



**Munywoki (Suing as the Administrator of the Late Kiema Munywoki Musioni) v Macharia & 3 others; Land Registrar-Makueni (Interested Party) (Environment and Land Case E010 of 2023) [2025] KEMC 289 (KLR) (27 November 2025) (Ruling)**

Neutral citation: [2025] KEMC 289 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
ENVIRONMENT AND LAND CASE E010 OF 2023  
YA SHIKANDA, SPM  
NOVEMBER 27, 2025**

**BETWEEN**

**DAVID KIEMA MUNYWOKI (SUING AS THE ADMINISTRATOR OF THE LATE KIEMA MUNYWOKI MUSIONI) ..... PLAINTIFF**

**AND**

**JAMES KARUNGO MACHARIA ..... 1<sup>ST</sup> DEFENDANT**

**FRANCIS GEOFFREY KINYANJUI ..... 2<sup>ND</sup> DEFENDANT**

**DEBORAH WAKESHO MWAMOSE ..... 3<sup>RD</sup> DEFENDANT**

**PHYLIS KANYA MIRITI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**THE LAND REGISTRAR-MAKUENI ..... INTERESTED PARTY**

**RULING**

1. On 1/8/2025 the plaintiff filed an application dated 31/7/2025 pursuant to the provisions of Order 5 rules 1 and 17 of the Civil Procedure Rules and sections 1A, 1B and 3A of the [Civil Procedure Act](#). The application seeks the following orders:
  1. That this Honourable court be pleased to re-issue summons to enter appearance to the defendants;
  2. That this Honourable court be pleased to issue orders that service of summons to enter appearance to the defendants be by way of advertisement in a local daily of nationwide circulation;
  3. That costs of the application be in the cause.



2. The application is supported by an affidavit sworn by Counsel for the plaintiff and is premised on the following general grounds:
  - a. The summons issued on 9/3/2023 have since expired and hence not valid and of no legal effect;
  - b. The process server could not trace the defendants as their physical addresses were unknown;
  - c. Despite all efforts and due diligence, the defendants cannot be traced for service and there is no agent upon whom summons can be served on behalf of the defendants;
  - d. Counsel lost contact with the plaintiff until April, 2025;
  - e. It is in the interest of justice that the orders sought be granted.
3. In the affidavit in support of the application, the applicant reiterated the grounds on the face of the application and attached a copy of the initial affidavit of service in support of the application.

**Main Issues For Determination**

4. The record indicates that the suit herein was filed on 3/3/2023 and summons to enter appearance issued on 9/3/2023. To my mind, the main issues for determination are as follows:
  - i. Whether the court has power to extend validity of summons which have expired;
  - ii. If so, whether the plaintiff is entitled to extension of validity of the expired summons;
  - iii. Whether the court should order service by way of advertisement.

**Analysis And Determination**

5. I have carefully considered the application and perused the record.

**The Legal Provisions**

6. Order 5 rule 2 of the Civil Procedure Rules provides as follows:
  - “(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) .....
  - (4) .....
  - (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".

