REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 133 of 2005

1. **ALFRED MAKHONGO**
2. **LUKE WAMALWA WANYAMA**
3. **HENRY KIRINGOTI**

(Suing as the Chairman, Secretary andTreasurer respectively of

AFRICAN RURAL MISSION) .....PLAINTIFFS

V E R S U S

1. PROF BISHOP ZABLON NTHAMBURI

2. DR. REV. STEPHEN KANYARU M'IMPWI

(Being Registered Trustee of Methodist Church) .....DEFENDANTS

R U L I N G

By a **ruling dated 12th and delivered on 13th March, 2009** this court (Waweru, J) allowed an application by the Defendants (**chamber summons dated 20th November, 2009**) in which they had sought two main orders - to discharge a temporary injunction granted to the Plaintiffs on 18th July, 2005 pending disposal of suit, and to strike out the suit under **Order 6, rule 13(1)(a) – (d)** of the **Civil Procedure Rules** (the **Rules**).

The court had heard the application *ex parte* as there was no appearance for the Plaintiffs when the application came up for hearing on 17th February, 2009, notwithstanding that the hearing date had been taken by consent at the registry.

Five issues had been canvassed for the Defendants at the hearing. The court allowed the application only upon one of those five issues. That issue was **whether or not the suit was invalid for failure to serve summons to enter appearance so long after the suit was filed**.

The Plaintiffs subsequently filed an application by **chamber summons dated 24th March, 2009**. They sought two main orders:-

> "1...
>
> 2. That the *ex-parte* hearing of this suit conducted on 17th February, 2009...and ruling delivered on 13th March, 2009 and all other consequential orders/proceedings be set aside.

3. That this suit be heard on its merit in the normal way and the (Plaintiffs)...be allowed to be heard on the application dated 20th December, 2007.

4.....

5....."

The application is bought under **Order 9B, rules 3** and **8** of the Rules, and is opposed by the Defendants.

As the Defendants were overruled upon all the other issues that had been canvassed *ex parte* on their behalf on 17th February, 2009, the court directed that the parties do address it only on the one issue upon which it had allowed the Defendants' application to strike out the suit.

I have read all the affidavits sworn in support of and in opposition to the application. I have also considered the written submissions filed on behalf of the parties.

The record of the court indicates that summons to enter appearance were never issued or served upon the Defendants for all the time that this suit has been in existence, over four years. This is a factual position that has not been seriously challenged by the Plaintiffs.

The main point that has been urged by the Plaintiffs in this application is, in effect, that notwithstanding lack of issuance and service of summons, the Defendants entered appearance and filed defence. The parties exchanged documents. Issues were framed, and the suit has been set down for hearing on several occasions. The Plaintiffs argued therefore that in these circumstances, and notwithstanding the provisions of **Order 4, rule 3** of the Rules, it was patently unjust to strike out the suit and thereby prevent the adjudication on merit of the dispute between the parties.

The Defendants on the other hand do not dispute that they entered appearance (but under protest) and filed defence, and that documents have been exchanged, issues framed, and the suit set out for hearing on a number of occasions. But they urge that issuance and service of summons upon the Defendants is a matter that goes to jurisdiction, and cannot therefore be ignored.

In its aforesaid ruling of 13th March, 2009 this court expressed itself as follows:-

"This suit was filed on 8th February, 2005. The Defendants have stated at paragraph 32 of the supporting affidavit that they have never been served with summons to enter appearance. They filed memorandum of appearance under protest precisely for this reason. Subsequently they filed defence. On this issue of service of summons to enter appearance, the Plaintiffs have not asserted in the replying affidavit that the same were issued or served. On the contrary, at paragraph 31(g) of the affidavit there is a tacit admission that summons to enter appearance have never been issued or served. I have perused the court record. I cannot find any copy of summons to enter appearance, issued or not issued. What is the effect of all this upon the Plaintiffs' suit?

Order 4, rule 3 of the Rules sets out the law in this regard. Sub-rule (5) of that rule requires, in mandatory terms, that the plaintiff or his advocate prepare summons to enter appearance and file them with the plaint. The same are then signed and issued in accordance with sub-rule (2). Sub-rule (1) requires, again in mandatory terms, that when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified in the summons.

