



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Suit 512 of 2010**

**ERERI COMPANY LIMITED.....PLAINTIFF**

**-VERSUS-**

**SIMON KAMAU GITAU.....1<sup>ST</sup> DEFENDANT**

**FRANCIS KARIUKI MARANGA.....2<sup>ND</sup> DEFENDANT**

**STEPHEN KAMAU KUNGU.....3<sup>RD</sup> DEFENDANT**

**NEPHAT GICHUHI KINYANJUI.....4<sup>TH</sup> DEFENDANT**

**STEPHEN NDUNGU NJENGA.....5<sup>TH</sup> DEFENDANT**

**GEOFFREY MUIRURI MUCHAI.....6<sup>TH</sup> DEFENDANT**

**GIKONYO NDIRANGU.....7<sup>th</sup> DEFENDANT**

**KAMAU MURIGU.....8<sup>TH</sup> DEFENDANT**

**RULING**

1. Before the Court is the Defendants' Notice of Motion dated 17<sup>th</sup> May 2012. It is filed under Order 5, Rules 1 and 2 of the Civil Procedure Rules and Section 1A and 1B of the Civil Procedure Act. The application is mainly seeking for orders that the suit herein be dismissed for want of service of summons.
2. The application is based on the grounds stated on the face of the application. The defendants also filed a Notice of Preliminary objection dated 17<sup>th</sup> May 2012 and the grounds are as set out on the face of it.
3. The application was not opposed. However, the plaintiff was represented by learned counsel, Mr. Macharia at the hearing of the application.
4. The defendants' case is that the suit was filed on or about the 27<sup>th</sup> of July 2010 and no summons to enter appearance has ever been issued or served upon them. That the Civil Procedure Rules, 2010 mandatorily require that every summons are to be collected and served within thirty days of issue failing which the suit should abate.
5. At the hearing of the application, Mr. Kuyo for the defendants relied on the grounds set out in the

defendants' application as well as the list of authorities filed in court on 18<sup>th</sup> May 2012. He referred the court to the case of **Golden Bell (Overseas) East Africa Ltd v University of Dar es Salam & anor [2006]**, in which the court of appeal stated that failure to take out summons was a fundamental defect that could not be cured. He submitted that summons had not been taken since the suit was filed and that as such the defendants had not filed their defence. He further submitted that the terms of **Order 5 rules 1 and 2** were cushioned in mandatory terms.

6. Mr. Macharia for the plaintiff indicated that they were in court to hear the instant application and the Notice to Show cause dated 8<sup>th</sup> May 2012. He stated that the defendants were to show cause as to why they should not be put to civil jail. It was his submission that **Order 22 of the Civil Procedure Rules** provided that where a party had failed to comply with a decree, an application would be made for committal to civil jail. The plaintiff's case is that the defendants had been ordered to hand over to the plaintiff various items. The defendants applied for the review of those orders, of which their application was rejected. Counsel for the plaintiff contended that the defendants had not shown any cause as to why the court could not commit them to civil jail and prayed that the defendants be jailed for six months.

7. On the instant application, Mr. Macharia submitted that it was not true that there was no valid decree before the court capable of execution. He averred that **Order 22 of the Civil Procedure Rules** could be used to enforce either a decree or an order. As regards the issue of service of summons, he submitted that the file had been active ever since the first application and that summons had never been signed by a Deputy Registrar. He further submitted that the purpose of summons was to notify the other party of the existence of a suit. He contended that the defendants had submitted themselves to the court's jurisdiction and they had never raised the issue of non-service of summons. He relied on the decision of Gacheche J. (as she then was) in the case of **Fredrick Chesire vs Raymond W. Bomett [2006] eKLR**.

8. I have carefully considered the application herein as well as the submissions by counsel for both parties.

9. It is trite law that the purpose of issuance and service of summons is to ensure that the party against whom a suit has been filed is made aware that there is a suit against them. In the instant case, it is clear that the defendants have been well aware of the suit against them, having submitted to the jurisdiction of this court on several occasions. There is therefore no valid reason why the defendants should now raise the question of non-issuance of summons and this, in my humble view is an afterthought.

10. This court is mandated to observe the overriding objective to do justice to the parties as captured at Section 1A and 1B and as read together with Section 3A of the Civil Procedure Act. In the instant case, the dictates of substantive justice render dismissal of the suit for want of issuance of summons, draconian. Undeniably, this Court is also called upon to administer justice without undue regard to procedural technicalities under Article 159 of the Constitution of Kenya, 2010. The need to issue summons while cushioned in mandatory terms under the Civil Procedure Rules is nevertheless excusable in the interest of substantive justice, where the facts clearly show that the Defendant was made aware of the suit and participated in the proceedings giving rise to the decree sought to be enforced.

11. In the upshot, the defendants' Notice of Motion dated 17<sup>th</sup> May 2012 fails and is hereby dismissed with costs to the Plaintiff.

12. The plaintiff may take a fresh date at the registry for the hearing of the Notice to Show Cause dated 8<sup>th</sup> May 2012.

**IT IS SO ORDERED.**

**DATED, DELIVERED AND SIGNED THIS 11<sup>TH</sup> DAY OF OCTOBER 2012**

**J.M MUTAVA**

**JUDGE**