



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. E007 OF 2021

KEPHER ONDERE MISATI

.....PLAINTIFF/RESPONDENT

VERSUS

CONSOLIDATED BANK OF KENYA

.....DEFENDANT/APPLICANT

AND

**CONNECT CREDIT LIMITED1ST INTERESTED
PARTY**

**REGENT AUCTIONEERS2ND INTERESTED
PARTY**

RULING

1. Before this court is the Notice of Motion dated 18th February 2025 in which the Defendant seeks to have this suit declared as abated or in the alternative for the suit to be dismissed for the Plaintiff's failure to extract summons to enter appearance.

2. The application is expressed to be brought pursuant to **Section 3A of the Civil Procedure Act and Orders 2 Rule 15 and Order 5 Rule 1(6) of the Civil Procedure Rules**. It is premised upon grounds that:-

- “(a) The suit herein was filed by the Plaintiff vide a plaint dated 9th December 2021.**
- (b) The Plaintiff filed two injunctive applications dated 9th December 2021 and 21st March 2023 for conservatory orders to stop the Defendant from realizing its security by the 1st and 2nd interested party which were dismissed by the court via a Ruling dated 8th November 2022 and 23rd March 2023 respectively.**
- (c) Since filing of the suit on 9th December 2021, the plaintiff has not bothered and/or failed to take out and/or serve the defendant with summons to enter appearance.**
- (d) It has been well over thirty eight (38) months since the filing of the suit and issuance of the orders and the plaintiff has negligently and willingly failed to take out summons.**
- (e) Evidently, the plaintiff was only interested in the interim orders which were not granted and not on the prosecution of the main suit.**
- (f) Under Order 5 Rule 1(6) of the Civil Procedure Rules, 2010, it is a mandatory requirement that the plaintiff collect summons within thirty (30) days of issue or notification for purposes of service upon the defendants, otherwise the entire suit abates in law.**

- (g) Undoubtedly, the Plaintiff's suit is fatally defective and therefore a nullity in law by their failure to prepare, extract and serve summons upon the defendant simultaneously with the plaint dated 9th December 2021 for the past over thirty-eight months.**
- (h) The Plaintiff's failure to extract and serve summons is extremely prejudicial to the Defendant and has made it impossible for the Defendant to enter appearance and file a statement of defence in this suit.**
- (i) It is trite law that where no summons is served so as to notify a party of the time frame in which they are expected to enter appearance, then the suit abates in law.**
- (j) The plaintiff's failure to extract and serve summons is not a mere irregularity but a fundamental abuse of the court process and an express breach of the Civil Procedure Rules which are not mere suggestions to parties. The rules must be strictly observed by all litigants."**

3. The Defendant/Applicant filed one affidavit in support of the application while the Plaintiff/Respondent urges this court not to allow the application given that the Defendant/Applicant has been actively participating in the suit by filing a Notice of Appointment of advocates and subsequently filed responses and written submissions to the interlocutory application and in view of that it would be improper to dismiss the suit for want of summons. He avers that the purpose of summons is to notify the Defendant that a suit has been filed against them in a particular suit. Further that the Plaintiff has amended the

plaint and served it upon the Defendant/Applicant's advocates who have been on record since the inception of the case; that summons were extracted on 29th September 2025 and served upon the Defendant/Applicant and that therefore this application has been overtaken by events and that the Defendant was not prejudiced in any way.

4. The application was canvassed orally. Mr. Muya, advocate for the Defendant/Applicant urged this court to allow the application as the provisions of **Order 5 Rule 5 of the Civil Procedure Rules** are mandatory; that it is true that the Defendant/Applicant participated in the interlocutory applications which were dismissed but that the suit has never been fixed for hearing as summons were never extracted and that the summons were only served after this application was filed. Counsel urged that should the suit not be dismissed then the Defendant/Applicant should be awarded costs.
5. For the Plaintiff/Respondent, it was admitted that the summons were never extracted. Mr. Mudeizi however submitted that the same were recently extracted and served upon Counsel for the Defendant/Applicant on 1st October 2025; that the Defendants/Applicant has always participated in this case; that the matter has never gone to hearing as parties have engaged in interlocutory applications; that the purpose of summons is to inform the Defendant of the suit and that the

Defendant/Applicant having participated in the matter since 2021 it would not be in the interest of justice to dismiss the suit when the purpose of the summons has been served.

