**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 532 OF 2003**

**KIMONJO FAMILY CO. LTD. ……..……..….PLAINTIFF/RESPONDENT**

**-VERSUS-**

**KIMONJO FAMILY COMPANY &**

**PARTNERS LIMITED…..…….1ST DEFENDANT/APPLICANT**

**JASON MAINA MWANGI……..…..….2ND DEFENDANT/APPLICANT**

**PETER MWANGI MAINA…….…..….3RD DEFENDANT/APPLICANT**

**KANGEMA TOWN COUNCL……..……...…4TH DEFENDANT**

**RULING**

The 1st, 2nd and 3rd defendants' application by Notice of Motion was dated and filed on 11th January, 2005. It was brought under Orders L (rule 1), IV (rule 3) and VI (rule 12) of the Civil Procedure Rules, and carried the following prayers:

(i) that, the Court be pleased to strike out the suit as being defective and incompetent;

(ii) that, the suit be struck out for being improperly before the Court and being bad in law;

(iii) that the plaintiff be condemned in costs.

The application is premised on the following grounds:

(a) that, the plaint as filed in Court without summons to enter appearance is incurably defective and is incompetent;

(b) that, the plaintiff has never prepared, issued or served summons to enter appearance upon the applicant as required by law;

(c) that, the suit is improperly before the Court, is bad in law, and ought to be struck out.

The motion comes with the supporting affidavit of Peter Mwangi Maina, the 3rd defendant. He deposes that the suit, filed on 3rd June, 2003 together with the verifying affidavit had been served upon him along with the co-defendants. There was no summons to enter appearance attached to the plaint. Subsequently the plaintiff served upon the defendants an application for injunctive relief, dated 30th May, 2003. It is averred that the said application for injunctive orders was served when no summons to enter appearance,

to accompany the plaint of 30th May, 2003 filed on 3rd June, 2003 had been served upon the defendants. The defendants, however, did enter appearance upon the service of the plaint. On the occasion of the hearing of this application, on 12th October, 2005 learned counsel, Mr. Kimani and Mr. Wanjohi appeared respectively for the defendants/applicants and the plaintiff/respondent.

On that occasion Mr. Kimani noted that although the Notice of Motion of 11th January, 2005 had been served during that same month, the respondent had filed neither a replying affidavit nor grounds of opposition as required by Order L of the Civil Procedure Rules. He proposed, in these circumstances, that the instant application be deemed as heard ex parte, as the respondent had no formal presence.

Learned counsel went on to submit that the respondent's suit had been filed on 3rd June, 2003 and served upon the defendants — though without the summons to enter appearance. He cited Order IV, rule 3(1) which reads:

> **"When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein."**

It is provided in O.IV, rule 3(3) that:

> **"Every summons shall be accompanied by a copy of the plaint."**

Order IV, rule 3(5) provides:

> **"Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint…"**

In view of the mandatory expression of the requirement that the plaint accompanies the summons, learned counsel submitted that no plaint may be served without summons, and that the suit would be defective if the plaint was not accompanied by summons. But while the plaint, after filing on 3rd June, 2003 was thereafter served, it had not been accompanied by summons to enter appearance; and up to-date no summons to enter appearance has been served; and consequently, counsel contended, the suit was defective and a nullity.

Mr. Kimani relied on the Ugandan case, Salume Namukasa v. Yozefu Bukya [1966] E.A. 433, where Sir Udo Udoma, C.J. had held:

> **"Counsel must understand that the rules of this Court were not made in vain. They are intended to regulate the practice of the Court. Of late a practice seems to have developed of counsel instituting proceedings in this Court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this defective, disorderly and incompetent application being struck out?"**

It was held that the application in that case, was not properly before the Court and must be struck out with costs.

In the same way counsel urged that the plaintiff's suit in this instance, was not properly before the Court, and should be struck out, with costs to the defendants/applicants.

Learned counsel, Mr. Wanjohi conceded, in the light of the plaintiff/respondent's lack of formal replying papers, that any address he could make before the Court was confined to points of law. He averred that summons to enter appearance had indeed been prepared by the plaintiff, except that by oversight it was not served. Such a situation, counsel urged, was not on all fours with the scenario in Salume Namukasa v. Yozefu Bukya [1966] E.A. 433. The instant matter, it was submitted, should be judged on the test of prejudice-or-no prejudice to the defendants; and for this proposition he invoked the case, Central Bank of Kenya v. Uhuru Highway Development Ltd. & Three Others, Civil Appeal No. 75 of 1998.

