



**Kaiga v Co-operative Bank of Kenya Ltd (Cause E141 of 2023)
[2024] KEELRC 2218 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2218 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E141 OF 2023
JK GAKERI, J
SEPTEMBER 18, 2024**

BETWEEN

DAWSON THURANIRA KAIGA CLAIMANT

AND

THE CO-OPERATIVE BANK OF KENYA LTD RESPONDENT

RULING

1. Before the Court for determination is the Respondent’s Notice of Motion dated 21st March, 2024 seeking Orders That:
 1. The Honourable Court be pleased to find that this cause has abated for want of summons to enter appearance to the Respondent.
 2. The Honourable Court be pleased to dismiss this cause for want of prosecution by the Claimant.
 3. Costs of this Application be borne by the Claimant.
2. The Notice of Motion is expressed under the provisions of the *Civil Procedure Act*, Order 5 Rule 1 and Order 17 Rule 2 (1) and (3) of the *Civil Procedure Rules, 2010* and Rule 11 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and is based on the grounds set out on its face and the Supporting Affidavit sworn by Mr. Ian Nyanhoga Advocate on 21st March, 2024.
3. The affiant deposes that the suit was filed on 17th February, 2023 seeking damages for unfair termination but the Claimant has failed to extract and serve the Respondent with summons to enter appearance as ordained by Rule 11 of this *Court’s Rules, 2016*.
4. That in the absence of summons, the Respondent has not submitted to the jurisdiction of the court for more than 12 months and the suit has abated.



5. That the matter is compounded by the fact that the Claimant has not taken any step to prosecute the suit for more than one year and no reasonable explanation has been provided.
6. The affiant deposes that the Claimant's failure to take out summons and prosecute the suit denies the Respondent the right to expeditious disposal of the suit, is an abuse of the court process and contrary to fair administration of justice and is intentional.

Response

7. By a Replying Affidavit sworn on 22nd April, 2024, the Claimant deposes that the Respondent entered appearance on 8th March, 2023 and the issue of summon is thus spent but the advocate had not served notice of appointment and the advocate on record is a stranger.
8. That the advocate having entered appearance ought to have filed a response within 21 days or leave to file a response out of time.
9. That the instant Notice of Motion is incompetent, misconceived and an abuse of the court process as it is filed under the wrong provisions of the [*Employment and Labour Relations Court \(Procedure\) Rules, 2016*](#).
10. The affiant states that he approached the registry and was notified that the age of the matter did not matter and could move the court for directions as there was no defence on record and came across a notice of appointment of the Advocate of the Respondent in the e-filing system portal when seeking pre-trial directions on 3rd April, 2024 to be heard on 24th April, 2024.
11. That the instant Notice of Motion was served on 12th April, 2024 and is an afterthought and a waste of judicial time and a delaying tactic.
12. That it is in the interest of justice that the matter proceeds to formal proof.

Claimant's submissions

13. On 25th April, 2024, the court accorded parties 14 days a piece to file and exchange submissions.
14. On 27th May, 2024, the Claimant was absent. The Respondent's counsel confirmed compliance and a ruling date was given.
15. By 28th June, 2024, the Claimant had not filed submissions.

Respondent's submissions

16. Counsel submits that the Claimant has failed to take out summons against the Respondent and prosecute the case within the one (1) year period and cites the sentiments of the court in [*Mobile Kitale Service Station V Mobil Oil Kenya Ltd & another*](#) (2004) eKLR and [*Republic V Commissioner of Income Tax & another; Equatorial Commercial Bank Ltd*](#) (2022) eKLR.
17. As regards want of summons, counsel urges that the Notice of Appointment of Advocates does not equate to submitting to the jurisdiction of the court.
18. That failure by the Claimant to take out summons for the Respondent to enter appearance is a major procedural requirement as held in [*Chevron Kenya Ltd V Tamoil Kenya Ltd*](#) (2007) eKLR.
19. Counsel urges that under Order 5 Rule (1) (6) of the [*Civil Procedure Rules, 2010*](#), the suit abated for failure to take out summons.



