



Five Star Agencies Limited & another v Mutisya & another (Suing on their own behalf and as administratrixes of the Estate of the Late Dennis Kioko Mutisya alias Denis Kioko Mutisya) (Civil Appeal E013 of 2025) [2026] KEHC 4016 (KLR) (27 March 2026) (Judgment)

Neutral citation: [2026] KEHC 4016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E013 OF 2025
JN ONYIEGO, J
MARCH 27, 2026**

BETWEEN

FIVE STAR AGENCIES LIMITED 1ST APPELLANT

ABDULLAHI SAGON MUHAMED 2ND APPELLANT

AND

ANGELA MUTISYA AND JOY TATU MUTUA (SUING ON THEIR OWN BEHALF AND AS ADMINISTRATRIXES OF THE ESTATE OF THE LATE DENNIS KIOKO MUTISYA ALIAS DENIS KIOKO MUTISYA) ... RESPONDENT

(Being an appeal arising from the ruling of Hon. T. Mwangi (CM) delivered on 11-8-2025 in Garissa C.M.'s court civil case No.15 of 2020)

JUDGMENT

1. The matter herein stems from the fact that the respondents commenced proceedings in the lower court against the appellants via a plaint amended on 30.03.2021. The prayers were that judgment be entered against the defendants jointly and severally for special damages of Kes. 7,110/-, general damages, costs of the suit, interest on the general damages together with costs at court rate and any other further relief that the trial court would deem just to grant.
2. The appellant has since alleged that the respondent failed and/or neglected to collect and/or serve summons to enter appearance upon the appellants as required under Order 5 Rules (1) and (2) of the Civil Procedure Rules. According to them, the suit abated by operation of the law and further to that, on 30.03.2021, a year after the plaint was filed, the respondent purported to amend the plaint, which in law had abated and therefore incapable of being amended. That 2 years after filing the amended plaint, the respondent on 05.11.2023 purported to irregularly take out summons contrary to Order 5 Rule 1(6) of the Civil Procedure Rules.



3. It was deposed that the respondent's indolence and lack of interest in pursuing the matter led to the trial court dismissing the suit on 22.06.2023 for want of prosecution. That the respondent in an attempt to revive the suit filed an application dated 27.11.2023 seeking to reinstate the suit and be issued with fresh summons. The trial court via a ruling delivered on 14.12.2023 allowed the said application but the respondent instead of taking out the fresh summons, only served upon the appellants' the rest of the pleadings. The foregoing act prompted the appellants to file an application seeking to strike out the respondent's pleadings for being an abuse of the court process.
4. The application thus was heard and a ruling delivered on 11.08.2025 dismissing the appellants' application and allowing an incurably defective suit to continue.
5. Having perused the record herein, I wish to bring out the order of events from the time when the suit herein was filed.
6. Dennis Kioko Mutisya the Original plaintiff now deceased commenced these proceedings via a plaint and accompanying documents dated 06.03.2020. consequently, the respondents extracted summons to enter appearance which were issued on 08.06.2020.
7. On 10.11.2020, letters of administration pendente lite were issued to Angela Nundu Mutisya and Joy Tatu Mutua as the next of kin and personal representatives to the estate of one Denis Kioko who had died during the pendency of these proceedings.
8. The respondents amended their pleadings by further filing an amended plaint on 30.03.2021 and further obtained summons to enter appearance issued on 08.06.2022. It remains unknown whether the pleadings were served upon the appellants as a notice to dismiss the suit for want of prosecution under order 17 of the Civil Procedure Rules was issued by the court on 16.06.2023 and consequently, the suit was dismissed for want of prosecution on 22.06.2023.
9. By an application dated 27.11.2023, the firm of S.N. Ngare moved the trial court seeking inter alia that the suit be reinstated for hearing on merit and further, that upon reinstatement, the court do re-issue summons to the appellants.
10. Consequently, the respondents were re-issued summons on 05.04.2024. An affidavit of service was filed by Peter Njue Mugo detailing the manner of service as effected upon the appellants.
11. The appellants entered appearance on 01.07.2024 and filed a preliminary objection dated 12.07.2024 on the following grounds:
 - i. That the amended plaint dated 30.03.2021 had abated for want of summons to enter appearance contrary to Order 5 Rule 2 of the Civil Procedure Rules and the same be struck out.
 - ii. That the suit has abated for failure to collect summons for service in accordance with Order 5 Rule 1(6) of the Civil Procedure Rules.
 - iii. That the plaintiffs failed to serve summons issued on 05.04.2023 within the period of validity of the summons in violation of Order 5 Rule 2(1) of the Civil Procedure Rules.
 - iv. That the plaintiffs did not apply for extension of summons pursuant to Order 5 Rule 2(2) of the Civil Procedure Rules after the expiry of the summons issued by this court on 05.04.2023.
12. The appellants thereafter withdrew the preliminary objection and filed an application dated 20.12.2024 seeking that the plaint amended on 30.03.2021 be struck out for being an abuse of the court process. The trial court via a ruling delivered on 11.08.2025 dismissed the application with costs



to the 5th and 6th defendants assessed at Kes. 25,000/- payable personally by the plaintiff's respondent's advocates within 21 days and in default, the plaintiffs' suit stands automatically dismissed.

