Case Number:	Civil Case 285 of 2014
Date Delivered:	14 Mar 2016
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Roselyne Ekirapa Aburili
Citation:	Board of Trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others [2016] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Allowed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 285 OF 2014

BOARD OF TRUSTEES OF AFRICAN INDEPENDENT

PENTECOSTAL CHURCH OF AFRICA CHURCH …….....……PLAINTIFF

VERSUS

PETER MUNGAI KIMANI…….....1ST DEFENDANT

JOHN WAINAINA MWAURA…….....…2ND DEFENDANT

ISAACK NJOROGE MWAHAKI…….....3RD DEFENDANT

PAUL MWANGI WAWERU…….....…4TH DEFENDANT

JAMES NJOROGE KAMANDE…….....…….5TH DEFENDANT

JOSEPH MBUGUA MWAURA …….....6TH DEFENDANT

MICHAEL KARIUKI NDUNGU…….....7TH DEFENDANT

ISAACK NDUNGU KIHAMA…….....……..8TH DEFENDANT

WILSON WANYOIKE KINUTHIA…….....…9TH DEFENDANT

PETER GITAU KANGETHE…….....…10TH DEFENDANT

JOHN WANYOIKE MURIGI…….....……11TH DEFENDANT

ISAACK MACHARIA MBURU …….....12TH DEFENDANT

HARUN MWAURA MWANGI…….....…13TH DEFENDANT

RULING

1. This ruling determines the plaintiff/applicant's application dated 26th March 2015 and the defendant's preliminary objection dated 21st May 2015. In the application dated 26th March 2015, the plaintiffs/ applicants seek from this court orders:

a. Spent

b. That the court be pleased to extend the validity of the temporary injunction issued on 4th December 2014 and consequently issue directions as to the hearing and disposal of the suit.

c. That costs of the application be provided for.

2. The application is brought under the provisions of Sections 1A, 1B, 3A and 63(c) of the Civil Procedure Act; Order 40 Rule 6, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. The said application is predicated on the grounds that:

i. On 4th December 2014 the court issued a conditional injunctive order restraining the defendants from interfering with the leadership affairs of the AIPCA Church.

ii. That the orders were to lapse within 120 days or else that suit be made ready for hearing within the same period.

iii. That the period is due to lapse on a around 4th April 2015 whereas all the pleadings were issued upon the defendants, who entered appearance on 8th October 2014.

iv. That as was noted the respondents did not apply to stay or lift their suspension and so far the evidence the applicant required to bring before the court has been gathered hence the matter is ready for pre-trial as to whether parties have complied with Order 11 of the Civil Procedure Rules.

v. That no prejudice will be suffered arising from such enlargement of time as the defendants have not been denied worship or partaking in religions affairs, only their acts of misrepresentation has been impugned.

vi. That it would be in the interest of justice that once the time is enlarged the validity of injunctive orders issued be extended as the plaintiff has now made the suit ready for pre-trial.

3. The application is further supported by the affidavit sworn on 26th March 2015 by Timothy Gitonga Gachoya reiterating the grounds upon which the application is premised, adding that the plaintiffs had taken necessary steps towards making the suit ready for hearing after filing an amended plaint on 27th March 2015 but that the defendants had not filed their defence. Further, that it would be prejudicial to the plaintiff/applicant if the injunctive orders lapse since the respondents who had not sought the lifting of their suspension may revert to the impugned acts and that no prejudice will be suffered arising from such enlargement of the orders made.

4. On 21st May 2015, counsel for the defendants 1st-8th,12th and 13th filed a notice of preliminary objection and notice of withdrawal of appeal which they had filed challenging the ruling of this court made on 4th December, 2014 granting an injunction against the defendants.

