



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

Civil Suit 286 of 2007 (OS)

REV. FESTUS NJOROGE NJANGIRU.....PLAINTIFF

-versus-

RT. REV. DR. GIDEON GICHUHI GITHIGA.....1ST DEFENDANT

ANGLICAN CHURCH OF KENYA (DIOCESE OF THIKA).....2ND DEFENDANT

R U L I N G

In his preliminary objection dated 30th May 2007 and filed on same date, Mr. Karuga Wandai, Counsel for the Defendants in this suit is saying:

THAT “the suit is wrongfully and unprocedural before the court in that it should be by way of plaint not by way of originating summons.”

Mr. T. Murage, learned Counsel for the Plaintiff does not agree and I have got what was said by each counsel on record and in full consideration in this ruling.

To start with what each side is not saying but which I have noticed is that the filing of the originating summons (O.S.) seems to be attracting issues leading to interlocutory applications or hearings which could perhaps be avoided if the suit were commenced by a plaint. See this preliminary objection dated 30th May 2007, chamber summons by the Plaintiff dated 16th May 2007 and the Defendant’s replying affidavit thereof dated 30th May 2007 all following the questioned other replying affidavit dated 24th April 2007 which the Plaintiff does not clearly identify in the chamber summons aforesaid. Would the proceedings not be straight forward if all those interlocutory issues were avoided?

Concerning what is in the originating summons therefore, the subject matter is Termination of a Contract of Service. The question is whether that termination was wrongful. Looking at the headnotes of the original summons, it is stated to have been brought under **Order XXXVI Rules 1(g), 3 and 5** of the **Civil Procedure Rules**. That is a strange combination of rules which may lead to startling results. This is because while **Rule 1(g)** is concerned with matters relating to claims in an estate of a deceased person; **Rule 3** is concerned with matters relating to land transaction and **Rule 5** concerns persons claiming interest under deeds or wills or other written instruments” which in my opinion must be construed to be in the group of wills or deeds and not contracts.

That is the kind of diversity that comes out when looking at **Rule 1(g), Rule 3 and Rule 5** of **Order XXXVI** of the **Civil Procedure Rules**. As such, it is difficult to comprehend a suit which would properly fall under all those three rules or even under only two of them. When this originating summons was filed under all those three rules, the impropriety was clear and ought to be seen by the Plaintiff.

Moreover, this being a case based on a contract of service – an employment contract, I do not see how it fits in any of those three rules.

What I am saying therefore vindicates what Mr. Karuga Wandai was telling this court that the originating summons herein is not covered by the three Rules or any of them contrary to what Mr. Murage was telling the court.

In that situation, again contrary to what Mr. Murage and Mr. Karuga Wandai were saying in their respective opposition to each other, **Rule 10** of **Order XXXVI** does not help us out. That rule is helpful only when the originating summons is properly founded under specified other rule or rules of **Order XXXVI**. It is in such a situation that the court, looking at the filed originating summons as well as relevant affidavits, may decide to treat those documents as pleadings for the purpose of continuing the proceedings “*as if, the cause had been begun*” by filing a plaint. As can be deduced from the last part of **rule 10**, that is done mainly for the purpose of calling witnesses to give evidence to add to what is filed by way of documents. That is not the position in this suit.

In the circumstances, the Plaintiff should be grateful to Mr. Karuga Wandai who was so reconciliatory that he merely asked that the Plaintiff proceeds by way of a plaint. He did not say that the suit be dismissed.

Following upon that reconciliatory note, by Mr. Karuga Wandai, and in the interest of justice and further, notwithstanding that **Rule 10** does not provide us with a solution out of this situation, I do hereby invoke this court’s inherent power under **Section 3A** of the **Civil Procedure Act** and do order this suit struck out with liberty to the Plaintiff to institute a fresh suit by way of a plaint within a period of thirty (30) days from the date of this ruling.

The Plaintiff to pay costs of this originating summons to the Defendants.

Dated this 17th day of October 2008.

J. M. KHAMONI

JUDGE

Present:

Mr. Murage for the Plaintiff

Mr. Kinyanjui holding brief for Mr. Karuga Wandai for the Defendants

Mr. Kabiru – Court Clerk