



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KITALE**  
**CIVIL CASE NO. 24 OF 2004**

**LILIAN J.C.PLAPAN**

**MILKA KROP**

**CHRISTINE KASIWAI**

**VERONICAH RIWO.....PLAINTIFFS**

**JACKSON C. KAMARI**

**VERSUS**

**SENTINELLES FOUNDATION.....1ST  
DEFENDANT**

**ALEXANDRES NAZERIAN.....2ND DEFENANT**

**RULING**

The suit before me was instituted on 26.2.2004 by Lilian Plapan, Milka Krop, Christine Kasiwai, Veronicah Riwo and Jackson C. Kamari, who claim to be representative and founder members of Setat Women's organization, and who I shall refer to as the plaintiffs, against Sentinelles Foundation and Alexandres Nazerian (who I shall hereinafter refer to as ' the 1st and 2nd defendants respectively).

The plaintiffs whose plaint was filed pursuant to leave granted under Order 1 rule 8 of the Civil Procedure Rules, to file the suit as a representative suit, claim that they entered into a partnership agreement with the 1st defendant and that the latter provided funding for their programmes, which funding included a motor vehicle to facilitate their operations, as well as computers and other office equipment, which items the defendants have now taken away, with it is averred, the intention of continuing with the programmes to the exclusion of the plaintiffs. They therefore seek a declaratory order to the effect that the defendants are not entitled to the said items or to take over the management of the programmes. They also seek a permanent injunction to restrain the defendants from taking away the said items and the management of the programmes.

The issue before me now is a preliminary objection, which has been raised by the defendants herein, and whose ground it is, that the plaintiffs suit is fatally defective for failure to comply with the aforementioned leave of this court, obtained prior to filing of the suit.

It was the submission of Mr. Mwangi, learned counsel for the defendants, that though this suit was instituted as a representative suit, the plaintiffs have yet to comply with the conditions under which the leave was granted.

Mr. Samba, learned counsel for the plaintiffs who opposed the preliminary objection, informed the court that though the court had not set a time limit within which his clients were expected to comply with the condition, the relevant Notice had been placed in the Nation Daily Newspaper on 25/3/2004.

The aforementioned Notice of advertisement, was done under Order 1 rule 8 was inadvertently marked as 'substituted service by advertisement and notice of institution of suit'.

An advertisement under Order 1 rule 8 for Notice of Institution of the suit is to be made in accordance with the directions of the court.

In my opinion, the substituted service can only be made under Order V rule 17 and even then only where the court is satisfied upon an application that "the summons cannot be served in accordance with any of the other rules under the said order," which means that there must be a formal application before the court.

The two cannot be combined for they cannot be issued at the same time. In any event the court did not grant an order for the substituted service.

I must emphasize that where a court issues an order but does not give a time within which the order should be complied with, the party must seek guidance from the Civil Procedure Act, and where it is not available, the party should act within reasonable time or seek for the directions of the court. These plaintiffs obtained a conditional leave on 19.2.2004 and they did not make any attempts to comply until 35 days later. Was it a reasonable delay? It must be appreciated that each case is governed by the circumstances surrounding it. The plaintiffs have not set out to explain the delay. I do note that they waited until this production order was raised on 22/3/2004 to place the advert 3 days later. I can only but form the opinion that they went into slumber after obtaining the leave. Having found as I do, the preliminary objection is bound to be upheld.

However, I do note that should I dismiss this application and the entire suit, the plaintiff will be shut out of this court forever. This is a court of Justice and I do order, in the interests of Justice, that the plaintiffs do comply with the orders of 19.2.2004 within the next 7 days, otherwise the suit stands dismissed. The plaintiffs shall also meet the costs of this preliminary objection.

**JEANNE GACHECHE**

**JUDGE**

**Dated and delivered at Eldoret this 13th day of April 2004.**

**GEORGE DULU**

**JUDGE**

**Delivered in the presence of:**