5. The defendants also filed replying affidavit sworn by Peter Mungai Kimani sworn on 21st May 2015 deposing, in addition to the notice of preliminary objection, that the suit herein had abated. Further, that the order of injunction had lapsed on 4th April 2015 and therefore there was nothing to be

extended. That the plaintiff went to slumber for over three months and forgot the obligations under the conditional injunction which had now lapsed hence there was nothing to be extended. The defendants further deposed that they had since withdrawn the appeal after they failed to trace the court file to get proceedings and since there was no order in place. That they discovered that their Memorandum of Appearance was erroneously filed in this matter and now they had filed a notice of appointment. The deponent also deposed that the application was bad in law, incurably defective and a gross abuse of the court process, totally unfounded and the same adopts a procedure unknown in law; is malafides, blatantly misrepresenting and grossly lacking in merit; that the application is opaque and presumably resjudicata; and that the applicant is guilty of indolence and unreasonable delay. Finally, that the defendants will be extremely prejudiced if the orders were to be reinstated or validated.

6. The plaintiff filed, with leave of court, supplementary affidavit sworn on 17th June 2015 by Timothy Gitonga Gachoya rebutting the deposition by the defendants and maintaining that the suit had not abated since they served summons to enter appearance on 17th September 2014 and annexed to the copy of affidavit of service sworn on 17th September 2014 by Amos Chege Kanoga. The plaintiff also denied that the application was Resjudicata. Further, that the Notice of Appeal and its withdrawal by the respondents had never been served upon the plaintiff. The deponent also maintained that despite service of a plaint and amended plaint upon the defendants they had not filed any defence but that nonetheless there had been attempts to settle the dispute through the church tribunal hence delay in filing an amended plaint. That further delay was occasioned by a suit which was instituted in court challenging the composition of the church tribunal wherein an injunction was issued in January 2015.

7. On 29th June 2015 the plaintiff herein withdrew suit against the 9th and 10th and 11th defendants. Upon reading the supplementary affidavit sworn by the plaintiff on 17th June 2015, the defendants obtained leave of court to file a reply thereto and on 22nd July 2015 Peter Mungai Kimani swore a replying affidavit to the effect that Timothy Gachoya who had been swearing affidavits in the matter had since passed on and as such the suit had totally abated. He also reiterated that they had never been served with summons and that they were not aware of any properly constituted tribunal to adjudicate church disputes but that the embattled Archbishop Amos Kabuthu Mathenge tried to constitute a tribunal comprising his friends to try his enemies but the court frowned upon him and stopped him from conducting any business vide Milimani CMCC 211/2015. That the defendants had never been requested to attend any mediation or arbitration proceedings to resolve the disputes in Gatanga AIPCA Diocese Church. That the late Timothy Gachoya and suspended Arch Bishop Kabuthu's supporters had been meting out violence in church premises as they tried to evict legally elected leaders of the church as shown by an annexture P3 form and finally, that the defendants would be extremely prejudiced if the orders were to be reinstated or validated.

8. On 26th September 2015, the plaintiff's counsel filed Notice of Appointment of Trustee, one Mr Eliud Njua Juma following the death of Timothy Gitonga Gachoya, one of the trustees of the plaintiff. This was pursuant to Sections 2 and 3 of the trustees (perpetual succession Act) Cap 164 Laws of Kenya. The plaintiff also filed a further amended plaint striking out the 9th, 10th and 11th defendants from the suit, among other amendments.

9. On 27th October 2015 the parties advocates agreed to have the application and preliminary objection disposed of by way of written submissions which they dutifully filed and exchanged and this court is now called upon to determine the application and preliminary objection together.

10. In their written submissions dated 3rd November 2015 and filed in court on 5th November 2015, the plaintiff's counsel contended that the suit has not abated and maintained that if it is the issue of

