



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
MILIMANI COMMERCIAL COURT  
CIVIL CASE NO. 231 OF 2004**

**RAJ KUMARI GANDHI .....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.1ST DEFENDANT**

**DIKEMWA ENTERISES LIMITED .....2ND DEFENDANT**

**RULING**

When this matter came up for hearing of the Plaintiff's application dated 4th May 2004 the 1st defendant raised a Preliminary Objection which was in accordance to notice filed on 28th July 2004.

The notice was in the following terms: -

*"The 1st defendant will raise the Preliminary Objection to the Chamber Summons dated 4th May 2004 and to the suit generally that the summons have not been issued in terms of the mandatory provision of Order 4 Rule 3 (1) which pre-supposes that the summons shall be issued simultaneously with or after the filing of the plaint. The plaint was filed on 4th May 2004. While the summons were issued on 5th April 2004 before the suit had been filed".*

The 1st defendant's counsel argued that the summons infringed Order 4 Rule 3 (1) because it was issued one month before the plaint and consequently any order issued in this suit on the basis of the summons hereof, was irregular. He stated that the authorities he relied upon clearly showed that it is the summons that trigger off the suit and if those summons were irregular a party affected by the exercise of the jurisdiction of court is entitled to have any orders granted be set aside. He concluded his argument by saying that the 1st defendant was not seeking the striking out of the plaintiff's suit but the setting aside of orders granted to the plaintiff.

The 1st defendant relied on the following authorities: ·

- RE PRITCHARD (deceased) 1963 I ALL ER 873 ·
- KAFUMA – V – KIMBOWA BUILDERS & CONTRACTORS (1974) E.A. 91 ·
- CENEAST AIR LINES LTD – V – KENYA SHELL LTD (2000) 2 E.A. 362 ·
- FONVILLE – V – KELLY III AND OTHERS (2002) I E.A. 71.

The Plaintiff in opposition to the objection raised argued that the same be dismissed because it had no merit. Counsel said that there were no orders to date to be set aside as sought by the 1st defendant since all orders in this suit had been recorded by consent.

The Plaintiff's counsel accepted that the summons had a problem of being dated one month before the plaint but he pointed out that the plaintiff in accordance with Order 4 Rule 3 (5) had prepared the

summons and filed them in court for signature by the court. His line of argument was to effect that the court signed, sealed and dated the summons and to that extent counsel argued that that mistake of the court should not be visited upon the plaintiff. He did therefore pray that the court will rectify its own mistake.

I confirm that I have looked at the offending summons and I confirm that it is very clear that the offending date was inserted by the deputy registrar when appending his signature. The summons in part state: -

*“Given under my hand and the seal of the court this 5 th day of April 2004.”*

The mistake of the court in dating those summon is a mistake, I believe, can be rectified under Section 99 of the Civil Procedure Act. That Section provides: -

**“Clerical or arithmetic mistake in judgments, decrees or orders, or errors arising therein from any accidental slip or omission may at anytime be corrected by the court either of its own motion or on the application of any of the parties”.**

The court will on its own motion correct the date on the summons, herein, the date to read 4th May 2004 rather than 5th April 2004; this will ensure that the error as a result of the accidental slip of this court is corrected.

The orders of this court therefore are as follows: -

**(1) The 1st defendant’s preliminary objection dated 28th July 2004 is dismissed with no orders as to costs.**

**(2) The summons herein shall be amended in regard to the date of signature and sealing to read as 4th May 2004.**

Dated and delivered this 11th day of November 2004.

**MARY KASANGO**

**AG JUDGE**