



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC NO. 455 OF 2011**

**BISHOP ISAIAH CHALLO**

**REV. SYLVESTER KIEMA**

**REV. JACKSON MUTUNE (Suing as the Trustees of Living Water**

**Church**

**International.....PLAINTIFFS/RESPONDENTS**

**= VERSUS=**

**THE REGISTERED TRUSTEES OF REDEEMED GOSPEL CHURCH.....1<sup>ST</sup> DEFENDANT**

**EMBAKASI CONSTITUENCY CDF.....2<sup>ND</sup> DEFENDANT**

**RULING:**

The matter coming up for determination is the Notice of Motion application dated 17<sup>th</sup> October, 2013 brought under **Order 5 Rules 1,2,3,4,5,and 6, Order 51 of the Civil Procedure Rules 2010 and Section 3A of the Civil Procedure Code** and all other enabling legislation .

The application is brought by the Defendants herein against the Plaintiffs seeking for orders that:

- a. *That the Court do pronounce that the Plaint dated 30<sup>th</sup> August, 2011 filed by the Plaintiffs in this matter as having abated and order the same to be struck out .*
- b. *That costs be provided for.*

The application is supported by the grounds on the face of the application and on the supporting affidavit of **Bishop Arthur Kitonga**. These grounds are:-

- i. *The Plaintiffs served a Notice of Motion dated 30<sup>th</sup> August 2011 and a Plaint of even date under certificate of urgency on the Defendants.*

- ii. *No summons to enter appearance to the Plaintiff was served.*
- iii. *The Notice of Motion was heard and ruled against the Plaintiffs.*
- iv. *The Plaintiffs have made several attempts to fix the matter for hearings in total disregard of the fact that summons have never been served on the Defendants.*
- v. *That it is mandatory requirement that summons be served with the Plaintiff.*

The Plaintiffs opposed the Notice of Motion. One **Bishop Isaiah Kivuvi Challo** swore a Replying Affidavit. He admitted that their previous advocate did not take out summons for service upon the Respondents. That the said failure was not intentional and mistake of their advocate should not be visited on them. The deponent urged the court not to allow the instant application.

The parties herein canvassed this Notice of Motion by way of written submissions. I have now considered the dispositions, the annexures thereto and the written submissions and I make the following findings.

The applicants have argued that Plaintiffs herein did not take out summons to enter appearance. That the suit has now abated since the Plaintiffs have breached a mandatory requirement.

The Plaintiffs/Respondents have admitted that indeed the Summons to Enter Appearance were never taken out. They averred that was due to the inadvertent mistake on the part of their previous advocates and they should not be penalized for the mistakes of their advocates.

I have considered the provisions of **Order 5 Rule 1** which reads as follows:-

**“ when a suit has been filed, summons shall issue to the Defendant ordering him to appear within the time specified therein”.**

The above provision is couched in mandatory terms. The Summons **shall** issue to the Defendant **Order 5 Rule 1 (6)** provides that:-

**“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”.**

The above sub rule is also couched in **mandatory terms**. The plaintiffs were supposed to collect Summons to Enter Appearance within **30 days**. It is on record that such Summons were not collected.

The provisions of **Order 5 Rule 1(6) are mandatory provisions** and the parties have to adhere to them. As was rightly held in the case **of John Sakaja Vs Caleb Kositany ( 2008) eklr which quoted John Akasirwa Vs Alfred Inat Kimuso , Civil Appeal No. 16 of 1999.**

**“Proper service of Summons to Enter Appearance in litigation is crucial matter in the process whereby the court satisfies itself that the other party to the litigation has notice of the same and therefore choose to enter appearance or not”.**

The issue of service of Summons to Enter Appearance has been dealt variously by other courts. In the case of **Jairo Angote Okonda Vs Ke nya Commercial Bank Ltd, Civil Appeal No. 216 of 1999,** the Court held that:-

**“Where Summons is not served within the prescribed period, the suit abates. Failure to serve summons to Enter Appearance within the prescribed period results in the suit abating”.**

The Plaintiffs submitted that the mistakes of their advocates should not be visited on them. However, this is a matter that does not require the discretion of the court, as the provisions of **Order 5 Rule 1 (6)** are mandatory Provisions.

The Plaintiffs herein failed to collect Summons within the prescribed time and/or serve them. For the above reasons the Plaintiffs suit has abated.

From the foregoing, the Court finds that the Defendants/Applicants Notice of Motion dated 17<sup>th</sup> October 2013 is merited and the same is allowed in terms of prayer No.1 and cost of the application be borne by the Plaintiffs/Respondents.

It is so ordered.

Dated, signed and delivered this **16<sup>th</sup> day of May, 2014**

**L.GACHERU**

**JUDGE**

In the Presence of:-

M/s Amoko holding brief M/s Mbacho for the Plaintiffs/Respondents

None attendance for the 1<sup>st</sup> Defendant

None attendance for the 2<sup>nd</sup> Defendant

Lukas: Court Clerk

**L.GACHERU**

**JUDGE**

**16/5/2014**