



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION

CIVIL CASE NO. 26 OF 2008

1. JUMA RAJAB
2. YAHYA HUSSEIN
3. RAMADHAN RAJAB

(Suing as members of PUMWANI RIYADHA MOSQUE).....PLAINTIFFS

V E R S U S

1. ATHMANI MPONDA
2. MOHAMED SAID
3. JUMA ABDALLA SEVENTEEN
4. ADNAN RUSHTANA
5. MAURID ABDALLA MTHUI
6. SALIM IBRAHIM NYAMBU

(Sued as “Outside Committee” of PUMWANI RIYADHA MOSQUE).....DEFENDANTS

RULING

This is an application (**notice of motion dated 2nd November, 2010**) by the Defendants for two main orders:-

1. That the plaint and suit herein be struck out for being defective and incompetent.

2. That in the alternative the suit be struck out for being bad in law and an abuse of the process of the court.

The application is brought under **Order IV, rule 3** and **Order VI, rule 13(d)** of the old **Civil Procedure Rules** (the **Rules**).

The grounds for the application appearing on the face thereof are:-

1. That the Plaintiffs or their advocates have never prepared and did not file summons to enter appearance together with the plaint.
2. That no summons have ever been issued or served upon the Defendants.
3. That the plaint herein filed without summons to enter appearance is incompetent and incurably defective.
3. That the suit as filed is an abuse of the process of the court.

There is a supporting affidavit filed by the Plaintiff's counsel sworn by an advocate from the firm of advocates representing the Defendants. He deponed as follows in the material part:-

1. That the documents so far served upon the Defendants did not include summons to enter appearance.
2. That perusal of the court records confirmed that no summons to enter appearance was filed with the plaint, and none has ever been issued by the court.

The application was served on 4th February, 2011 upon the Plaintiffs. No papers were ever filed in response.

The application came up for hearing on 21st June, 2011. The Plaintiff's counsels were duly served with hearing notices on 7th April, 2011. There was no appearance for the Plaintiffs at the hearing. The application is thus unopposed either by filing grounds of opposition or replying affidavit, or by appearing at the hearing to present any legal arguments in opposition.

I have considered the submissions of the learned counsel for the Defendants, including the one case cited. **Order IV, rule 3 (5)** provides as follows:-

“Every summons shall be prepared by the Plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.”

Sub-rules (1), (2) and (3) of the same rule provide 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.

(3) Every summons shall be accompanied by a copy of the plaint.”

This suit was filed on 13th February, 2008. Summons to enter appearance were not prepared by the Plaintiffs or their advocates and filed with the plaint as required by subrule (4) aforesaid. As a consequence, no summons to enter appearance have ever been issued in accordance with subrule (2) and served upon the Defendants in accordance with subrule (1), all stated above.

Issuance of summons to enter appearance and service thereof upon the defendant are necessary and mandatory steps in civil litigation. A defendant can only be properly brought into a suit by way of service of summons to enter appearance.

In the present case the Defendants have never been properly brought into the suit because they have never been served with summons to enter appearance ,which summons in any case have never been issued because the Plaintiffs or their advocates have never prepared them.

The suit is now more than 3 years old. The Plaintiffs appear to have lost interest in it. Their failure to respond to the present application is a further manifestation of this lack of interest in the suit. In any event the suit can no longer be considered to be properly on record for want of preparation and service of summons to enter appearance upon the Defendants.

I will in the event allow the application. The plaint dated 13th February, 2008 is hereby struck out and the suit dismissed with costs to the Defendants.

It is o ordered.

DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JULY, 2011

H.P.G. WAWERU
JUDGE

DELIVERED THIS 29TH DAY OF JULY, 2011