6. **Issues for determination**

- Whether the failure to extract summons rendered the suit fatally defective and
- Whether filing a Notice of Appointment and participation in the interlocutory application cured the defect.

Analysis and determination

7. I have considered the application, the grounds, the affidavits, the submissions and the law. In regard to summons, **Order 5 Rule 1 of the Civil Procedure Rules** states:-

“When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”

8. From the above provisions, the plaint must be accompanied by summons to enter appearance; the same must require the Defendant to enter appearance within the time specified therein and must be collected for service within 30 days of issue, failing which the suit shall abate.

9. So what are the consequences of not taking out summons? There are two conflicting schools of thought. The

first is that failure to extract summons is fatal and renders the suit incompetent. This opinion was espoused in the case of **Kenya National Highway Authority v Titus Gatitu Kariuki & 8 others (Civil Appeal 130 of 2020) [2023] KEHC 17352 (KLR) (Civ) (11 May 2023) (Judgment)** where the court stated:

“[12] Order 5 is clear beyond peradventure. It stipulates the period of validity of the summons; provides for its renewal; and outlines the consequences for non-renewal. Sub-rule (7) gives the court discretion to dismiss the suit where no application to renew the summons has been made. Here, by its own admission the Respondent has never extracted the Summons to Enter Appearance or served on the Appellant with the same to date.

[13]Considering the provisions of Order 5 together with the decisions in Juja Coffee supra and Lee Mwathi Kimani supra as set out above, I am persuaded that not only did the suit abate, but also that there is no longer anything left to extend or renew in present circumstances because the summons has since expired.

[14]As regards the question of whether or not, the Notice of Appointment cured or waived the Appellant’s right to challenge, in short, I do not think so. The Appellant had no option but to appoint an advocate to represent it in the various interlocutory applications. This action did not absolve the Respondents of their duty to serve the

summons in accordance with the Civil Procedure Rules. Further, I am guided by the decision of the Court of Appeal in Udaykumar Chandulal Rajani & 3 Others v Charles Thaithi [1997] eKLR where the court stated as follows:-“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance 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...Neither did the entry of appearance by the defendants revive the summons which had expired..” (emphasis my own).

[15]It is therefore clear to me that beyond filing a Notice of Appointment, even entry of appearance after a summons has expired is a nullity. A Notice of Appointment therefore has no bearing on the provision of Order 5 in the present circumstances.

[16]Finally, I am satisfied that the Magistrate misapprehended the applicability of Article 159 of the Constitution to the substantive timelines provided in Order 5 of the Civil Procedure Rules. I do not think the lower court was correct in its interpretation that the said provisions may be construed as ‘technicalities’ and curable under Article 159.

[17]To construe substantive provisions under such a broad -based category of ‘technicalities’ would defeat the purpose of Order 5. In this regard, the

Court of Appeal has already articulated with finesse, the consequence of such an interpretation in its decision in Nicholas Salat (supra), where the court stated as follows:-

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever 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. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned”

10. To arrive at the above decision the court placed reliance on the case of **Udaykumar Chandulal Rajan & 3 others v Charles Thaithi [1997] eKLR** where the court held:-

“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance 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..... Neither did the entry of appearance by the defendants revive the summons which had expired”(emphasis my own).

11. The second school of thought is that whether failure to extract summons renders a case fatally defective depends on the circumstances of the case. This was the finding in the case of **Benedicta Mwendwa Muga & another v Consolidated Bank of Kenya Limited (Commercial Cause E165 of 2022) [2025] KEHC 4714 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)** where the court stated:-

“[30] In this case, the plaintiffs’ Advocate has admitted that no summons were ever extracted for service upon the defendant herein. He attributed the failure to do so to negotiations that were ongoing between the parties herein. The plaintiffs’ Advocate has therefore conceded to having failed to adhere to an important procedural step in these proceedings.

