



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

**Civil Case 514 of 2005**

**JIMOKO ENTERPRISES LTD.....**

**PLAINTIFF**

**VERSUS**

**DEPOSIT PROTECTION FUND BOARD**

**as Liquidators of Middle East Africa Finance Co. Ltd .....1<sup>ST</sup>  
DEFENDANT**

**GILBERT MWINGA t/a WATTS ENTERPRISES.....2<sup>ND</sup>  
DEFENDANT**

**GAMI PROPERTIES LTD.....3<sup>RD</sup>  
DEFENDANT**

**R U L I N G**

This application has been brought by the 1<sup>st</sup> and 2<sup>nd</sup> defendants pursuant to the provisions of Order 39 rule 4, and Order 4 of the Civil Procedure Rules, as read together with Sections 3A and 63(e) of the Civil Procedure Act.

The application seeks the setting aside or discharge of the injunction order granted on 28<sup>th</sup> March 2006. It also seeks the dismissal of the suit.

In the body of the application, the applicant contends that the plaintiff had failed to comply with the orders which were made on 25<sup>th</sup> March 2006. It is also said that there was no valid suit before the court, as the plaintiff had not yet extracted and served a summons to enter appearance. The failure to do so is said to amount to a violation of the mandatory provisions of Order 4 rule 3 of the Civil Procedure Rules.

The other grounds upon which the application is founded are that the plaintiff’s conduct was undeserving of any equitable relief; and also that the suit was scandalous, frivolous, vexatious and is otherwise an abuse of the court process.

In an affidavit sworn by Mr. Mohamud A. Mohamud who is the Liquidation Agent of the 1<sup>st</sup> defendant, it is said that the plaintiff had

**“blatantly and deliberately refused to comply with the said court orders and the time frame within which they were ordered to comply with the said court orders has since expired.”**

In that respect, the plaintiff did demonstrate, to the satisfaction of the court that on 27<sup>th</sup> April 2006, they filed their undertaking as to damages, and thereafter served a copy thereof on the defendant.

The plaintiff's advocates also demonstrated the fact that on 24<sup>th</sup> April 2006, they wrote to the advocates for the defendants, inviting them to attend at the High Court Registry on 26<sup>th</sup> April 2006, for purposes of fixing a hearing date for the suit.

In view of the fact that the court order of 28<sup>th</sup> March 2006 required the plaintiff, inter alia, to take steps within thirty days, to have the suit set down for hearing, the plaintiff certainly complied with the said order, by sending-off that invitation to the advocates for the defendants.

In effect, the plaintiff has shown that it did comply with the two directions set out in the court order. Therefore, I do not understand why Mr. Mohamud did state, under oath, that the plaintiff had blatantly and deliberately refused to comply with the said orders.

Meanwhile, Order 4 rule 3 (1) of the Civil Procedure Rules stipulates as follows:-

**“when a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.”**

That rule requires a summons to issue to the defendant. In my understanding, the purpose for which the summons are issued is to order the defendant to appear within the time specified in the summons. Therefore, whenever a defendant is served with the Plaint and summons, he would respond thereto by filing a Memorandum of Appearance. If he failed to do so within the stipulated period of time, the plaintiff could successfully apply to the court for judgement.

In my understanding, if no summons are served upon the defendant, such as has happened in this case, the defendant would not be obliged to file a Memorandum of Appearance. Instead, if the defendant were to engage an advocate, the said advocate would come on record by way of a Notice of Appointment, instead of through a Memorandum of Appearance.

Secondly, it would not be open to the plaintiff to apply to the court for judgement in default of appearance. To my mind those are the ramifications for failure to serve summons on a defendant. Such failure would not, of itself render the suit a nullity, as was suggested by the defendant herein.

Indeed, as the 1<sup>st</sup> defendant had already been served with the Plaint, there would be nothing to stop it from filing its Defence, if it wished to do so.

Already the case has been set down for hearing on 4<sup>th</sup> December 2006. In order to ensure that all the pre-trial procedures are finalised well before the trial date, the plaintiff should now take immediate steps to extract the summons to enter appearance and to serve it upon the defendant. Thereafter, the 1<sup>st</sup> defendant will become obliged to enter appearance and then file a Defence.

In the meantime, I find absolutely no merit in the application dated 9<sup>th</sup> May 2006. It is therefore dismissed, with costs to the plaintiff.

Dated and Delivered at Nairobi this 27th day of July 2006.

**FRED A. OCHIENG**

**JUDGE**