

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY

ELC CASE NO. E006 OF 2023(O.S)

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP
22, LAWS OF KENYA)**

AND

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION OF
A PORTION OF CENTRAL KASIPUL/KACHIENG/249**

BETWEEN

**MICHAEL ODHIAMBO OTIENO (Suing as personal
and Legal Rep. of MESHACK OCHIENG**

**OTIENO-
DECEASED)PLAINTIFF**

AND

**ZAKARIA ASEDA ATIENO (Personal and Legal Rep. of
BWANPAS ATIENO alias BONFAS**

**ATIENO-DECEASED)
.....DEFENDANT**

RULING

The application

1. The applicant filed a Notice of Motion application dated 9th October 2025. The application is anchored on sections 3B of the Civil Procedure Act as well as and Order 5 of the Civil Procedure Rules, 2010. He seeks ORDERS THAT:

*THAT the orders of ABATEMENT of the suit made on the
9th October, 2025 be set aside, the suit be reinstated for
hearing and determination, and the Honourable Court*

do extend time for service of and the validity of the Summons to enter appearance.

- 2.** The application is premised on the grounds set out on the face of the application as well as the grounds set out as well the affidavit sworn by Michael Odhiambo Otieno on even date.
- 3.** The plaintiff's /applicant's case is that the court made an order that this suit abated on the 9th October, 2025. The reason for abatement was failure to extract and serve Summons to Enter Appearance within the stipulated timelines as per the Civil Procedure Rules. He stated that summons to enter appearance has never been either issued/signed or collected for service upon the Defendant. That being so, it suit abated.
- 4.** The plaintiff/applicant contended at the time of filing the originating summons on 10th November 2023, he was acting in person. Further, he honestly did not know that Summons to Enter Appearance should be issued for service upon the defendant.
- 5.** He added that he did not know that he was supposed support to collect the same summons for purposes of service upon the defendants. He also stated that he expected the registry to inform him about the date of service. As a consequence, he stated that the defendant was never made aware of the existence of the suit he had instituted against him.
- 6.** Lastly, the plaintiff/applicant contended that the failure to have the Summons to enter appearance served upon the Defendant was an honest and inadvertent mistake on his part. He

maintained that he is desirous of prosecuting his matter to its logical conclusion and added that he should not be punished for the inadvertence. He pleaded with the court to grant his prayer and stated that doing so would be in the interest of justice and fair play.

7. This court has considered the supporting affidavit annexed to the application and is of the view that there is no point belaboring its contents since the said affidavit merely replicates the contents of the application.

Response

8. The defendant filed a replying affidavit dated 7th October 2025 opposing the applicant's application. He deponed the application had been brought in bad faith and argued that the suit abated by operation of law on 11th December 2023, the matter having been filed on 10th November 2023.
9. The defendant/respondent deponed that he was never served with summons to enter appearance despite being a neighbor to the plaintiff/applicant, with whom he shares a gate. Moreover, the defendant/respondent deponed that that on 24th January 2024, he filed a suit against the plaintiff/ applicant, the said suit being, Oyugis Senior Principal Magistrate Court Case No ELC. E008 of 2024. He annexed a copy of the plaint of the said suit as annexure marked ZAA-1.
10. The defendant/respondent further deponed that he served the plaintiff/ applicant with summons to enter appearance, and the latter entered appearance filed a defence and a

counterclaim. He deponed that the plaintiff/ applicant in his counterclaim stated that there was no other suit pending between the parties. He annexed a copy of the said defence and counterclaim as annexure marked s Z.A.A-2.

11. The defendant/respondent deponed that said suit proceeded to its logical conclusion without the Applicant herein raising any issue of the instant case. He also deponed that on 30th September 2025, the Court rendered its Judgement and ordered that the plaintiff/applicant, his agents, and anyone claiming under him be evicted from the suit property. He annexed a copy of the said judgment as annexure marked s Z.A.A-3. The plaintiff/applicant further deponed that the he was issued with a decree on 9th October 2025 by the trial court and annexed a copy of the said decree as annexure marked Z.A.A-4.

12. On the basis of the above stated developments, the defendant/respondent deponed that the application herein constitutes abuse of court process and maintained that the same was triggered by the decision of the lower court. he also stated that the cause of action had been fully extinguished by dint of the court orders evicting the plaintiff/applicant and as well as the permanent injunction against the plaintiff/applicant's occupation of the suit property.

13. Finally, the defendant/respondent maintained that there was inordinate delay in bringing the application and prayed that the same be dismissed.

Submissions

- 14.** The application was canvassed by way of written submissions. The defendant /respondent did not file his submissions. The plaintiff/applicant filed his submissions dated 31st October 2025.
- 15.** The gist of the plaintiff's/ applicant's submissions is that a case cannot abate for failure to serve summons to enter appearance on the defendant where the said summons had not been issued by the court in the first place. He justified this line of thinking by arguing that s summons to enter appearance is only valid once it has been issued, signed and sealed by the court. He also reasoned that summons to enter appearance is a formal court document that must be issued by the court to be considered legitimate.
- 16.** The plaintifft /applicant concluded that a case can only abate for failure to serve a valid summons that was actually issued by the court. He maintained that the summons in the instant case was never issued. In the circumstances, he argued that there was nothing to serve and consequently, the suit could not be said to have abated on the basis of failure to serve non-existent summons to enter appearance.
- 17.** The plaintiff/applicant submitted that it was the duty of the court to issue the summons to enter appearance, sign the same and inform him to collect the same for purposes of service.

