

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KITALE
ELC NO. 106 OF 2018

STEPHEN **KAMAU**
THINDIU-----PLAINTIFF

VERSUS

MINISTRY OF LABOUR & SOCIAL PROTECTION-----1ST
DEFENDANT

ATTORNEY GENERAL-----2ND
DEFENDANT

PETER MBUGUA MUNGAI-----3RD
DEFENDANT

RULING

1. Through an application dated **18/2/2025**, the court is asked to set aside its orders dated **6/2/2025**, dismissing the suit against the 3rd defendant, and to reinstate it for hearing. In the grounds of the application and a supporting affidavit of Wanjiku Mwangi, advocate, sworn on **18/2/2025**, she states that efforts to locate the 3rd defendant had been unsuccessful after the amendment of **4/7/2024** was allowed to join the said party. Further, the deponent states that, out of an oversight on their part, they

had failed to extract and serve summons to enter appearance upon the 3rd defendant until the suit was dismissed on **6/2/2025** for non-service.

- 2.** The applicant deposes that they have now made an application to extract the summons and shall make a renewed effort to serve the same upon the 3rd defendant. The deponent says that in the event they fail to trace him, they shall make an application for substituted service.
- 3.** The applicant prays that the suit be reinstated to ensure justice is served. The applicant deposes that the application is made in good faith and in the interest of justice, as the 3rd defendant is a necessary party to the suit.
- 4.** The applicant invokes **Articles 50(1)** and **159** of the Constitution on access to justice and fair hearing. The applicant deposes that in assessing the prejudice caused to the defendants by the delay, the court should also assess the likely prejudice the dismissal will occasion upon him; otherwise, the prolonged delay should not prevent the court from doing justice to all the parties for the sake of substantive justice.
- 5.** This suit was commenced on **28/11/2018** following a judgment in **Petition No. 16 of 2015**, where the 3rd defendant was an interested party. In paragraph

4 of the plaint, the plaintiff states that he purchased the land from the 3rd defendant. After an inordinate delay, a notice of dismissal of the suit was issued on **3/2/2021**.

- 6.** The defendant filed a statement of defence and counterclaim dated **19/10/2021**. By an application dated **17/12/2021**, the Hon. Attorney General sought the consolidation of this suit with **Kitale ELC No. 117 of 2012**, which the plaintiff opposed. Parties eventually filed trial bundles on **11/5/2022** and **25/7/2022**.
- 7.** By an application dated **31/1/2024**, the plaintiff sought to join the 3rd defendant as a party to the suit. It was allowed by consent on **13/5/2024**, and the applicant was given **10 days** to amend the plaint and serve it. A mention date was given for **4/7/2024**. The plaintiff had not complied by then; hence, time was extended for **30 days** to do so.
- 8.** Come **19/9/2024**, **6/11/2024**, and **16/12/2024**, the service of summons and amended plaint had not been effected upon the 3rd defendant. As of **6/2/2025**, the 3rd defendant had not been served with a summons to enter appearance. Indeed, the deponent admits that she did not file the amended plaint accompanied by a summons to enter appearance against the 3rd defendant.

9. Extraction and service of summons to enter appearance is governed by **Order 5, Rules 1 (5)** and **(6)** of the Civil Procedure Rules. The order is couched in mandatory terms. Failure to comply is fatal. It is through summons that a defendant is required to appear and answer to a suit. If summons are not served within **30 days** of their issuance or notification, the suit stands abated.
10. Extraction and service of summons is an integral part of court proceedings. It ultimately accelerates the dispensation of justice. Failure to extract and serve means that the applicant was not only careless but unwilling to prosecute the suit against the 3rd defendant. The suit against the 3rd defendant was dead on arrival.
11. The timelines set by **Order 5** of the Civil Procedure Rules are not mere technicalities of procedure to be accommodated under **Article 159** of the Constitution, as held in **Charles Wanjohi Wachira -vs- Githinji Ngari & Others [2016] eKLR, Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission & 6 others [2013] KECA 113 (KLR), and Zacharia Okoth Obado -vs- Edward Akongo Oyugi & Others [2014] eKLR.**

- 12. Order 5 Rule 2** of the Civil Procedure Rules goes further to say that the lifespan of a summons to enter appearance is **12 months**, and unless renewed or extended, they expire at the peril of the plaintiff.
- 13.** In this suit, the plaintiff, after the leave to amend and join was granted, for over a year, did nothing to lodge, let alone to extract and serve the summons. Such a defect cannot be cured by **Sections 1A, 1B,** and **3A** of the Civil Procedure Act, as held in **Udaykumar Chandulal Rajani & 4 Others -vs- Charles Thaithi [1997] eKLR.**
- 14.** In **Nicholas Kiptoo Arap Korir Salat -vs- Independent Electoral and Boundaries Commission, (supra),** the court held that **Article 159** of the Constitution and the oxygen principle were not meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice, and that a court must never provide succors and or cover to parties who exhibit scant respect for rules and timelines, which are meant to make the process of judicial adjudication and determination fair, just, certain and evenhanded.
- 15.** To do as requested by the plaintiff is to aid him in bending or circumventing the rules and shifting the

goal posts to harm not only the 1st and 2nd defendants, but also the course of justice. A case belongs to a litigant, but not the lawyer. In this suit, the plaintiff has not sworn an affidavit to say where the 3rd defendant is, even if the court were to find the application merited.

- 16.** The deponent to the application appears uncertain about the whereabouts of the 3rd defendant. The applicant is not even seeking an extension of time to file and serve the summons from the date leave to amend was allowed. The court is being blamed for dismissing the suit on **6/2/2025** for non-service. What was the court to do if there were no summons filed and extracted, let alone served?
- 17.** Can justice be done without playing by the rules and abiding by them? It is not in the interest of justice for a party to sit by, after leave to amend has been granted, and do nothing to put on course the wheels of justice, and when the hour of reckoning comes, to put a stop to inaction, claims the order is unjust, unfair, and prejudicial.
- 18.** I think the plaintiff has himself to blame. A nullity is a nullity. The court on **5/2/2025** simply confirmed there was a stillborn suit against the 3rd defendant for non-extraction of summons and their service after the 3rd defendant was joined as a party.

19. The upshot is that I find the application lacking merit. It is dismissed with no order as to costs.

20. Orders accordingly.

Ruling dated, signed, and delivered via **Microsoft Teams/Open Court** at **Kitale** on this **4th** day of **March 2026**.

In the presence of:

Court Assistant - Dennis

Miss Mwangi for Macharia for plaintiff/applicant

present

Chilaka for Attorney General absent



**HON. C.K. NZILI
JUDGE, ELC KITALE.**