**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 935 of 2002**

**CHURCH COMMISSIONERS FOR KENYA…….……PLAINTIFF**

**VERSUS**

**JULIA AYING'O ……1ST DEFENDANT**

**GORDON OKUMU WAYUMBA ……..…….2ND DEFENDANT**

**ROSE AUMA AGENDO ……..……..3RD DEFENDANT**

**ERIC OPON NYAMUNGA ……..…….4TH DEFENDANT**

**R U L I N G**

The application dated 22nd February 2007 by way of Chamber Summons is premised under Order V Rules 1,7 and 32, Order VI Rules 13(1) (b) and (d) of Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of Laws of Kenya.

The facts behind this application are not disputed. The suit was filed on 3rd June, 2002 and an ex-parte Judgment was obtained by the Plaintiff/Respondent on 12th October 2005 after he placed an advertisement on 15th June 2002, in '**The Digger Classified"** section of Standard Newspaper on 15th June, 2002. The said Judgment and decree were set aside. It was held that the service of court process was defective/invalid.

The Plaintiff hereafter purported to serve a fresh summons dated 14th November 2006 on the Defendant's Advocates.

The Defendants filed a Memorandum of Appearance under protest and Statement of Defence.

Thereafter this application is filed seeking to strike out the summons and to dismiss the same and the suit.

In the grounds of objection the Plaintiff's Counsel contends that the invalidity of the summons cannot render a suit defective and the Defendant having filed the Defence cannot raise the issue of summons.

With the above grounds it is impliedly accepted by the Plaintiff that the summons were invalid. Even apart from that, the suit having been filed in 2002, the fresh summons dated 14th November 2006 has to

be issued in accordance with the provisions of law.

Order IV Rule 3 of Civil Procedure Rules stipulates that a summons shall issue to the defendants on the filing of the suit, ordering him to appear within the time specified therein.

Thereafter Order V Rules 1(1) stipulates and I quote:

"**1 (1) A summons (other than a concurrent summons, shall be valid in the first instance for twelve months beginning with the date of its issue and a concurrent summons shall be valid in the first instance for the period of validity of the original summons which is unexpired at the date of issue of the concurrent submissions."**

Order V Rule 1(2) does provide for extensions of the validity of the summons from time to time, while Rule 1(7) gives the court the power to dismiss the suit at the expiry of twenty four months from the issue of the original summons if no application has been made under sub-rule (2).

I do not have any evidence that any such application was made by the plaintiff.

These provisions are amply considered by the Court of Appeal in the case of Uday-Kumar Chandulal Patel & Others vs Charles Thaithi (C.A. 55 of 1996 V.R.). It was held by the Court of Appeal –viz-

"**order V Rule (1) provides a comprehensive code for the duration and renewal of summons and therefore the non-compliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure. The first summons having expired, the Deputy Registrar, having held that there was no proper service, he could not in the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the Defendants revive the summons which had expired".** (Emphasis mine)

On the case of **Mobile Kitale Services Station v Mobil Oil Kenya Ltd. & Another** (2004) 1 KLR. It was held: namely

"**We ought to respect rules of engagement as they are promulgated to achieve justice to rival parties. Summon is a judicial document calling a party to submit to the jurisdiction of the court."**

With these observations I shall have no hesitation to find, which I hereby do, that the fresh summons issued was dead. The summons thus cannot be revived having been a nullity and not an irregularity.

The holding in the reputed case of **Mcfoy Limited Vs Africa Co. Ltd.** (1961) 3 AII E.R. 1169 at 1172 comes to my rescue, namely.

"**If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside ---- you cannot put something on nothing and expect it to stay there."**

I think I have sufficiently responded to the grounds of objections filed by the plaintiff, and I reject the same.

The upshot of all the aforesaid is that I allow the application dated 22nd February 2007 and grant the same as prayed.

**Delivered, dated and signed at Nairobi this 2nd day of August 2007**.

**K.H. RAWAL**

**JUDGE**