



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KAJIADO

ELCLC NO. E107 of 2024

VICTOR OCHIENG'

MALLELAH.....PLAINTIFF

VERSUS

BALOZI INVESTMENT COMPANY LIMITED.....1ST

DEFENDANT

ENKAVILLA PROPERTIES LTD.....2ND

DEFENDANT

RULING

1. The Defendant/Applicant vide the application dated 24th April 2025 seek orders that the Court finds that the suit herein has abated for failure to extract and serve summons to enter appearance, and consequently that the Plaint dated 23rd October 2024 be struck out with costs.

2. The application is premised on the grounds on the face of the motion and the supporting affidavit sworn by Meshack

Muhoho. The Applicant contends that since the filing of the suit the Plaintiff has failed to extract and serve summons upon the Defendant as required under the Civil Procedure Rules. That the Defendant only learned of the suit after the court sent a mention notice. It is therefore the Applicant's case that the suit has abated by operation of law.

3. The application was served upon the Plaintiff. However, no replying affidavit or grounds of opposition were filed. The application is therefore unopposed. The sole issue for determination is whether the suit has abated for failure to extract and serve summons to enter appearance and whether the Plaint ought to be struck out.

4. The requirement for extraction and service of summons is governed by **Order 5 Rule 1 of the Civil Procedure Rules, 2010** which provides: "*When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.*" Further, **Order 5 Rule 1(6)** provides:

“Every summons... shall be collected for service within thirty days of issue or notification, failing which the suit shall abate.”

5. The purpose of summons is to formally notify the Defendant of the institution of proceedings against him and to afford him an opportunity to appear and defend the claim. Service of summons is therefore a fundamental procedural requirement in civil litigation. The Court of Appeal in **Uday Kumar Chandulal Rajani & 2 Others v Charles Thaithi [1997] eKLR** held that failure to serve summons within the prescribed period renders the suit liable to abatement.
6. Similarly, in **Mobile Kitale Service Station v Mobil Oil Kenya Ltd [2004] eKLR**, the Court underscored that summons must be served within the period stipulated under the Civil Procedure Rules and failure to do so renders the proceedings defective.
7. This Court is alive to the constitutional imperative under **Article 159(2)(d) of the Constitution** which obligates courts to administer justice without undue regard to procedural technicalities. However, the Supreme Court has

cautioned that **Article 159** was never intended to abrogate mandatory procedural requirements.

8. In **Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others [2013] eKLR**, the Supreme Court stated: “*Article 159(2)(d) is not a panacea for all procedural deficiencies.*” Likewise, the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR** emphasized that parties must comply with procedural rules as they are handmaidens of justice.
9. Failure to extract and serve summons goes to the root of due process, as it is the mechanism through which a defendant is formally notified of proceedings against him. It cannot therefore be treated as a mere procedural technicality.
10. Abatement occurs automatically by operation of law when the conditions prescribed by the Civil Procedure Rules arise. In **Uday Kumar Chandulal Rajani & 2 Others v Charles Thaithi [1997] eKLR**, the Court of Appeal explained that where summons are not served within the prescribed period the suit effectively lapses unless properly

revived. Thus, once the statutory timelines lapse without compliance, the suit ceases to exist in law unless appropriate steps are taken to revive it.

11. The Applicant has deposed that no summons were ever extracted or served upon the Defendant. The Plaintiff has not controverted this assertion despite being served with the application. In the absence of any material placed before this Court to demonstrate that summons were extracted and served within the timelines prescribed under the Civil Procedure Rules, the inevitable conclusion is that the suit abated by operation of law.

12. In the circumstances, the Court finds merit in the Defendant/Applicant's application which is allowed as follows;

a. The suit herein is declared to have abated for failure to extract and serve summons to enter appearance as required under Order 5 of the Civil Procedure Rules.

b. The Plaint dated 23rd October 2025 is hereby struck out.

c. The Defendant/Applicant shall have the costs of the application and the suit.

Dated, Signed and Delivered virtually at Kajiado this 5th day of March 2026.

JUDY OMANGE

JUDGE.

IN THE PRESENCE OF

Obura for Ms. Kyumu for Applicant.

N/A for Defendants.

Peter - Court Assistant.