In the Uhuru Highway Development case aforementioned it had been held (in the judgement of Bosire, JA):

> **"Neither the aforementioned plaint nor summons to enter appearance was formerly served on any of the defendants. CBK was however served with an application for interlocutory injunction by UHDL, to which was attached a copy of the plaint. CBK did not wait to be formerly served with the plaint and summons to enter appearance before it could file its written statement of defence. Its defence contained a counterclaim…**.
>
> **"Mr. Rebello, for the respondents, submitted that that defence was irregularly filed and was therefore invalid. In his view any pleadings by way of defence filed before service of summons to enter appearance is inconsequential. He cannot be right. As rightly pointed by Mr. Oraro for the appellant, service of summons to enter appearance sets on the clock for counting the time within which to enter appearance, and no more. If, however, as happened in this www.kenyalaw.org Kimonjo Family Co Ltd v Kimonjo Family Company & Partners Limited & 3 others [2005] eKLR 5 case, a defendant became aware of a suit against him, otherwise than through formal service, there is nothing in our law to preclude him from filing a defence to the claim against him. Where he does so time within which to file a reply starts running against the plaintiff and the proceedings are supposed to continue in the normal manner."**

On the basis of the principles thus set out by the Court of Appeal, learned counsel Mr. Wanjohi urged that if, in the present instance, the defendants became aware of the suit otherwise than through formal service, then they could quite properly enter appearance. The defendants had in this instance, just as in the Uhuru Highway Development case, filed a memorandum of appearance followed by a statement of defence. Counsel urged that the defendants had suffered no prejudice; and therefore a draconian measure such as the striking out of the plaint (as prayed for) was not called for. Counsel cited another Court of Appeal decision, Unga Ltd v. Amos Kinuthia & Gabriel Mwaura, Civil Application No. Nai. 175 of 1997 in support of the submission that, a deviation from prescribed procedure which does not affect the substance of the matter, and which is not calculated to mislead, is not fatal to a suit or motion in Court. The relevant passage in the ruling thus reads:

> **"Deviation from [form] is not fatal if the deviation does not affect the substance…[or is one] which is not calculated to mislead.**
>
> **"However, in the peculiar circumstances of this application, namely that the objection was not taken for one year and two months, and in view of Mr. Muigai's own candid statement that he himself [stands] for substance rather than form, we think it is not proper to dismiss the application for want of form — particularly when Mr. Muigai has not been misled in any way and has suffered no prejudice. Mr. Inamdar has verbally applied for amendment of the notice of motion, to include the grounds on which the motion is based."**

Mr. Wanjohi also called in aid the Ugandan case, Sebei District Administration v. Gasyali & Others [1968] E.A. 300 where Sheridan, J stated (p.302):

> **"The nature of the action should be considered; the defence if one has been brought to the notice of the Court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court."**

Learned counsel urged that the applicants' Notice of Motion be dismissed with costs to the respondent, because it failed to meet the standards that would justify invoking the Court's powers to strike out the suit and lock out the plaintiff who, in any case, should not be prejudiced by the omissions of its advocate. Counsel observed that the proceedings had been running since 2003, and that the applicants had not disclosed what prejudice they had suffered in being served with the plaint but with no summons to enter appearance. The fact that the defendants had themselves, over time, filed several applications within the

framework of the suit, it was urged, was evidence that they had suffered no prejudice by the fact of being served with plaint without summons to enter appearance.

Learned counsel contented that the instant application was a delaying tactic by the defendants. He contended that the plaint did show a clear cause of action, and a high probability of success.

In his rejoinder, learned counsel for the applicants maintained that the rules governing service of plaint together with summons to enter appearance had been framed in mandatory terms; and that it had not been denied that the plaint herein was not served with summons. He argued that observance of the terms of Order IV, rule 3 of the Civil Procedure Rules was a matter of substance and not form.

From the Court of Appeal decisions in Central Bank of Kenya v. Uhuru Highway Development Ltd, Civil Appeal No. 75 of 1998 and Unga Ltd. v. Amos Kinuthia & Gabriel Mwaura, Civil Application No. Nai 175 of 1997 I think it must be concluded that just the use of the obligating term "shall", in the Civil Procedure Rules, does not always bear the right meaning unless read in the context of an analysis of facts and an exercise of discretion by the Court. These rules have been designed to enable the Court to give a fair hearing to the claims of the parties, and to do justice. Therefore, the provision of Order IV, rule 3(5) that "Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint" is not to be regarded as an autonomous provision which compels a certain course of action without regard to the facts of a particular case, as may be determined by the Court. If it is found that a defendant has entered appearance and filed and served a defence, even though the plaintiff had not served upon him the summons to enter appearance, then that reality supersedes the fact-assumptions that underlie the requirement of Order IV, rule 3(5); and the action already taken by the defendant becomes the new condition determining the next stage in the pleadings.

From these principles it follows that the application by the 1st, 2nd and 3rd defendants cannot succeed. The state of the law as it is understood and applied, does not support the applicants' prayers.

I must, therefore, dismiss the Notice of Motion of 11th January, 2005 with costs, in any event, to the plaintiff/respondent.

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 25th day of November, 2005.

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Defendants/Applicants: Mr. Kimani, instructed by M/s. R.M. Kimani Advocates**

**For the Plaintiff/Respondent: Mr. Wanjohi, instructed by M/s. Mathenge & Muchemi Advocates.**