7. Order 50 rule 6 provides as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

8. Section 95 of the *Civil Procedure Act* provides as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired”.

### Case Law

9. Over the years, the superior courts have endeavoured to interpret the legal provisions with regard to extension of validity of summons which have expired. Case law reveals that there have been divergent views amongst Judges of the High court. I will highlight some of the authorities.
- i. In the case of *Mechanised Cargo Systems Limited v Fina Bank Limited* [2007] eKLR, the Plaintiff therein had sought the extension of the summons which had expired and had not been served upon the Defendant due to inadvertence on its part. The Defendant opposed the application on the ground that the summons could not be extended beyond the period of twelve months. In that case, Lesit J (as she then was) found that the court had power to re-issue summons as the Learned Judge was satisfied with the grounds that had been given for not effecting service of the summons upon the Defendant therein;
  - ii. In the case of *James Muniu Muchere v National Bank of Kenya Limited* [2010] eKLR, the Appellant therein, who was the Defendant in the suit in the lower court had argued that the Plaintiff was an abuse of the court process as he had been served with summons to enter appearance after the same had expired. Okwengu J (as she then was) distinguished between the extension of the validity of summons and re-issue of summons and found that a court could re-issue summons to enter appearance;
  - iii. In the case of *Duncan Mwangi Kiora v Valley Bakery Limited & 2 Others* [2011] eKLR, the court considered the question of extending the validity of the summons which had expired for more than a year and had not been served upon the Defendant therein. While appreciating that the Plaintiff's advocate had been indolent, Dulu J nonetheless extended the validity of the summons by virtue of Article 159 (2)(d) of *the Constitution* of Kenya, 2010;
  - iv. The case of *Kenya Commercial Bank Limited v Ann Kajuju Magondu & Others* [2012] eKLR dealt with the question of extension of validity of summons and re-issue of summons. In that case, Mabeya J held that a court could extend such summons before or after the expiry of the



summons as it had power to extend the time for doing something under Order 50 Rule 6 of the Civil Procedure Rules, 2010;

- v. In the case of Terry Wanjiru Kariuki v Equity Bank Limited [2012] eKLR, Odunga J (as he then was) gave priority to the overriding objective captured in the *Civil Procedure Act* and extended the validity of the summons by a period of twelve (12) months;
  - vi. In the case of Elegant Colour Labs Nairobi Limited v Housing Finance Company (K) Limited & 2 Others [2010] eKLR, Onyancha J (as he then was) held that extension of Summons can only logically be made while the original summons is still valid. That if the original summons is left to expire, it would be legally impossible to extend it when it has so expired and therefore ceased to exist. That the summons under the Order which have capacity to be extended by the court on the application by the Plaintiff, are the summons that are still valid;
  - vii. The case of Julius Njoroge Muira v Harrison Kiambu Mburu [2011] eKLR, where Rawal J (as she then was) held that an expired summons ceases to exist and cannot be revived by reissuance. That non-compliance with the process of renewal is a fundamental defect which cannot be cured by inherent powers. The Learned Judge quoted Lord Denning in the case of *Macfoy v United African Limited* (1961) 3 ALL ER 1169 at 1172 wherein he stated as follows:

“If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad...And every proceeding which is founded on it is also bad and incurably bad. It will collapse”.
  - viii. The case of Zakaria Somi Nganga v Kenya Commercial Bank Limited & 3 Others [2008] eKLR, wherein Lesiit J (as she then was) held that where summons to enter appearance has expired, it cannot be revived;
  - ix. In the case of Barclays Bank of Kenya Limited v Patrick Njuguna Kubai [2014] eKLR, J.Kamau J held that where summons to enter appearance have expired, the same cannot be extended as they are dead;
  - x. In the case of Fina Bank Limited v Satyam Industries Kenya Limited & 4 others [2015] eKLR, J.Kamau J maintained that once summons to enter appearance have expired, they cannot be extended.
10. In view of the foregoing, it is clear that the superior courts and in particular the High Court Judges are not in agreement as to whether the court can extend the validity of summons which have expired. According to the doctrine of stare decisis, this court is bound by the decisions of the High Court. What happens when the opinion of the High Court is divided such as in this case? Which opinion should this court follow? While grappling with the issue, I came across the Court of Appeal decision in the case of *Udaykumar Chandulal Rajani & 4 Others v Charles Thaithi* [1997] eKLR, wherein the Court of Appeal held as follows:

“Order V Rule 1 (now Order 5 rule 2) provides a comprehensive code for the duration and renewal of summons and therefore 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 inherent powers of the court under Section 3A of the *Civil Procedure Act* cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in the circumstances re-issue fresh summons.....the court had



no power to extend the validity of summons beyond 24 months, when in fact there was no valid summons in existence....”

