



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civ Appli 227 of 1997**

ANNE NDINDA NGOKA.....PLAINTIFF

**VERSUS**

DR. WILSON MWONGA NGOKA.....DEFENDANT

**RULING**

In the Chamber Summons application dated and filed on the 30<sup>th</sup> December 2003, Dr. Wilson Mwonga Ngoka (to whom I shall hereinafter refer to as **“the Defendant”**) seeks orders that the suit herein, instituted by way of the Originating Summons dated the 13<sup>th</sup> March 1997 (which the Plaintiff amended on the 25<sup>th</sup> May 1999), be dismissed with costs on the grounds, *inter alia*, **“that the plaintiff has taken no action to prosecute this matter for well over two and a half years since the pleadings closed.”** The application is supported by the affidavit of the Defendant sworn on the 30<sup>th</sup> December 2003.

At the hearing of the application on the 24<sup>th</sup> February 2005, the Defendant, who conducted his own case, urged me to hear him in the absence of the plaintiff who had failed to attend court or file a replying affidavit and or grounds of opposition in response to the application notwithstanding that the application had been duly served on the 26<sup>th</sup> and 27<sup>th</sup> February 2004 and a hearing notice thereof subsequently served on the 14<sup>th</sup> February 2005 pursuant to the order of the Court of Appeal (O’Kubasu, J.A.) made on the 13<sup>th</sup> October 2003.

Having now had an opportunity of perusing the court record and of considering the Defendant’s submission fully, it would appear that said order of the Court of Appeal was made in respect of a Notice of Motion dated the 24<sup>th</sup> September 2003 in Nairobi High Court Divorce Cause No. 2 of 1997 and is therefore irrelevant for the purposes of the application before me. The Defendant would appear to have been well aware of this fact because in another application herein also dated and filed on the 30<sup>th</sup> December 2003, the Defendant sought leave of the court to serve that application on the plaintiff by way of substituted service as is therein more particularly set forth. No such application for leave was made nor an order granted by the court in relation to the application before me and whilst the Defendant purports to have served the same as deponed in the respective affidavits of service sworn and filed by Linus Irungu and Timothy Madonye on the 3<sup>rd</sup> March 2004 and the 14<sup>th</sup> February 2005 respectively, such purported service is invalid for want of the prerequisite leave of the court.

Accordingly, I find and hold that the Chamber Summons application dated the 30<sup>th</sup> December 2003 seeking dismissal of this suit has not been duly served upon the plaintiff. Consequently, it is ordered that the proceedings which took place before me on the 24<sup>th</sup> February 2005 be and are hereby struck out and expunged from the record. The Defendant is at liberty to prosecute the application but only after serving the same as by law prescribed. There will be no order as to costs.

Dated and delivered at Nairobi this 15<sup>th</sup> day of April 2005.

P. Kihara Kariuki

Judge