service of summons to enter appearance, the suit was filed on 15th September 2014 and the summons to enter appearance were signed by the court on 3rd October 2014 and that by an affidavit sworn by one Amos Chege a process server on 13th October 2014 and filed in court on 14th October 2014, the process server effected service of summons to enter appearance together with an order of 29th September 2014 on 4th October 2014 upon the defendants and that the defendants being aggrieved they filed an application dated 8th October 2014 seeking to discharge those orders. That the defendants also filed their Memorandum of Appearance on 8th October 2014 through their advocate and that a notice of appointment filed on 21st May 2015 cannot replace a Memorandum of Appearance since the two documents are provided for under different provisions of the law i.e. Order 9 Rule 7 and Order 6 Rule 1 respectively and that the said documents serve different purposes and that the latter document- notice of appointment of advocates cannot succeed the Memorandum of Appearance. Further, that having filed Memorandum of Appearance in response to the summons to enter appearance, under Section 17 and 18 of the Evidence Act, there is an admission on behalf of the defendants by their agent/advocate, of such service of summons to enter appearance. In addition, it was submitted that if at all there was no such service of summons to enter appearance; there has been no challenge to the affidavit of service sworn and filed by the process server, who has not even been summoned for cross examination. The plaintiff therefore urged the court to find that the summons to enter appearance was served within time and that the suit had not abated and dismiss the preliminary objection with costs.

11. On the question of whether the court can enlarge the time/period of validity of the injunctive orders it was submitted that the matter herein relates to church leadership dispute and that time had to be given for attempts to amicably resolve the dispute. That the court should be cautious and disregard baseless allegations of violence against non parties to the suit. That the formation of the tribunal is not denied and that there is no dispute that an injunction restraining formation of the tribunal was issued by the lower court.

12. It was submitted that enlargement of the validity of the injunctive orders is a discretionary power and that it was justifiable in the circumstances. That the plaint had to be amended and credible evidence gathered to prepare for the hearing which led to delay. That no prejudice would be suffered if the injunctive orders are enlarged/validated. The plaintiff relied on the case of **Stephen Kiatu Nganga V Stanley Kinduga & Another CA 441/2012** where this court addressed itself on the issue of discretion and opined that there is need to consider the totality of circumstances and the entire history of the case. The plaintiff also prayed for costs and dismissal of the preliminary objection.

13. In their opposing submissions dated 30th November 2015, the 1-9th ,12th and 13th defendants(the (respondents') counsel submitted that in the first place, there is no order to be extended as the order of 4th December 2014 had lapsed on 4th April 2015 and that under the law the court cannot extend a non existent order. Reliance was placed on the decision by Honourable Justice Mutungi in **NSSF V John Ochieng Opiyo [2006] e KLR** where the Learned Judge stated that:

" However, I need to address the issue of this court validating the order which has lapsed. I know of no law under which an issue which has died/lapsed/expired can be validated other than under the order referred to herein above. The court cannot validate orders, which upon expiry, have ceased to exist."

14. The defendant's counsel also referred this court to the case of **Karachi Walla Nairobi Ltd V Sanji Van Mukherhjee [2015] e KLR** where Honourable F. Ochieng J stated that:

" J Kamau J made the following observation when determining that application: courts have

wide and unfettered discretion to enlarge time to allow parties to do certain acts where time limitation have been given and to proceed d to determine matters without undue regard to technicalities as provided in Article 159(2) (d) of the Constitution of Kenya, 2010. However, courts have to be careful when balancing this discretion by considering the consequences of certain acts which are not done within the stipulated period, in particular, where there are express and clear provisions of the law regarding those time lines." I am in complete agreement with pronouncement of my learned sister. But I also pause to indicate that in the case at hand, there was no question about any provisions of law that governed the time lines in relation to the orders which the defendants was seeking an extension of. It is the court which fixed the period within which the defendant should have made available the security which was required as a foundation upon which the order for stay of execution would be anchored……..application to extend order dismissed."

15. The defendants urged the court to be guided by the above decision and dismiss the application by the plaintiff on that ground alone. The defendants nonetheless proceeded to submit that there was no reason at all to extend the order and that any extension would amount to gross abuse of the court process since litigation must come to an end and parties should not litigate on a matter forever.

16. It was further submitted that there was no evidence to show that evidence was being collated. Further, that the plaintiff was insincere as there was no additional list of documents filed hence the excuse is an afterthought.

17. In addition, the defendant's counsel submitted that there was inordinate and inexcusable delay and indolence on the part of the plaintiff seeking to enlarge time when the same was lapsing. That the delay was deliberate and mischievous.