Issues, Analysis and Determination

- 18.** The issues for determination in this application are whether the orders of abatement issued by the courts on 9th October 2025 should be set aside and; whether, the plaintiff's/applicant's suit should be reinstated. Attendant to these issues is the question of the costs of the application.
- 19.** The court has considered the application in totality, the response filed by the defendant respondent as well as the submissions filed by the defendant /respondent. The plaintiff/applicant filed a suit on 10th November 2023. At that time, he was acting in person. He argued that he did not know whether he was expected to extract and serve summons to enter appearance upon the defendant/respondent. He admitted that the failure to serve the said summons left the defendant/respondent in the dark concerning the suit that the plaintiff/applicant had filed. On 9th October, 2025, the court ordered that the suit filed by the plaintiff/applicant on 10th November 2023 had abated.
- 20.** Meanwhile, the defendant filed a suit against the plaintiff/applicant on 24th January 2024. He was granted orders of a permanent injunction barring the plaintiff and his agents from the occupation of the suit property. The court also granted orders of eviction against the plaintiff/applicant. The defendant /respondent equally obtained a decree on 9th October 2025. It should be noted the suit property herein is also the subject of the suit filed by the plaintiff/applicant herein on 10th November 2023.

21. The plaintiff/applicant maintains that he did not know that he was supposed to extract summons to enter-appearance and serve the same upon the defendant/respondent. He argued that the court should not punish him for an honest mistake considering that he was a self-representing litigant at the time. He also seems to be blaming for not his predicament for he says that the court did not issue, sign, seal and inform him about the collection of the said summons. The plaintiff/applicant also argued that a suit could not abate where summons had not been issued by the court in the first instance.

22. The defendant /respondent argued that the plaintiff/applicant's case had been overtaken by events by dint of his inaction and maintained that setting aside the abatement order and reinstating the suit would amount to abuse of court process.

23. It is important to point out that ignorance of the law cannot afford a party a defence: "*ignorantia juris non excusat*". To permit such an argument to hold water shall be to open floodgates of all sorts of lies, liars and lame excuses into courts or judicial processes.

24. Order 5 Rule 1 of the Civil Procedure Rules 2010 provides for summons to enter appearance in the following terms:

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.

25. Summons to enter appearance as provided under **Order 5 rule 1 (5)** should prepared by the plaintiff and filed together with the plaint. It is after this initial step that the judge or other designated officer signs and seals it with the seal of the court. The summons should then be collected by the plaintiff within 30 days, failing which, the suit abates.

26. The plaintiff /applicant did not indicate that he prepared the summons to enter appearance and filed the same together with the originating summons. He has not annexed even a copy to show that he did so. The Court record too does not show that he ever did so yet he was obligated to so do. Could the fact of being a self-representing litigant afford the plaintiff/applicant an excuse in these circumstances? The court notes that, whereas the plaintiff/applicant was not represented by counsel at the time, he was served with summons to enter appearance by the defendant/respondent when the later filed a suit against him on 24th January 2024. The plaintiff/applicant entered appearance, and filed a defence and counter claim and denied the existence of any other suit as between himself and the defendant /respondent herein over the same subject matter.

27. Granted the above circumstances, the court is not convinced that the plaintiff/applicant was completely oblivious of the necessity of extracting and serving a summons to enter appearance. In any event, a suit belongs to the client, who has the obligation of seeing to it that he adheres to the rules of procedure. in **Habo Agencies Limited v Wilfred Odhiambo Musingo [2020] KECA 486 (KLR)** the Court of Appeal held that litigants have responsibility of showing interest in their cases. The court determined that:

It is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts

have always emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel (emphasis added).

28. Besides showing interest in their matters, litigants are expected to adhere to procedural timelines set out in law as the same help in the expeditious disposal of the said suits. This was the position adopted by the supreme court in **Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)** as well as the Court of Appeal in **Nicholas Kiptoo Arap salat v Independent Electoral and Boundaries Commission & 7 others, civil appeal no (application)228 of 2013, eKLR (as per Kiage JA).**

29. Two years have since elapsed since the said suit was filed. The plaintiff/ applicant was expected to extract the summons to enter appearance within 30 days. He did not. The defendant/applicant instituted and suit and obtained a judgment against the plaintiff/applicant herein. In the circumstances, the court finds that the application herein has been overtaken by events.

30. I have also carefully analyzed the annexes attached to their replying a Little Feat respondent indeed I find that suit Oyugis SPM ELC. E008 No. of 2024 was filed and in the same parties over the same parcel of land and that was concluded on 30th September 2025 It is instructive that application was brought

so soon thereafter which leads this code to agree with the respondent that indeed it warns the judgment in that court that good about the filing of the instant application The issues about this matter have since crystallized in that judgment it absurd and then abuse of the court process have this application successful because it's an abuse of the process of the court

31. The upshot of the foregoing is that the plaintiff's /applicant's on setting aside the abatement order and reinstating is declined.

32. On the issue of costs, it is trite that costs follow event, and they are awarded at the discretion of the court. The defendant/respondent, having succeeded in the application, shall have the costs of the application.

33. Orders accordingly.

Ruling **dated, signed** and **delivered virtually** via the **Teams Platform this 5th day of February 2026.**

**HON. DR. IUR NYAGAKA
JUDGE**

In the presence of,

Omuthi for the Respondent

Bunde J. O. for the Applicant (Absent)