



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT 45 OF 2009**

**ROSELINE AKINYI**

ONYUKA.....PLAINTIFF

**VERSUS**

JOSHUA KIMETICH.....1<sup>st</sup>  
**DEFENDANT**

THE COMMISSIONER OF LANDS.....2<sup>nd</sup>  
**DEFENDANT**

**RULING**

The Plaintiff / Applicant’s Notice of Motion dated 22<sup>nd</sup> November 2011 seeks that this court reissues summons to enter appearance on her behalf. The same is brought pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure and Section 1A, 1B and 3A of the Civil Procedure Act.

The affidavit of **Alex Thangei** sworn on 22<sup>nd</sup> November 2011 in support of the application shows that the plaint herein was filed on 29<sup>th</sup> April 2009. Summons to enter appearance was issued on 5<sup>th</sup> May 2009. The summons were served upon the 1<sup>st</sup> defendant who entered appearance and filed his defence on 19<sup>th</sup> June 2009. They have not been able to serve the 2<sup>nd</sup> defendant.

The 1<sup>st</sup> defendant has opposed the said application vide the grounds of opposition filed on 13<sup>th</sup> February 2012. According to the 1<sup>st</sup> defendant the said application offends the provisions of Order 5 (2) of the Civil Procedure Rules. The 1<sup>st</sup> defendant has equally blamed the applicant for coming to court very late.

I have perused the application carefully together with the supporting affidavit of **Mr. Thangei** wherein paragraph 5 thereof states:-

**“That attempts to serve the 2<sup>nd</sup> defendant before the expiry of the validity of the summon to Enter Appearance have borne no fruit”.**

I do not buy this at all. The Commissioner of Lands is not a villager hiding somewhere in the bush or a conman hibernating so as to evade summons. The period between May 2009 and to date July 2012 is over 36 months!.

The provisions of Order 5 (5) and (6) of the Civil Procedure Rule states :-

**“5 (5) An application for an order under Sub Rule (2) shall be made by filling an affidavit setting**

**out the attempts made at service and their result and the order may be made without the advocate or plaintiff in person being heard”.**

**(6) As many attempts to service the summon as are necessary may be made during the period of the summons”.**

I have not been shown even a single attempt by the applicant within the said 36 months to serve the 2<sup>nd</sup> defendant. The provisions of Article 159 of the Constitution which the applicant sought me to invoke does not lie. That article is not to be applied capriciously and whimsically by any party who has failed to prosecute his case.

I do not think that the applicant has demonstrated any iota of seriousness in attempting to serve the Commissioner of Lands. The plaintiff has slept on her rights. Equity does not aid the indolent. I shall consequently dismiss the notice of motion dated 22<sup>nd</sup> November 2011. The same in any event is brought under the general provisions of the law despite the fact that there are clear provisions under Order 5 of the Civil Procedure Rules earlier referred. The 1<sup>st</sup> respondent shall have the costs of this application.

Orders accordingly.

**Dated, signed and delivered at Kisumu this 13<sup>th</sup> of July 2012**

**H. K. CHEMITEI**

**JUDGE**

**In the presence of:**

..... **Advocate for Plaintiff**

..... **Advocate for Defendant**

*HKC/aao*