



Arboretum Plaza Limited v Middle East Bank Kenya Limited & 4 others (Commercial Case E594 of 2023) [2025] KEHC 11446 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11446 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E594 OF 2023**

PM MULWA, J

JULY 31, 2025

BETWEEN

ARBORETUM PLAZA LIMITED PLAINTIFF

AND

MIDDLE EAST BANK KENYA LIMITED 1ST DEFENDANT

GARAM INVESTMENTS 2ND DEFENDANT

AKBER ABDULLAH KASSAM ESMAIL 3RD DEFENDANT

DHIRENDRA RANA 4TH DEFENDANT

ELIZABETH ONGARE 5TH DEFENDANT

RULING

1. Before the Court for determination are seven applications, all filed by the Defendants at different intervals. The applications are as follows: by the 1st Defendant dated 20th May 2024 and 24th January 2025; by the 4th Defendant dated 11th June 2024; by the 3rd Defendant dated 9th December 2024; by the 5th Defendant dated 9th January 2025 and 28th January 2025; and by the 2nd Defendant dated 4th February 2025.

Background

2. The Plaintiff commenced this suit by a Complaint dated 1st December 2023. Contemporaneously, the Plaintiff filed a Notice of Motion under a certificate of urgency, seeking, *inter alia*, a stay of the intended transfer of LR No. 209/8619, Nairobi, following a public auction conducted on 21st November 2023. The Defendants opposed the application, arguing that the court lacked jurisdiction to hear and determine the issues raised by the Plaintiff. Upon hearing the application, this Court delivered a ruling



on 11th April 2024, wherein it found that it was properly seized of jurisdiction and granted a temporary stay of the transfer of LR No. 209/8619, Nairobi, situated along Nanyuki Road.

3. Following the said ruling, the 1st and 4th Defendants filed the present applications, which, though varied in form, seek to set aside the orders of 11th April 2024, while the other Defendants seeks to have the suit struck out for want of service of summons to enter an appearance.

The Applications

4. The applications dated 11th June 2024 by the 4th Defendant and 20th May 2024 by the 1st Defendant are brought pursuant to Order 40 Rule 7 of the *Civil Procedure Rules*. The gravamen of both applications is that the orders issued on 11th April 2024 ought to be set aside ex debito justitiae on account of lack of service. The Applicants contend that they were neither served with the plaint nor the application which culminated in the impugned ruling. The 4th Defendant, in particular, disavows any association with one Mr. Riungu, alleged to have received the pleadings on his behalf. They contend they were condemned unheard contrary to the requirements of a fair hearing.
5. The Notice of Motion dated 24th January 2025 (1st Defendant), that dated 28th January 2025 (5th Defendant), and that dated 4th February 2025 (2nd Defendant) seek to strike out the suit on the basis of non-compliance with Order 5 rule 1(5) of the *Civil Procedure Rules*, which mandates that summons be collected for service within thirty (30) days from the date of filing. The Defendants argue that no summons were prepared or served, thus rendering the suit incompetent *ab initio*.
6. The 5th Defendant's application dated 9th January 2025 raises a distinct issue. It challenges the jurisdiction of the Court and asserts that no reasonable cause of action has been disclosed against the 5th Defendant, thereby rendering the claim against her unsustainable.

Response by the Plaintiff

7. In response, the Plaintiff filed various replying affidavits in opposition to the said applications. The affidavits mirror each other. It is the Plaintiff's case that the Defendants were duly served with the Plaint and Notice of Motion dated 1st December 2023, and that they actively participated in the proceedings by filing responses and instructing counsel to file a notice of appointment. The Plaintiff contends that service of summons, even if not regular, did not occasion prejudice, and the Defendants, having participated in the application, are estopped from challenging service.
8. Further, the Plaintiff argues that technical lapses in service, if any, should not be used to defeat substantive justice, and that the applications before the Court are intended to delay or derail the fair trial of the suit by raising technical objections.
9. The applications were canvassed orally before the Court, and I have considered the rival submissions made by learned counsel for the respective parties, as well as the affidavits and authorities placed before me.