[31]Once the suit herein was filed, summons should have issued to the defendant requiring the Bank to appear within the time specified therein. The defendant argued that it cannot file a statement of defence because it has not been served with summons to enter appearance and for the said reason the suit will proceed undefended and it will suffer prejudice.

[32]In my considered view, when it comes to the issue of whether a suit abates due to non-service of summons or not depends on the circumstances of each case. The suit herein was filed on 16th May 2022, no summons to enter appearance were filed together with the plaint. Upon service of the pleadings, the applicant appointed the law firm of MMW Advocates LLP to act on its behalf. That is evident from the Notice of Appointment dated 24th May 2022.

[33]On 31st May 2022, the defendant filed a replying affidavit to the application dated 16th May 2022 which was filed contemporaneously with the plaint. The said application was heard and determined vide a ruling dated 13th March 2024 by Judge D. Chepkwony and delivered on 18th March 2024 by Judge A Mabeya.

[36]In this instance, the defendant has not filed its statement of defence but it did actively participate in the application filed by the plaintiffs dated 16th May 2022. Having done so, and since the suit herein was filed in the year 2022 the defendant has been aware of the existence of the since then, and that

precludes it from protection under the provision of Order 5 Rule 6 of the Civil Procedure Rules, 2010 by seeking for the prayer for this Court to hold that the suit has abated for want of service of summons. In addition, the defendant has not demonstrated what prejudice it will suffer if the suit as filed is allowed to proceed for hearing, if anything, the defendant herein can be compensated by an award of costs.

[38]In this instance, it is apparent that the Counsel for the plaintiffs missed a crucial procedural step at the time of instituting the suit between the parties herein. The explanation given by the plaintiffs' Counsel that failure to take out and serve summons was due to negotiations that were ongoing is hard to sell because Rules of procedure should be complied with regardless of whether negotiations are ongoing or not. Having considered the circumstances of this case, and the defendant's participation in the proceedings so far, the orders that commends itself to me is that;-

- 1. The defendant shall within twenty one (21) days from today file and serve its statement of defence.**
- 2. The plaintiffs will within twenty one (21) days of service file and serve a reply to the defence and file its compliance documents.**
- 3. The plaintiffs shall pay thrown away costs of Kshs.20,000/= to the defendant within 14 days due to their non-compliance with the provisions of Order 5 of the Civil Procedure Rule, 2010"**

12. In arriving at the above decisions the court place reliance of the case of **Industrial and Commercial Development Corporation v Sum Model Industries Limited [2007] KECA 320 (KLR)** where the Court of Appeal stated:-

“Service of the summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and void. It will depend largely on circumstances of each case. On the facts and circumstances of this case, we do not think anything turns on the issue.”

13. Of the schools of thought, I am persuaded by the case of **Benedicta Mwendwa Muga & Another v consolidated Bank of Kenya limited (supra)**. Like in that case, the Plaintiff/Respondent admits that he did not take out summons and hence the Defendant/Applicant was never served with the plaint. The Defendant/Applicant did however, enter appearance and subsequently participated in an application spanning the period 2021 when the suit was filed to 18th January 2024 when the last ruling was read. It is my find that the fact that the Defendant filed a Notice of Appointment and has participated in the proceedings so far, all along, the purpose of the summons to enter appearance were served. I therefore agree with Counsel for the Plaintiff/Respondent that it would be unjust to dismiss the case. **In the premises let the Defendant/Applicant file and serve its defence, list of**

witnesses and documents within 21 days of today's date and the Plaintiff/Respondent file a reply to defence within fourteen days after service of the defence, so that upon close of the proceedings the case can be placed before the Hon. Deputy Registrar for directions on case management.

14. To compensate the Defendant/Applicant, the Plaintiff/Respondent shall pay thrown away costs of Kshs.20,000/- to the Defendant/Applicant within 15 days of today's date.

Orders accordingly.

Ruling signed, dated and delivered virtually on this 30th day of April 2026.

**E. N. MAINA
JUDGE**

In the presence of:

Ms Mudeizi Advocate for Plaintiff/Respondent

Mr. Muya for the 1st Defendant/Applicant

No appearance for the interested parties

Mary - Court Assistant/Interpreter