding objectives of the *Civil Procedure Act* and Rules, as well as Article 159(2)(d) of *the Constitution*, which requires that justice be administered without undue regard for procedural technicalities.
10. He further contended that dismissing the suit would cause grave injustice and deny the Plaintiff the right to access to justice and a fair trial, as guaranteed by *the Constitution*.



11. The application was canvassed by way of written submissions. At the time of writing this ruling, the Defendants/Applicants had not filed their submissions as directed.

Plaintiff's Submissions

12. The Plaintiff filed his submissions dated 23rd June 2025.
13. On behalf of the Plaintiff, Counsel submitted that the issue for determination is whether the Plaintiff's suit should be struck out for want of summons to enter appearance.
14. Counsel relied on Order 5, Rules 1 and 2 of the Civil Procedure Rules, which govern the issuance, service, and validity of summons and provide that summons remain valid for twelve months, subject to extension by the Court.
15. It was submitted that, as a general principle, a suit may abate if summons are neither issued nor served within the prescribed period and no extension is sought.
16. Counsel further submitted that there is no uniform judicial interpretation of Order 5, Rules 1 and 2. It was argued that while one school of thought treats failure to issue and serve summons within the prescribed period as a fatal defect going to jurisdiction, another holds that such failure is not necessarily fatal and must be assessed in light of the circumstances of each case, particularly whether prejudice has been occasioned.
17. Counsel submitted that the purpose of summons is to notify a Defendant of the existence of a suit, invite the entry of appearance, and provide an opportunity to file a defence within the prescribed timelines, including notice of the consequences of non-compliance.
18. Counsel contended that when a Defendant becomes aware of a suit through alternative means and then enters appearance or actively participates in the proceedings without objection, the non-receipt of summons does not, in itself, constitute a fatal flaw. To support this argument, Counsel relied on the cases of *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR and *Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another* [2021] eKLR, in which the courts held that the primary purpose of summons is to provide notice.
19. Counsel submitted that in the present case, the Defendants, through Counsel, filed a Notice of Appointment dated 12th July 2024, Grounds of Opposition, and participated in subsequent court proceedings, thereby demonstrating full knowledge of the suit and voluntary participation in the process.
20. Counsel relied on *Tej Prakasha Shem v Petroafric Company Limited & 2 others* [2014] eKLR, *Tropical Foods International & another v Eastern and Southern African Trade and Development Bank & another* [2017] eKLR, and *Industrial and Commercial Development Corporation v Sam Modez Industries Ltd*, Civil Appeal No. 229 of 2001, to argue that failure to serve summons is not necessarily fatal unless prejudice is shown and that each case must be considered on its own facts. It was further submitted that the Defendants had not demonstrated any prejudice arising from the failure to issue or serve summons.
21. Counsel submitted that the failure to serve the summons was not fatal in this case, since the Defendants entered an appearance and fully participated in the proceedings.



Analysis And Determination

22. Having considered the application, the response, and the rival submissions, the sole issue for determination is whether this suit should be struck out for failure to issue and serve summons to enter appearance.
23. The issuance and service of summons are governed by Order 5 Rule 1 of the Civil Procedure Rules, which stipulates as follows:
- (1) 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.
24. The effect of non-issuance and non-service of summons has not been uniformly interpreted by the courts. In *Tana Trading Limited v National Cereals & Produce Board* [2014] KEHC 304 (KLR), *Pecker Woods Limited v Bank of Africa Kenya Limited* [2021] KEHC 8398 (KLR), and *Grace Obuya Okumu (suing as the legal administratrix of the Estate of Obadia Ambar Okumu (Deceased) v Diriri Mohamed Diriri & another* [2018] KEELC 2062 (KLR), the courts held that failure to issue and serve summons goes to the root of the suit and renders it incompetent.
25. Other decisions, however, have adopted a more pragmatic approach, holding that failure to issue summons is a procedural lapse that can be cured, particularly where the Defendant has appeared, participated in the proceedings, or suffered no prejudice. In *Paulina Wanza Maingi v Diamond Trust Bank Limited and another* [2015] KEHC 548 (KLR), the Court held that:
- “Although the rules are couched in mandatory terms, each case has to be decided on its own merits, and circumstances vary. While in one case the court may proceed and dismiss the suit for want of summons, in another, the circumstances may dictate otherwise.”
26. This Court aligns with the second school of thought, which holds that the failure to issue or serve a summons does not, in itself, render a suit incompetent. Instead, the Defendant must show that the omission has caused prejudice. This position was articulated in *Tropical Foods International and another v Eastern and Southern African Trade and Development Bank and another* [2017] KEHC 7506 (KLR), where the Court stated:
- “The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons



and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.”

27. In Republic v Peter Mbugua & another (2010) eKLR, the court held that a Defendant who is aware of the proceedings and participates without objection waives any irregularity arising from procedural defects.
28. Similarly, in Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Ltd & another (2021) eKLR the court held that once a Defendant has entered an appearance or filed a defence without protesting the absence of summons to enter appearance, the Defendant will be deemed to have waived its right to challenge the validity of the suit on account of failure to comply with Order 5 Rule 1.
29. The record shows that the Applicants, despite asserting that no summons to enter appearance was issued, have filed a Notice of Appointment of Advocates on 12th July 2024, Grounds of Opposition, and have actively participated in the proceedings. Participation without objection is a clear waiver of any right to challenge the validity of the proceedings.
30. While Order 5, Rule 6 of the Civil Procedure Rules provides that failure to issue a summons to enter an appearance may result in the abatement of suits, such a defect cannot defeat the suit where the Defendant has waived the right to object.
31. Having entered an appearance and participated in the proceedings, the Defendants cannot be heard to contend that they were unaware of the suit. No prejudice arising from the non-issuance or non-service of summons has been demonstrated.
32. Based on the foregoing, striking out the suit would elevate procedural form over substantive justice, contrary to the duty imposed on this Court under Section 1B of the *Civil Procedure Act* to facilitate the just, expeditious, and proportionate determination of proceedings.
33. Courts have repeatedly emphasized that under Article 159(2)(d) of *the Constitution*, technical defects should not be used as a shield to evade substantive justice or liability.
34. The upshot of the foregoing is that the application is without merit and is hereby dismissed with costs to the Plaintiff.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF FEBRUARY, 2026.

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T. MURIGI

JUDGE

In The Presence Of:

Shikanda holding brief for Osundwa for the Defendants

Ahmed – Court assistant

