Kemama & 2 others (Suing as the Persoal Representatives of the Estate of Amadeo Raymond Kemama (Deceased)) v ECO Bank Kenya Limited & another; Awad Auto Limited & 2 others (Interested Parties) (Civil Appeal 248 of 2016) [2025] KEHC 12261 (KLR) (Commercial and Tax) (29 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12261 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL 248 OF 2016

H NAMISI, J

AUGUST 29, 2025

BETWEEN

CHARITY KEMAMA ..... 1ST PLAINTIFF

KENNETH MURIUKI KEMAMA ..... 2ND PLAINTIFF

ANTHONY ROY KEMAMA ..... 3RD PLAINTIFF

SUING AS THE PERSOAL REPRESENTATIVES OF THE ESTATE OF AMADEO RAYMOND KEMAMA (DECEASED)

AND

ECO BANK KENYA LIMITED ..... 1ST DEFENDANT

AWAD AUTO LIMITED ..... 2ND DEFENDANT

AND

AWAD AUTO LIMITED ..... INTERESTED PARTY

VALLEY AUCTIONEERS ..... INTERESTED PARTY

CHIEF LAND REGISTRAR ..... INTERESTED PARTY

RULING

1. Before this Court are two applications and a Preliminary Objection, which, by direction of the Court, have been consolidated and heard together as they revolve around a single, fundamental issue: the legal status of this suit.

2. By Notice of Motion dated 8 May 2024, the 1st Defendant seeks the following orders:

   i. The amendments and joinder of the 3rd Plaintiff and the 1st to 3rd Interested Parties in the Amended Plaint dated 23 November 2023 be disallowed;

   ii. The suit against the Defendant be struck out with costs;

   iii. Cost of the application be awarded to the Defendant in any event.

3. The Application is premised on the grounds that:

   i. The Amended Plaint is fatally defective as a party cannot amend the plaint or join parties where Summons were never taken out and the suit having abated;

   ii. The amendments are a departure from the original plaint and time barred;

   iii. Where summons have not been filed and served within 24 months, a suit ought to be struck out with costs.

4. By Notice of Motion dated 21 June 2024, the Plaintiffs seek the following orders:

   i. The Honourable Court be pleased to issue summons to enter appearance out of time;

   ii. costs of the Application be provided for.

5. The Application is premised on the following grounds

   i. The Plaintiffs instituted the instant suit vide Plaint dated 28 June 2016 filed contemporaneously with Chamber Summons of even date;

   ii. The application was placed before the Court on the same day and the Court directed the Plaintiffs to serve the application for inter partes hearing the following day on 29 June 2016 at 8:30 am;

   iii. The Plaintiffs served the application upon the 1st Defendant on 28 June 2016 at 4:15 pm and the 1st Defendant acknowledged service by stamping;

   iv. The 1st Defendant subsequently appeared in Court the following day through its Advocates on record on 29 June 2016 as scheduled;

   v. The Plaintiffs' former Advocates in advertently failed to prepare, have Summons to Enter Appearance filed with the Plaint, to be signed and sealed with the seal of the Court, collect Summons to Enter Appearance within 30 days and serve as required;

   vi. Despite the foregoing, the 1st Defendant was fully made aware of the suit, has fully participated in the proceedings including the application for injunction. After filing Notice of Appointment of Advocates and Replying Affidavit, the matter has been listed severally at which point it was ably represented by its Advocates on record;

   vii. The Plaintiffs prays that the Plaintiffs' former Advocates actions/ omissions should not be visited upon them;

   viii. The overriding objectives of the *Civil Procedure Act* and Rules as well as Article 159(2) (d) of the *Constitution*, that justice shall be administered without undue regard to procedural technicalities, were intended to cure;

ix. It is in the interests of justice, equity and conscience that the orders sought in the application are granted by the Honourable Court so as not to oust the Plaintiff from the judgment seat of justice as well as to deny the Plaintiffs a right to a hearing and fair trial espoused in Article 50(1) of the *Constitution*;

x. The *Constitution* commands the courts to, in the exercise of judicial authority which is derived from the people, to administer justice without regard to status and or procedural technicalities;

xi. The purpose of Summons to Enter Appearance is to notify the Defendant and or invite them to defend the suit;

xii. The Defendant has not suffered any prejudice whatsoever despite lack of service of Summons to Enter Appearance. The Plaintiffs notified the 1st Defendant about the suit and the 1st Defendant has actively participated in the suit;

xiii. No party shall suffer any prejudice by the Court allowing the instant application. It is travesty of justice to dismiss the suit for want of Summons.