13. Being dissatisfied by the ruling of the trial court, the appellants/applicants filed a Memorandum of appeal dated 26.08.2025 citing grounds that:
- i. The learned magistrate erred in law and fact in failing to find that the appellants were never served with summons to enter appearance.
 - ii. The learned magistrate erred in law and fact in failing to find that the summons to enter appearance dated 05.04.2023 had lapsed and consequently the suit had abated by operation of the law.
 - iii. The learned magistrate erred in law and fact in failing to find that the summons dated 05.04.2023 had expired on 04.04.2024.
 - iv. The learned magistrate erred in law and fact in failing to find that the respondent's failure to extract and serve summons to enter appearance was fatal to the suit.
 - v. The learned magistrate erred in law and fact in erroneously finding that there was valid summons issued by the court dated 05.04.2024, when in fact the only summons on record are dated 05.04.2023, which summons had already expired.
 - vi. The learned magistrate erred in law and fact in finding that the respondent extracted and served the appellants with valid summons to enter appearance despite there being no evidence on record to support such a finding.
 - vii. The learned magistrate erred in law and fact in holding that there was an inordinate and unexplainable delay on the part of the respondent which was not explained yet proceeded to dismiss the appellant's application.
 - viii. The learned magistrate erred in law and fact in that he abused exercise of his judicial discretion contrary to the well-established legal principles of judicial discretion.
14. The appeal was canvassed by way of written submissions.
15. The appellants filed submissions urging that the trial magistrate had erred both in law and fact by allowing a defective suit to proceed. That it is well established in law that summons to enter appearance is not a piece of paper of little consequence. That it is a necessary and vital document governing the timetable of pleadings and the rules governing issuance and service, thereof hence it must be complied with for the pleadings to acquire legitimacy. To that end, reliance was placed on the Court of Appeal decision in CA 85/96 Uday Kumar Chandulla Rajani & Others t/a Lit Petrol station v Charles Thaithi (UR) where the court held that:
- “Order V r 1 provided a comprehensive Code for 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”
16. The appellant recounted that the respondents had filed CMCC Civil Suit No. 15 of 2020 but failed to take out summons within the prescribed 30 days and further, serve summons to enter appearance as required under Order 5 Rules 1 and 2 of the Civil Procedure Rules. They pointed out that the respondents attempted to amend their plaint a year later, long after the suit had abated, and only irregularly took out summons three years later in April 2023. The appellants emphasized that the trial



court had dismissed the suit for want of prosecution in June 2023, but later reinstated it in December 2023, directing the respondents to issue fresh summons. According to the appellants, the respondents disobeyed this order and instead served only pleadings, which meant the suit had abated by operation of law.

17. It was further submitted that their application to strike out the amended plaint was wrongly dismissed by the trial magistrate, and that the magistrate erred in finding that valid summons existed. They insisted that the only summons on record were dated 5.04.2023, which had expired by April 2024, and that the purported summons of 2024 were invalid. They contended that failure to extract and serve summons was fatal to the suit, and that the magistrate wrongly relied on Article 159(2)(d) of *the Constitution* to cure a fundamental defect that could not be remedied. They maintained that the magistrate misdirected himself, abused his discretion, and allowed a fatally defective suit to continue, and therefore the costs of the appeal should be borne by the respondents.

18. On the other hand, the respondents filed submissions urging that the main argument is that the advocate made an inadvertent mistake of not serving the appellants with fresh summons sought and granted vide an application dated 27.11.2023. That this court is vested with power not to strike out pleadings as enumerated under sections 1A, 1B,3 & 3A of the *Civil Procedure Act*. That the appellants will not suffer any prejudice if the appeal is allowed and conversely, the respondents will have their day in court for their matter to be heard on merit. It was urged that notably, even if there has been prejudice occasioned to the appellants, that prejudice can be compensated by an award of costs. To buttress the foregoing, the respondent relied on the case of *Horizon Coach Company Limited & Another v Elizabeth Mutave Muli & Others* [2021] eKLR where Odunga J. as he was then held that:

With respect to costs, I did not hear the 1st respondent contend if the application is allowed she will suffer such prejudice that cannot be compensated by an award of costs. Costs, it has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine.

19. This court was thus urged to dismiss the appeal herein and direct that the matter be heard substantively. Reliance was placed on the case of *D. handulal K Vora & Co. Ltd v Kenya Revenue Authority* [2017] eKLR where he court held that:

“The main consideration for the courts is to do justice to the parties in a suit. The discretion to dismiss a suit or strike out an appeal or pleadings generally should be exercised sparingly and judicially and only in deserving cases which cannot be mitigated...”

20. This court was therefore urged to dismiss the appeal herein and direct that the matter be heard substantively.

21. I have perused the submissions filed by the appellant and the record of the lower court. The single issue for determination is whether by operation of Order 5 of the Civil Procedure Rules, the suit before the lower court abated when summons to enter appearance were not taken out and/or collected for service upon the Appellants within 30 days of filing suit and whether therefore, the learned Magistrate erred in his findings in the impugned ruling rendered on 11.08.2025?

