



**Muga & another v Consolidated Bank of Kenya Limited (Commercial Cause E165 of 2022) [2025] KEHC 4714 (KLR) (Commercial and Tax) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4714 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CAUSE E165 OF 2022**

**MN MWANGI, J**

**MARCH 28, 2025**

**BETWEEN**

**BENEDICTA MWENDWA MUGA ..... 1<sup>ST</sup> PLAINTIFF**

**OLE POLOS CONSTRUCTION COMPANY LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CONSOLIDATED BANK OF KENYA LIMITED ..... DEFENDANT**

**RULING**

1. The application that is before me was filed by the defendant. It is dated 18<sup>th</sup> April 2024. The said application is anchored on the provisions of Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 2 Rule 15, and Order 5 Rule 1(6) of the Civil Procedure Rules, 2010.
2. The prayers are for this Court to find that the suit herein has abated on account of the plaintiff's failure to extract and serve summons to enter appearance.
3. In the alternative, the defendant prays for the suit to be dismissed for the want of summons to enter appearance. It also prays for costs of the instant application to be borne by the plaintiffs.
4. The application is supported by an affidavit sworn on 18<sup>th</sup> April 2024 by Ernest Kibuthu, an Advocate of the High Court of Kenya, and learned Counsel for the applicant. He averred that plaintiffs instituted the suit against the defendant vide a plaint dated 16<sup>th</sup> May 2022. He stated that since the plaintiffs instituted the suit, well over two (2) years ago, they have failed to extract summons in the suit for purposes of serving the defendant herein, despite the plaintiff's obligation under Order 5 of the Civil Procedure Rules, 2010.



5. Mr. Kibuthu contended that in the absence of service of summons to enter appearance, the defendant does not have any legal standing or authority before the Court to ventilate over the issues in dispute on account of the plaintiff's indolence.
6. He deposed that the plaintiff's deliberate failure to comply with the rules of procedure, including its failure to serve summons is extremely prejudicial to the defendant if the suit proceeds without its appearance or participation as the orders granted shall be *exparte*, thereby denying the defendant the right to be heard.
7. He stated that the resultant action arising from the plaintiffs' conduct is curbed under the express provisions of Order 5 Rule 1(6) of the Civil Procedure Rules, 2010.
8. He deposed that under the express provisions of the law, it is a mandatory requirement for the plaintiffs to extract summons within thirty (30) days from issue for purposes of service, failure to which the suit abates.
9. He also deposed that it is a mandatory provision under Order 5 Rule 1(1) of the Civil Procedure Rules, 2010 for the plaintiffs to effect service of summons upon every defendant in the suit.
10. He contended that the plaintiffs in this suit has no justifiable reason as to their failure to extract and serve the summons on the defendant to enable it enter an appearance in this suit, leading to abatement of the suit in law.
11. He further contended that if there is no explanation or a just reason provided as to why summons were not taken out then Courts have no discretion but a judicial duty to ensure Rules of procedure are followed as failure to observe the same would be fatal.
12. Mr. Kibuthu averred that in the interest of justice and fairness to all parties, litigation before a Court of competent jurisdiction should be conducted efficiently and in compliance with civil and in compliance with mandatory rules of procedure.
13. In opposition to the present application, the 1<sup>st</sup> plaintiff, Benedicta Mwenda Muga, a Director of the 2<sup>nd</sup> defendant filed a replying affidavit sworn on 24<sup>th</sup> May 2024. She stated that the applicant's Advocate was duly informed about the ongoing negotiations between the bank/applicant and herself. She also stated that the delay in extraction of summons was occasioned by the negotiations, and that the applicant's Advocate was well aware of the same.
14. Ms Muga stated that due to the ongoing negotiations, she has been in direct and constant communication with the applicant and she was waiting for the outcome of the negotiations. She stated that her Advocate was never served with the notice of ruling and was only ambushed with the present application.
15. She urged this Court to allow her Advocate to extract and serve summons as the Notice of Motion dated 18<sup>th</sup> April 2024 is an admission by the applicant that negotiations have come to a premature end. She averred that it was in the best interest of justice for the Court to allow her Advocate on record to extract and serve the summons as one of the Title Deeds is being held by the applicant is matrimonial property and its disposal would occasion great injustice to herself and her child thereby infringing on their inherent rights.
16. In support of its application the defendant filed written submissions dated 9<sup>th</sup> September 2024 by the firm of MMW Advocates LLP, on their part, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs filed written submissions dated 24<sup>th</sup> September 2024 by Amutallah Robert & Co. Advocates.