Under Order 5, rule 1(1) a summons (other than a concurrent summons) shall be valid in the first instance for 12 months beginning with the date of its issue. Under sub-rule (2) of that rule, where a summons has not been served on a defendant, the court may extend the validity of the summons from time to time if satisfied that it is just to do so. And under sub-rule (7), where no application has been made to extend the validity of summons, the court may without notice dismiss the suit at the expiry of 24 months from the issue of the original summons.

It is clear that even where summons have been duly issued, there a strict regime of time within which certain

events must happen for the suit to remain valid. Summons must be signed and issued without delay. Then they must be served upon the defendant within 12 months. If they are not served within that period they become invalid, but the court may extend their validity from time to time. If no application to extend validity of the summons is made within 24 months of issuance of the original summons, the summons expires. See the case of *Mobile Kitale Service Station –vs- Mobil Oil Kenya Limited & Another [2004] I KLR 1.*

"Would there be a valid suit without valid summons in place? I think not. Issuance and service of summons to enter appearance is not a mere formality. It is what brings a defendant into the suit. Without bringing a defendant into the suit there cannot be any final determination of the plaintiffs' claim. That is why the Rules set a definite time span within which summons must be served, or extended and served, upon a defendant. It is really an issue of jurisdiction. The court would not be properly seized of the matter until the defendant has been brought into the suit by service of summons.

What is the situation in the present case? Here, summons have never been signed and issued, let alone served, more than four (4) years since the suit was filed. Had summons been issued but not served or extended, the same would have died after 24 months from the date of issue of the original summons. The suit itself would then have been liable to be dismissed without notice.

In my view, where no summons are signed or issued within 12 months of the filling of the suit, the suit is liable to be dismissed. This is because the court has jurisdiction only to extend the validity of summons that have already been signed and issued where such validity expires after 12 months of the date of issue if there is no service. Is there jurisdiction to sign and issue original summons after 12 months from the date of filing suit? It appears to me that there is none. At any rate none is specifically provided for in the Rules.

In the present suit, no summons were signed and issued within 12 months of filing the suit or at all. It is liable to be dismissed without notice. It has not been demonstrated that the Plaintiffs did all they could to have summons issued and served, or that it was not their fault that they were not signed and issued. At any rate, to file a suit and then wait for over 4 years without moving to have summons issued and served upon a defendant is gross abuse of the process of the court, especially where the plaintiff is enjoying an interlocutory injunction."

Nothing has been placed before the court in the present application that persuades me to depart from that position that I took in the ruling of 13th March, 2009.

But I have also considered the matter in light of the new sections **1A** and **1B** of the **Civil Procedure Act, Cap 21** (the **Act**) enacted by **Act No 6 of 2009** which commenced operation on 23rd July 2009 after I heard the present application. Those new sections provide as follows:-

"1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

IB. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology."

Before enactment of these new sections of Cap 21, the courts in this country were probably spending the better part of their time

and effort interpreting and enforcing rules of procedure at the expense of doing substantial justice to the parties that appeared before them. The purpose of these new provisions is to enable the courts, advocates and parties to move away from undue preoccupation with technicalities of procedure in order to facilitate **just, expeditious, proportionate and affordable resolution** of civil disputes.

The courts are now enjoined by law, in exercising their powers under the Civil Procedure Act and Rules, to seek to give effect to this overriding objective. Advocates and parties are similarly enjoined to assist the courts to further the overriding objective.

However, I must hasten to add that the new sections 1A and 1B of Cap 21 will not, and should not, be a panacea for flouting all rules of procedure. If that is allowed, litigation might become so disorderly that the overriding objective of the Act and the Rules may well be defeated. At any rate, there are certain rules of procedure that go to the root of the matter, or to jurisdiction. These cannot be flouted with impunity.

In the ruling of 13th March, 2009 I held that issuance and service of summons to enter appearance go to jurisdiction of the court. I am still so persuaded. I am afraid that even if the present application had been filed after enactment of sections 1A and 1B of Cap 21 the Plaintiffs' application would not have been saved by those provisions.

In the event I find no merit in the chamber summons dated 24th March, 2009. The same is hereby dismissed with costs. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2010

H. P. G. WAWERU

J U D G E

DELIVERED THIS 12TH DAY OF FEBRUARY, 2010