Analysis and Determination

10. From the pleadings and submissions, the key issues arising for determination are:
 - i. Whether the suit is incompetent for want of service of summons to enter appearance under Order 5 Rule 1;
 - ii. Whether the ruling of 11th April 2024 should be set aside for failure to serve the 1st and 4th Defendants;



- iii. Whether the suit discloses a cause of action against the 5th Defendant.

Whether the suit is incompetent for want of service of summons to enter appearance

11. The crux of the Defendants' objection is that the Plaintiff failed to serve summons in compliance with Order 5 Rule 1(5) and (6) of the *Civil Procedure Rules*, and that such failure is fatal to the suit. The Defendants contend that in the absence of service, the suit must be deemed to have abated by operation of law. The Defendants further submit that the provisions of the said rule are couched in mandatory terms, leaving the Court with no discretion but to strike out the suit.
12. In response, the Plaintiff has not tendered any explanation as to why no summons to enter appearance were ever served on the Defendants, nor has the Plaintiff demonstrated any effort made to comply with the statutory procedure. No affidavit of service or application for extension of time or substituted service is on record.
13. For clarity Order 5 Rule 1 of the *Civil Procedure Rules* provides for the issue and service of summons 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 days from the date of filing the 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 shall not be less than ten days.
 - (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (2) of this rule.
 - (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.
14. It is therefore clear that the Plaintiff bore a mandatory duty to extract summons and serve them within the time prescribed. The summons to enter appearance are a fundamental component of due process, serving to notify the Defendant of the institution of the suit and affording them an opportunity to be heard. This principle was underscored by the Court of Appeal in *Equatorial Commercial Bank Limited v Mobansons (K) Limited* [2012] eKLR, where the Court stated:
- “The requirement of service of summons is intended to ensure that the Defendant is formally made aware of the suit and the obligation to respond. Without such service, the Court cannot lawfully assume jurisdiction over the Defendant.”
15. From the court record, the Plaintiff filed the suit on 1st December 2023, together with a Notice of Motion seeking injunctive relief. However, it is undisputed that the Plaintiff neither extracted nor served summons upon the Defendants as required. Although the Defendants did participate in the interlocutory application, that alone does not cure the omission. It matters not that the Defendant may have by other means been notified of the suit and entered an appearance. Such appearance is of no effect. In fact, a Defendant who may be aware of the existence of such a suit can opt to ignore it if



not properly notified through service of valid summons to enter appearance. A 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.

16. I am of the considered view that service of summons is not a mere procedural formality but a fundamental requirement in the exercise of fair hearing and due process. Non-compliance with the procedure outlined in Order 5 rendered a fundamental defect in the proceedings that the inherent powers of the Court under Section 3A of the Civil Procedure Act could not cure nor could it be cured or revived by the entry of appearance by the defendants. (See Palace Drycleaners Ltd & Another v Kenya Power & Lighting & Co. Ltd civil suit 837 of 2000).
17. The Plaintiff has not taken any steps to regularize the position or to seek leave to effect service out of time. No application for extension or revival of the suit has been filed. As such, the suit remains procedurally incurable from inception.
18. In view of the foregoing, and guided by the binding provisions of Order 5 Rule 1, I find that the Plaintiff failed to take the necessary procedural steps to properly bring the Defendants before the Court. The omission to extract and serve summons is not a mere technical defect but a fundamental jurisdictional lapse that goes to the root of the suit. As such, the Plaintiff's failure is fatal to the proceedings.
19. Consequently, I hold that the suit is incompetent for want of service of summons and is accordingly struck out. There shall be no order as to costs.
20. Having struck out the entire suit, I find it unnecessary and inappropriate to address the other issues raised in the pleadings. Specifically, I decline to consider whether it is appropriate to set aside my earlier orders issued on 11th April 2024, as the substratum upon which they were issued no longer exists.
21. Additionally, the 5th Defendant's Notice of Motion application dated 9th January 2025 is rendered moot by the striking out of the primary suit, and no further orders shall issue thereon.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY 2025.

PETER M. MULWA

JUDGE

In the presence of:-

Ms. Nyaga for Plaintiff

Mr. Esmael for 1st Defendant

Mr. Onyambu for 2nd Defendant

Mr. Ochieng for 3rd Defendant

Ms. Tanui h/b for Mr. Amoko for 4th Defendant

Mr. Kiragu Kimani, SC for 5th Defendant

Court Assistant: Carlos

