



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 237 OF 2008**

THE ACE RESTAURANT LIMITED .....PLAINTIFF

VERSUS

NYALI GOLF CLUB & COUNTRY CLUB .....DEFENDANT

**RULING**

An application by Way of a Chamber Summons was filed in Court on 10th September, 2008 under certificate of urgency. It was certified urgent but the Judge declined to grant interim and or temporary orders sought. The Defendants later raised a Notice of preliminary objection to the application which preliminary objection is dated 6th October, 2008.

The grounds

- (a) No summons has been served in this suit on the Defendants or of any due process to enable the court to exercise its jurisdiction to hear and determine this matter.
- (b) The Defendant herein has been incorporated as a company Limited by Guarantee and not having a share capital under the Companies Act Cap 486 of the Laws of Kenya and carries on business of a private members club. No leave has been obtained by the plaintiff to bring a representative suit against its members.
- (c) No suit may be brought against the Defendant as described herein above and it has been wrongly sued.

Order 5 rule 1 (1) provides,

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

**(6) Every Summons except where the court is to effect service shall be collected for service within 30 days of issue or notification whichever is later failing which the suit shall abate.**

**Rule 7 where no application has been made under subrule 2, the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons”.**

On the issue of service of summons counsel for the applicant submits that in the affidavit by Caroline

Matira Anami annexure E is an order appointing one George Mokuia of Mokuia & Co. as interim liquidator of Ace Restaurant Ltd. That order was made in the year 2008 and their lands were lied because of legal limitations. This argument is countered by Miss Oluoch counsel for the Respondent who maintains that the order for appointment of a liquidator was made on 29 July, 2008 whereas the plaint is dated 10th September, 2008. This is a suit of 2008 there is no evidence to the effect that summons were issued and served as required under order 5.

Under order 5 rule 1 (6) Summons should be collected for service within 30 days of issue or notification failure to which the suit shall abate.

I am satisfied that the preliminary objection has merit and the chamber summons application dated 10th September, 2008 is dismissed with costs to the Respondents.

Ruling delivered dated and signed in open court this **28th** day of **October, 2013**.

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**M. MUYA**

**JUDGE**

**28TH OCTOBER, 2013**

**In the presence of:-**

Learned Counsel Aisge holding brief Khana for Defendant.

Leaned Counsel for plaintiff ( absent)