22. Order 5 - Issue and Service of Summons

1.Issue of summons [Order 5, rule 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. (Underlined emphasis).
23. Order 5 Rule 2 of the Civil Procedure Rules on the other hand provides for the period of validity and extension of summons once issued in the following terms:
- 2.(1) A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent summons.
 - (2) Where a summons has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.
 - (3) Where the validity of a summons has been extended under sub-rule (2) before it may be served it shall be marked with an official stamp showing the period for which its validity has been extended.
 - (4) Where the validity of a summons is extended, the order shall operate in relation to any other summons (whether original or concurrent) issued in the same suit which has not been served so as to extend its validity until the period specified in the order.
 - (5) An application for an order under sub-rule (2) shall be made by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.
 - (6) As many attempts to serve the summons as are necessary may be made during the period of validity of the summons.
 - (7) Where no application has been made under subrule (2) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.
24. Pursuant to the provisions of Order 5 Rule 1(6) of the Civil Procedure Rules, it is incumbent upon the Plaintiff to prepare summons to enter appearance for endorsement and sealing by the court within thirty (30) days of filing the plaint. Where the Plaintiff fails to prepare such summons within the prescribed period, and no extension of time is sought or granted, the consequence is that no summons is issued or served upon the Defendant. In such circumstances, the operation of Order 5 Rule 1(6) is automatic, and the suit abates by force of law without the necessity of any further application or order of the court.



25. As already noted, the initial summons to enter appearance were issued on 08.06.2020. Thereafter, the plaintiff passed on and a grant letters of administration pendent lite was issued on 10.11.2020 to the respondents herein. The respondents proceeded to amend their plaint which by law had abated and further obtained summons to enter appearance issued on 08.06.2022. The suit was dismissed for want of prosecution on 22.06.2023 over one year again after issuance of a second set of summons albeit issued irregularly without any application for extension being made.
26. In my considered view, it is immaterial that the Defendant may have become aware of the suit through other means and even proceeded to enter an appearance. Such appearance is of no legal effect. Indeed, a Defendant who is aware of the existence of a suit but has not been duly served with valid summons to enter appearance is entitled to disregard it altogether.
27. In the case of *Law Society of Kenya v Martin Day & 3 others* [2015] eKLR in which my sister Aburili, J. observed as follows:
- “It is not sufficient for a plaintiff to institute suit against a party. That party must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The circumstances of this case are such that Summons must be served in the manner provided for in the rules to enable the defendants who have no registered office or business in Kenya submits to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient enough to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of this court is not invoked and therefore the 1st and 2nd defendants may choose never to appear or respond to the suit and nothing can happen to them. Consequently, the suit will never proceed against them and neither can the plaintiffs obtain interlocutory judgment against them nor set down the suit for hearing against the defendants since no interlocutory judgment can be entered in such a suit as this in default of appearance or defence.”
28. Similarly, the case of *Firenze Investment Limited v Kenya Way Limited* [2001] eKLR, the court while dealing with a similar issue stated thus:
- “A summons to enter Appearance is not a piece of paper of little consequence. It is a necessary and vital document governing the timetable of pleadings and the Rules governing Issuance and Service thereof must be complied with for the pleadings to acquire legitimacy. Such seriousness was underscored by the Court of appeal in CA 85/96 *Uday Kumar Chandullal Rajani & others T/A Lit Petrol Station v Charles Thaithi (UR)* where a defective summons was issued and served (beyond the validity of one year) but objection was raised to its validity although the defendant had already accepted it and entered unconditional Appearance.
- The High Court was of the view that any irregularity in the issuance of summons was cured by the fact that the defendant had entered appearance without protest and the court could issue orders to meet the ends of Justice by validating it under S.3A of the Civil Procedure Rules. But the Court of Appeal held that: “Order V r 1 provided a comprehensive Code for 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 S.3A of the *Civil Procedure Act* cannot cure”.



- 29. In the above case, the court declared that there was no valid summons in existence and that there were no valid proceedings before the court and the suit was dismissed. Similarly, in this case, there was no valid suit against which summons which had expired twice without extension were issued
- 30. The foregoing decisions does establish the principle that where a party institutes a suit without complying with Order 5 Rules 1(1) to (6) of the Civil Procedure Rules, the jurisdiction of the court is not properly invoked. Consequently, under sub-rule 6, such a suit abates. In circumstances where jurisdiction has not been properly invoked, Article 159(2)(d) of *the Constitution* cannot be relied upon to salvage the proceedings, since the defect is not a mere technicality but a fundamental issue that goes to the root of the court’s authority.
- 31. Accordingly, I am persuaded that the learned magistrate erred in law and fact, and consequently arrived at an incorrect determination in holding that the Appellant’s application dated 20.12.2024 was devoid of merit.
- 32. The end result therefore is that, I find the instant appeal merited and set aside the order of the trial court of 11.08.2025 dismissing the application dated 20.12.2024 and substitute the same with an order allowing the said application and thus striking out the suit with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MARCH 2026

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J. N. ONYIEGO
JUDGE