18. In their further submissions responding to the plaintiff's submissions, the defendants' counsel contended that the purpose of the 120 days timeline given by the court was to set the suit down for hearing and not for purposes of reconciliation through a Church Tribunal. That the tribunal was for another church faction and that the defendants had never been summoned to any mediation or reconciliation process or meeting.

19. It was further submitted that there is no supporting evidence to the application since the deponent died and that there had been no proper substitution of the deponent of the supplementary affidavit in respect of the application and that if the court was to order for cross-examination of the deponent, who would the plaintiff present for such cross-examination"

20. It was further submitted by the defendants' counsel that it is not equitable to extend those injunctive orders since the plaintiff sat on the orders granted and only approached the court on the eve of the lapse of the orders with an application to extend the same.

21. Further, that the defendants will be highly prejudiced if the orders were to be reinstated or validated. That the defendants had of course not filed defence and cannot file defence unless they are served with summons to enter appearance and that there is no moral or legal reason why the defendants should continue to shoulder orders in this matter.

22. Submitting on their preliminary objection dated 21st May 2015, the defendants opposed the entire suit on the grounds that the same abated as the defendants were never served with summons to enter appearance and that the filing of Memorandum of Appearance was erroneous which error the defendants' advocate rectified by filing a notice of appointment of advocates. That the process

server's affidavit at paragraph 2 does not disclose service of summons to enter appearance.

23. Further, that there is a contradiction in the affidavit of service sworn on 17th September 2014 by Amos Chege Kanoga and the paragraph 4 of the plaintiff's submissions that summons to enter appearance were duly signed on 3rd October 2014 and every party to the suit served on 4th October 2014. On the whole it was submitted by the defendant's counsel that no summons to enter appearance were collected and or served and that if there is any other affidavit of service on record other than the one of 17th September 2014, it should be investigated. The defendant's counsel also submitted that it was over one year and no summons had ever been taken out and or served from the date of filing suit hence there was no suit in place. That the suit abated and is therefore fit for striking out. Reliance was placed on the case of **Terry Wanjiku Kariuki V Equity Bank Limited & Another [2012] e KLR** where the court held that issuance of and service of summons to enter appearance go to the jurisdiction of the court and failure thereof to comply cannot be cured by Sections 1A and 1B of the Civil Procedure Act. And that the court was dealing with both failure to issue and to serve summons to enter appearance. Reliance was also placed on **Kenya Commercial Bank Ltd V Kenya Planters Co-operative Union Civil Application Nairobi 85/2010 where it was held that**

" ***where there is a conflict between the Statute ……Objective Principle) and a Subsidiary Legislation (Rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being Oxygen compliant, the Oxygen principle is not there to fulfill them but to supplant them where they prove to be a hindrance to the Oxygen or attainment of justice and fairness in the circumstances of each case."***

24. The defendants prayed that the court do dismiss the application and allow the preliminary objection.

25. I have carefully considered the application by the plaintiff/applicant, the preliminary objection raised, rival submissions and the authorities cited which include statute law. In my determinations, it is now settled law and practice that where a preliminary objection is raised then that preliminary objection must first be determined, especially where such determination is likely to dispose of the suit or matter at hand without going into the merits.

26. A preliminary objection is a point of law when taken would dispose of the suit. It is what was formerly called a "demurrer." The case of **Mukisa Biscuits Manufacturing Company Ltd V West End Distributors Ltd [1969] EA 696** is the locus classicus on preliminary objections. That case defined a preliminary objection as follows :

" A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection……..A preliminary objection…….raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuses the issue. The improper practice should stop….."

27. In the instant case, the preliminary objection raised by the defendants is that the suit herein has abated for want of issue and service of summons to enter appearance. Further, that there is no

injunctive order on record capable of being extended or validated and that therefore the application is an abuse of the court process.