6. In response to the Notice of Motion dated 21 June 2024, the 1st Defendant raised a Preliminary Objection on the same grounds as those upon which the Notice of Motion dated 8 May 2024 is premised.

7. The history of this litigation is protracted and central to the determination of these applications. The Plaintiffs filed the instant suit vide Plaint dated 28 June 2016. Filed contemporaneously was Chamber Summons seeking interlocutory injunction to restrain the Defendant from selling the property known as LR No. 209/3705 Nairobi South B. The Plaintiffs were directed to serve the Application for inter partes hearing on 29 June 2016. Service upon the Defendant was effected on 28 June 2016. On hearing the application, Justice Tuiyott (as he then was) dismissed the same and the property was subsequently sold by public auction on the same day.

8. The matter lay dormant for over 7 years until the Plaintiffs filed an Amended Plaint on or about 24 November 2023, introducing new parties and potentially new causes of action. This action prompted the Defendant to file the Notice of Motion dated 8 May 2024 seeking to strike out the suit in toto. In response, the Plaintiffs filed the Application dated 21 June 2024, seeking to issue Summons to Enter Appearance, which step was never taken in 2016.

9. The applications were canvassed by way of written submissions, with oral highlights.

10. The Defendant submitted forcefully that the suit is a nullity and must be struck out. The core of Counsel's argument is that the suit abated by operation of law. He contended that under Order 5 Rule 2(1) of the Civil Procedure Rules, Summons are valid for 12 months. Under Rule 2(7), where no application for extension of validity is made, the court may dismiss the suit at the expiry of 24 months from the issuance of the original Summons.

11. It was the Defendant's argument that since no Summons were ever taken out, the suit ought to have been dismissed in June 2018. The Defendant relied on the case of Udaykumar Chandulal Rajani & 3 others -vs- Charles Thaithi [1997] KECA 163 (KLR). The Defendant argued that one cannot amend a dead suit. Therefore, the Amended Plaint of November 2023 is a nullity as it sought to breathe life into a suit that had already abated. Counsel for the Defendant dismissed the Plaintiffs' claim of waiver, arguing that filing a Notice of Appointment and Replying Affidavit to oppose an application does not absolve the Plaintiffs of their mandatory duty to serve Summons to trigger the filing of a defence.

12. On their part, the Plaintiffs conceded that the Summons were never issued, but urged the Court to find that this was not fatal to the suit. Counsel's argument anchored on the principle of substantive justice enshrined in Article 159(2) (d) of the *Constitution* and the overriding objective in sections 1A and 1B of the *Civil Procedure Act*.

13. The Plaintiffs submitted that the primary purpose of Summons is to notify a defendant of the existence of a suit and invite them to participate. In this instance, that purpose was achieved when the Defendant was served with the Plaint and the application seeking injunctive orders, appeared in court through counsel and actively participated by filing a detailed Replying Affidavit. They argued that the Defendant, having been fully aware of the suit since 2016, has suffered no prejudice.

14. Counsel for the Plaintiff contended that the Defendant's active participation amounted to a waiver of its right to be served with summons. He relied on the case of Amina Hersi Moghe & 2 others v Diamond Trust Bank Kenya Limited & another [2021] KEHC 4303 (KLR). The Plaintiffs submitted that the Court has wide discretion under section 95 of the *Civil Procedure Act* and Order 50 rule 6 of the Civil Procedure Rules to enlarge time for the issuance of summons.

Analysis & Determination

15. I have carefully considered the Applications, the Affidavits and the rival submissions. The questions before me are: Can a suit, in which no summons to enter appearance have been issued for nearly 8 years, be sustained? Can the Court exercise its discretion to issue such summons out of time?