17. The defendant's Counsel, Mr. Kibuthu submitted that litigation must be conducted in an expeditious and fair manner, by ensuring that justice is not only done but within a reasonable time frame. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs bore the responsibility to actively pursue the matter after instituting the suit, but their undue delay in taking necessary procedural steps, has not only prejudiced the defendant but has also contravened the overriding objective of facilitating the just, efficient and timely resolution of disputes.
18. He pointed out that the plaintiffs instituted the suit two years ago but they have failed to extract summons to enter appearance upon the defendant, which failure constitutes a blatant abuse of the Court process.
19. Mr. Kibuthu relied on the case of *Firenza Investments Limited v Kenya Way Limited* [2001] eKLR, where the Court held that summons to enter appearance 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.
20. Counsel urged this Court to exercise its discretion to dismiss the suit for failure of the plaintiffs to serve the defendant with summons to enter appearance, and that is what moved the defendant to file the instant application under Order 5 Rule 1(6) of the Civil Procedure Rules, 2010.
21. Mr. Kabuthi relied on the case of *Abdulbasir Mohamed Ahmed Daliman & another v Fidelity Commercial Bank Limited* [2016] eKLR, where the Court held that a suit had abated for failure by the plaintiff to serve summons. He also relied on the case of *Mishack International v 4MB Mining Limited c/o Ministry of Mining Juba Republic of South Sudan & 3 others* [2019] eKLR.
22. The defendant's Counsel submitted that the plaintiffs' failure to comply with Order 5 Rule 1 of the Civil Procedure Rules, 2010 including its failure to serve summons, is extremely prejudicial to the defendant because the suit will proceed without the appearance or participation of the defendant, and any orders issued shall be done *ex parte*, thereby denying the applicant the right to be heard contrary to Article 50 of *the Constitution* and the rules of natural justice.
23. The applicant's Counsel prayed for the application to allowed and to be awarded costs.
24. Mr. Amutallah, learned Counsel for the plaintiffs submitted that the plaintiffs herein moved to this Court vide an application and plaint dated 16<sup>th</sup> May 2022. He stated that all the pleadings were served upon the defendant as per Order 5 Rule 7 of the Civil Procedure Rules, 2010.
25. Stated that upon service of the plaint and the interim orders on record, the sale of the securities which is the subject matter of this suit stopped, and the defendant's Advocates were issued with instructions.
26. Counsel further stated that the defendant has been in constant negotiations with the plaintiffs in regard to the loan being taken over by another financial institution.
27. Mr. Amuttalah contended that the plaintiffs have been waiting for conclusion of negotiations hence the delay of extraction of summons. He referred to the correspondence annexed to the plaintiffs' replying affidavit as evidence of the negotiations that have been taking place. He submitted that the defendant was fully aware of the suit herein and that it contributed to the delay in extraction of summons as it actively participated in the negotiations, which it walked out of.



## Analysis And Determination.

28. I have considered the application filed by the defendant and the affidavit in support thereof. I have also considered the replying affidavit filed by the plaintiffs and the written submissions filed by the parties' Advocates.
29. The issue for determination is if the suit herein abated for want of issuance and service of summons. The applicable provisions in an application of this nature is Order 5 Rule 1 of the Civil Procedure Rules, 2010, which provides as follows-
  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 (30) 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.
  5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.
  6. Every summons, except where the Court is to effect service, shall be collected for service within thirty (30) days of issue or notification, whichever is later, failing which the suit shall abate.  
(Emphasis is added).
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 16<sup>th</sup> 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 24<sup>th</sup> May 2022.
33. On 31<sup>st</sup> May 2022, the defendant filed a replying affidavit to the application dated 16<sup>th</sup> May 2022 which was filed contemporaneously with the plaint. The said application was heard and determined vide a ruling dated 13<sup>th</sup> March 2024 by Judge D. Chepkwony and delivered on 18<sup>th</sup> March 2024 by Judge A Mabeya.
34. The ruling was delivered in favour of the plaintiffs. From the documents available on the CTS, the defendant herein filed a Notice of Appeal dated 26<sup>th</sup> March 2024 from the said ruling. The said Notice of Appeal was followed by the filing of the present application on 26<sup>th</sup> April, 2024.



35. In the case of Pauline Wanza Maingi v Diamond Trust Bank Limited & another [2015] eKLR, the Court held as follows-

“In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1<sup>st</sup> defendant having filed a Notice of appointment of advocates and statement of defence which was not even filed under protest and six (6) years having elapsed since the suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1<sup>st</sup> defendant has actively been participating in the suit .....

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 16<sup>th</sup> 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.

37. In the case of *Industrial and Commercial Development Corporation v Sum Modez Industries Ltd. Civil Appeal No. 1229 of 2001*, the Court of Appeal held that service of summons to enter appearance though important, a failure to do so within the stipulated period does not necessarily render proceedings null and avoid. It will depend largely on circumstances of each case.

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.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF MARCH 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Kibuthu for defendant/applicant

Mr. Amutalah for plaintiff/respondent

Ms B. Wokabi - Court Assistant.