28. The first question under the preliminary objection is whether the suit herein has abated.

29. According to the defendants, from the time this suit was instituted on 15th September 2014 upto and until the time of hearing of this application, no summons to enter appearance had been collected and served upon them which was over one year hence the suit has abated. On the other hand, the plaintiff asserted that summons to enter appearance were served upon the defendants and that it is for that reason that the defendants promptly filed Memorandum of Appearance and response to the application dated 15th September, 2014 and that they also filed an application under certificate of urgency seeking to discharge the interim ex`parte orders issued by the court in the first instance.

30. Although the plaintiff annexed an affidavit of service sworn on 17th September 2014 by Amos Chege sworn to prove that he had served summons upon the defendants, that assertion was countered by the contention that if the summons were issued on 3rd October 2014, then there was no way the same summons could have been served on 17th September 2014. Further, that the said affidavit of Amos Chege Kanoga does not depose to the process server having effected service of summons to enter appearance upn the defendants.

31. I have examined the affidavit of service sworn on 17th September 2014 and filed by Amos Chege Kanoga. It is indeed a fact that he does not mention therein the issue of service of summons to enter appearance upon any of the defendants to this suit. The process server only mentions having received and served copies of certificate of urgency, notice of motion, plaint and its annexture all dated 15th September 2014 from the plaintiff's advocate's firm to serve the same upon the defendants for hearing on 23rd September 2014.

32. That being the case, and coupled with the fact that the summons to enter appearance were issued on 3rd October, 2014 after the service of the application under certificate of urgency together with the plaint, it cannot be time true that summons to enter appearance which had not been issued by 19th September 2014 could have been served upon the defendants.

33. However, a meticulous perusal of the record, with the plaintiff's submissions indicating that summons were served upon the defendants on 4th October 2014, I came across an affidavit of service sworn by Mr Amos Chege Kanoga sworn on 13th October 2014 and filed in court and indeed paid for vide receipt No.6213094 for shs 75/-. At paragraphs 2,3,,4,5,6,7,8,9-15 of that affidavit of service sworn on 13th October 2014 the process server deposes that he on 4th October 2014 ***received copy of summons to enter appearance dated 3rd October 2014, plaint*** and its annextures, application under certificate of urgency, court order dated 29th September 2014, Notice of Penal consequences and hearing notice dated 30th September 2014 from the firm of Mbiu Kamau & Company Advocates with instructions to serve the same upon the defendants herein requiring them to attend court on 16th October 2014 as per court order dated 29th September 2014 extracted from the aforesaid application. That he proceeded to the respective places explained in the affidavit and traced each of the defendants and served them but that they declined to sign on his copy which he returned.

34. The defendant's counsel in his submissions doubted that there was any other affidavit of service other than the one of 17th September 2014. Further, that his clients were not served with summons to enter appearance and that if there is any such affidavit sworn on 13th October 2014 and filed on 14th October 2014 then it should be investigated.

35. I have meticulously examined the record herein and the place where that affidavit of service sworn on 13th October 2014 is filed. There is nothing that would suggest to this court that the affidavit in question was a fraud. It is possible that the defendant's counsel never saw it but it is on record and it has not been challenged. I am satisfied on examining that affidavit of 13th October 2014 that the defendants were duly served with summons to enter appearance issued on 3rd October 2014 and that it is upon such service of summons to enter appearance upon the defendants that they duly instructed their advocates Kinyanjui Kirimi & Company Advocates to enter an appearance on their behalf on 8th October 2014 by filing a Memorandum of Appearance. For that reason there is no justification whatsoever for the defendant's counsel to purport to disown the Memorandum of Appearance dated 8th October 2014 and further purport to replace it with subsequent Notice of Appointment of Advocates dated 21st May 2015 accompanying a replying affidavit to this application. In my view, that action by the defendants and their advocates on record is an afterthought. It is unacceptable and only goes to reveal an act of ingenuity and dishonesty on the part of the defendants and their advocates. I say dishonestly and an afterthought because in the 1st defendant's affidavit sworn on 8th October 2014 at paragraph 7, he deposed that he had since become aware(after service on Saturday 4th October, 2014 at 7pm) that on 26th September 2014 this court issued an order against the defendants. The affidavit of service sworn by Amos Chege Kanoga clearly stated that he had effected summons to enter appearance dated 3rd October 2014 and the order of 26th September 2014 among other documents upon the defendants on 4th October 2014. The fact that the defendants and their advocates did not see the affidavit of service sworn on 13th October 2014 which affidavit was duly filed and paid for does not mean that the affidavit is nonexistent or that it is not genuine without laying any basis for such conclusions.