16. Order 5 Rule 2(1) of the Civil Procedure Rules provides:

> 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.

17. This provision creates a stringent and time-bound process. Summons are valid only for 12 months from the date of issue. Rule 2(2) provides a window for the Court to extend their validity, but this is a discretionary power to be exercised only if the Court is satisfied that it is just to do so. Order 5 Rule 2(7) provides that the Court may dismiss the suit after 24 months if no application for extension has been made.

18. In Pecker Woods Limited v Bank of Africa Kenya Limited [2021] KEHC 8398 (KLR), the Court opined that summons are the heart and soul of a suit. Without them, a defendant is under no legal obligation to file a defence, and the timelines for pleadings are never triggered.

19. In Misnak International (UK) Limited -V- 4MB Mining Limited c/o Ministry of Mining. Juba Republic of South Sudan & 3 Others (2019) eKLR, the Court of Appeal adopted that point of view when it upheld the high court thus:

> " We concur with and adopt the following sentiments of Aburili, J. in Law Society of Kenya vs Martin Day & 3 Others (supra):
>
> > " 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."

20. The Plaintiffs urge this Court to find that the Defendant waived its right to service. I am not persuaded. The Defendant's participation was limited to opposing an urgent application in June 2016 seeking injunctive orders. The pleadings filed by the Defendant were for that specific, limited purpose. It never filed a defence, which would signify unconditional submission to the suit for trial on merits.

21. I align myself with the sentiments by Hon CM Kariuki, J in the case of Grace Wairimu Mungai v Catherine Njambi Muya [2014] KEELC 538 (KLR), where the learned Judge stated thus:

> "No party took any action until the instant application was filed on 27th August 2013 over 20 months later from the date of the ruling which puts to question the plaintiff's commitment to the prosecution of the suit."

22. A defendant is entitled to oppose an urgent application seeking to restrain its rights while awaiting proper service to engage in the main suit. The Defendant's subsequent 8-year silence cannot be construed as acquiescence; it is consistent with the position of a party upon whom no legal demand to plead (vide Summons) has been made.

23. The Plaintiffs' plea to invoke the provisions of Article 159 and the overriding objective is misplaced in these circumstances. These provisions are a shield against the tyranny of arid technicalities, but not a sword to strike down mandatory statutory provisions that safeguard the right to a fair hearing and ensure the timely prosecution of suits. The failure to issue Summons for 8 years is not a procedural technicality. It is a fundamental omission that goes to the very root of the proceedings. In Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2013] KECA 113 (KLR), the Court of Appeal stated thus:

> "It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the *Constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities."

24. In Udaykumar Chandulal Rajani & 3 Others Vs Charles Thaithi [1997] KECA 127 (KLR), the Court of Appeal established that the court has no power to extend the validity of Summons beyond the statutory period, especially when no valid summons are in existence.

25. In the present case, the situation is even more dire for the Plaintiffs. They are not seeking to extend the validity of expired Summons; they are seeking to create and issue Summons for the first time, 8 years after the suit was filed. The Summons, which if issued in June 2016, would have expired in June 2017. By June 2018, the suit was ripe for dismissal. To grant the orders sought by the Plaintiffs now would be to purport to resurrect a suit that has, for all legal and practical purposes, been deceased for over 6 years. This Court has no jurisdiction to perform such a feat.

26. It follows, therefore, that the suit having abated, the Plaintiffs' act of amending the Plaint in November 2023 was a nullity. One cannot place something on nothing and expect it to stand. As there is no valid suit in existence, there was nothing to amend. The Amended Plaint is consequently of no legal effect.

27. In the premise, the Preliminary Objection dated 22 July 2024 is upheld. The Notice of Motion dated 8 May 2024 is hereby allowed. The Notice of Motion dated 21 June 2024 is hereby dismissed. This suit is struck out in its entirety, with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Plaintiffs/Applicants: Mr. Onyonka h/b Mr. Miencha

1st Defendant/Respondent: Mr. Otieno h/b Mr. Gichuhi SC

2nd Defendant: N/A

Interested Parties: N/A

Court Assistant: Lucy Mwangi.