20. Reliance was made on the decision in *Francis Kimutai Bii V Kaisugu (K) Ltd* (2016) eKLR on the applicability of the *Civil Procedure Rules* by the Employment and Labour Relations Court.
21. Further, reliance was made on the decision of the Court of Appeal in *Misnak International (UK) Limited V 4MB Mining Limited c/o Ministry of Mining Juba Republic of South Sudan & 3 others* (2019) eKLR affirmed in *Pecker Woods Limited V Bank of Africa Kenya Ltd* (2021) eKLR on the essence of service of summons as were sentiments of the court in *Uday Kumar Chandullal Rajani & others t/a A Lit Petrol Station V Charles Thaiti* on the effect of failure to take out and issue summons.
22. Concerning dismissal of the suit for want of prosecution, reliance is made on the decisions in *Kenya Plantations & Agricultural Workers Union V Unilever Tea Kenya Ltd* (2021) eKLR and *Karuri v Mureithi & another* (2023) eKLR on the burden of proof on the applicant for dismissal of a suit for want of prosecution to urge that in the instant suit there was no activity for one (1) year and no reasonable cause has been shown.
23. Reliance is made on the decisions in *Abdulbasit Dahman & another V Fidelity Commercial Bank Ltd* (2016) eKLR, *Zacharia Okoth Obado V Edward Akong'o Oyugi & 2 others* (2014) eKLR, *First National Finance Bank Ltd V Universal Apparels (EPZ) Ltd & 2 others* (2017) eKLR, *Savings & Loans Ltd V Susan Wanjiru Muritu* (2002) KLR and *Joseph Lekodi Telem V Jonathan Paapai & another* (2022) eKLR to emphasize the essence of procedure and the duty of the litigant to pursue the prosecution of his case.

Analysis and determination

24. It is common ground that the Claimant/Respondent filed the instant suit against the Respondent on 21st February, 2023 alleging unfair, unlawful and unprocedural termination of employment.
25. It is also not in dispute that the Claimant did not take out summons and none were served on the Respondent.
26. In his Replying Affidavit, the Claimant deposes that the Respondent entered appearance on 8th March, 2023 and thus the issue of taking out of summons does not arise.
27. However, the Claimant has not furnished a copy of the Notice to enter appearance by the Respondent allegedly filed on 8th March, 2023.
28. The principles that govern the taking out and service of summons are well settled.
29. Rule 11 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provide that;
 1. The Court shall issue summons in Form 2 set out in the 1st Schedule.
 2. A Claimant shall serve the summons issued under paragraph (1) to the Respondent together with the statement of claim.
 3. Summons shall be valid in the first instance for a period of 6 months beginning on the date of its issue and the Court may extend the validity from time to time if satisfied that it is just to do so.
30. The foregoing provisions of law are couched in mandatory terms and courts have affirmed as much. In *Misnak International (UK) Ltd V 4MB Mining Ltd (Supra)*, the Court stated that;

“It is not sufficient for a party 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. Summons must be served in the manner provided for in the rules



to enable the Respondent to submit to the jurisdiction of the Court. It therefore follows 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”.

31. Similarly, in *Uday Chandullal Rajani & others V Charles Thaita* (*Supra*), the court stated as follows;
- “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 to acquire legitimacy.
- What then is the fact of this case where the Claimant filed the claim without summons? Its fate is clear, the suit has abated”.
32. Clearly, the rules have no provision on the effect of failure by the Claimant to take out and serve summons. As the rules demand mandatory compliance, non-compliance is fatal.
33. The court is persuaded by the Respondent’s counsel’s argument that in the absence of an express provision in the *Employment and Labour Relations Court (Procedure) Rules*, the court is free to apply the *Civil Procedure Rules, 2010* to fill the lacuna. Under Order 5 Rule 1(6) of the *Civil Procedure Rules, 2010*, if summons are not collected within thirty days of issue or notification, whichever is latter, the suit abates.
34. In the instant suit, the Claimant has not availed any scintilla of evidence to prove that he not only took out summons but served the same on the Respondent and the Court found none on the e-filing portal.
35. From the foregoing, and it is the finding of the court that the Claimant’s suit abated.
36. As regards dismissal for want of prosecution, Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provides that;
1. In any suit in which no application has been made in accordance with Rule 15 or no action has been taken by either party within one year from the date of its filing, the Court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.
 2. If reasonable cause is given to the satisfaction of the Court, it may make such Orders as it thinks fit to obtain the expeditious hearing and determination of the suit.
 3. Any party to the suit may apply for dismissal as provided in paragraph (1).
37. The Respondent/Applicant’s Notice of Motion ought to have been grounded on Rule 16 as well but was not.
38. The omission, in the court’s view is not fatal to the Notice of Motion.
39. The court’s power to dismiss a suit for want of prosecution is discretionary which ought to be exercised judiciously.
40. From the record, it is clear that the Claimant took no action in furtherance of his claim after filing it on 21st February, 2023 until the Respondent filed the instant application and even assuming that the Respondent entered appearance on 8th March, 2023 as alleged by the Claimant in his Replying Affidavit, no action was taken by any of the parties from 8th March, 2023 until the instant application was filed in March 2024.



41. Having failed to demonstrate any action was taken between 8th March, 2024 and the instant application dated 21st March, 2024, it is clear that no action was taken by either party within one (1) year and no explanation was provided. Consequently, the Claimant's suit against the Respondent is for dismissal for want of prosecution and it is accordingly dismissed.

42. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