11. The High court Judges who hold the opinion that the court has power to extend the validity of expired summons appreciate the Court of Appeal authority but tend to distinguish it mainly on the ground that the decision was made prior to the promulgation of *the Constitution* of Kenya, 2010 and the insertion of sections 1A and 1B of the *Civil Procedure Act*. I am yet to come across a Court of Appeal decision that has departed from the position in the Udaykumar case (supra). The court of appeal in the authority of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR), quoted with approval the case of Udaykumar.
12. From the provisions of Order 5 rule 2 of the Civil Procedure Rules as well as the authorities considered above, it is clear that the power to extend time for the validity of summons is within the discretion of the court. What is not agreed amongst the High court Judges is whether such power extends after the validity of summons has expired.
13. In the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR, the Supreme Court of Kenya held as follows:

“Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigant’s legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined..... Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it”.
14. The Supreme Court, in the above case, then laid down the following underlying principles that a court should consider when exercising its discretion to extend time:
  1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
  2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  3. Whether the court should exercise the discretion to extend time is a consideration to be made on a case to case basis;
  4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  5. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  6. Whether the application has been brought without undue delay; and
  7. Whether in certain cases like election petitions, public interest should be a consideration for extending time.
15. I have had the advantage of perusing the court record. Summons herein were issued on 9/3/2023. On 4/5/2023, the plaintiff filed an application seeking for orders to serve the defendants by way of advertisement in a local daily of nationwide circulation. The application was allowed on 28/8/2023. It appears that after obtaining orders to serve by way of substituted service, the plaintiff went into



- slumber. Summons to enter appearance expired on 9/3/2024. No application for extension of validity was made before the expiry of the summons. Order 5 rule 2(7) of the Civil Procedure Rules provides that where no application has been made for extension of validity of summons, the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons.
16. From the provisions of Order 5 rule 2 of the Civil Procedure Rules, it is evidence that extension of validity of summons should be made before the original summons expires and that if the application for extension is not made within 24 months from the date of issuance of the original summons, the suit is liable to be dismissed. According to Order 5 rule 2(1) of the Civil Procedure Rules, the validity of summons in the first instance is twelve months beginning with the date of its issue. The application for what the plaintiff calls re-issuance of summons was made on 1/8/2025. That was after a period of about one year and five months from the time the summons expired. Order 5 rule 2, sub-rule 5 provides that the application for extension of validity of summons shall be made by filing an affidavit setting out the attempts made at service and their result. Sub-rule 6 provides that as many attempts to serve the summons as are necessary may be made during the period of validity of the summons.
  17. The applicant has annexed what appears to be an affidavit by the process server indicating how in the first instance he failed to trace the defendants. The record indicates that the process server may not have made enough attempts to serve the defendants. An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judiciously in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.
  18. In the Nicholas Kiptoo case (*supra*), The Supreme Court observed that the discretion to extend time is indeed unfettered. That it is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant. In the case of *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR, the Supreme Court held that it had the discretion, exercised on the merits of each case, to revive a notice of appeal the prescribed time-frame of which may have lapsed, provided there is a satisfactory explanation for the delay. An analogy can be drawn from the Supreme Court decision with respect to extension of validity of summons. Given the Supreme Court decisions, which decisions bind all other courts other than itself pursuant to the provisions of Article 163(7) of *the Constitution*, I would find that the courts have power to extend the validity of summons which have expired. However, such power ought to be exercised in the manner illustrated herein above.
  19. Article 159(2)(b) of the same Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall not be delayed. Section 1A of the *Civil Procedure Act* provides that the overriding objective of the Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act and that the Court shall, in the exercise of its powers under the Act or the interpretation of any of its provisions, seek to give effect to the overriding objective. It is also provided that a party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court. Section 1B of the *Civil Procedure Act* enjoins the court to ensure timely disposal of proceedings, among other things.



20. Although the application has been made after expiry of the summons and with quite some delay which has not been properly explained, I find that justice can still be achieved despite the delay. For those reasons, I allow the application. As for the orders for substituted service, the prayer was granted on 28/8/2023 in a previous application. It was unnecessary for the plaintiff to make a similar application herein.

**Disposition**

21. Having allowed the application, I make the following orders:
- a. The validity of summons to enter appearance issued herein on 9/3/2023 against the defendants are hereby extended for a period of 12 months from today;
  - b. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