36. The only inference that this court can make out of the conduct of the defendants disowning their own Memorandum of Appearance which was duly filed and served upon the plaintiff's advocate is that upon their realization that they had defaulted to file defence to the plaintiff's claim even after being served with summons to enter appearance, they wanted to divert the attention of this court and that of the plaintiff.

37. It is for the above reasons that I find and hold that there was no breach of Order 5 Rule 1 (b) of the Civil Procedure Rules by the plaintiffs since the suit was filed on 15th September 2014 and summons to enter appearance issued on 3rd October 2014 and collected and served upon the defendants on 4th October 2014 which was within 30 days of filing suit. Further, albeit the defendants claim that one year had lapsed since the suit had been filed without summons to enter appearance being served, that argument cannot stand the test of times, not even for academic purposes.

38. Accordingly, I find that the suit herein as filed is alive and that summons to enter appearance were issued on 3rd October 2014 and served on 4th October 2014 within one month from the date of filing of suit.

39. Even assuming that the summons to enter appearance as issued on 3rd October, 2014 were not served as alleged, but that as the record clearly shows, the defendants did file the Memorandum of Appearance dated 8th October 2014, the question is, would the suit herein have abated by the time this preliminary objection was filed" To answer that question, it is important to first set out the purpose of summons to enter appearance.

40. The purpose of summons to enter appearance is to inform a defendant of the institution of a suit. If a defendant files a Memorandum of Appearance, it is deemed to have had due notice of the institution of such suit. In this case, therefore, the defendant having filed Memorandum of Appearance on 5th October 2014 signifying their intention to defend the suit they are deemed to have had notice of

institution of such suit and therefore their purported disowning of their Memorandum of Appearance and the explanation thereof falls flat on its face and must be rejected. Further, the filing of notice of appointment of advocates subsequently filed was of no consequence. It is irrelevant and a technical gimmick or theatrical maneuver intended to defeat the ends of justice which technicality is abhorred by Article 159(2) (d) of the Constitution. I am fortified by the decision in **Equatorial Commercial Bank Ltd V Mohan Sons (K) Ltd [2012] e KLR** where the Court of Appeal, citing other Court of Appeal decisions including **Nanjibhai Prabhudas & Company Ltd V Standard Bank Ltd [1968] EA (K) 670** stated:

"…….we definitely appreciate and agree that the object and scope of summons to enter appearance is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law."

41. In this case, that aim of summons to enter appearance was achieved since there was an unconditional appearance and participation in the proceedings which constituted voluntary and complete waiver of any defect that could have affected the summons. In **Nanjibhai Prabhudas & Company Ltd case, the Court of Appeal** held, inter alia that:

a. ***"Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.***

b. ***Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing:" Sir Charles Newbold at page 681 and 682 stated:***

" The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High court; and it was not until at a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant. The question then is, did that incorrect action result in the service being a nullity" The courts should not treat any incorrect act as a nullity, with the consequences that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."

42. Albeit the above decision concerned an incorrect seal on summons to enter appearance and made before the 2010 Constitution, the decision was cited in the **Equatorial Commercial Bank Ltd (supra) decided in 2012**, where the Court of Appeal extensively approved the **Prabhudas (supra)** case and further quoted it at page 684.

" In my view, where a defendant chooses to enter an unconditional appearance in proceedings in the court, he must be taken , save in exceptional circumstances such as where he contemporaneously files a notice of motion to set aside the proceedings to which he has entered an appearance, to have waived any irregularity in the process to which he enters an appearance and thus accepts the jurisdiction of the court. Any statement to the contrary by MACDUFF J, in the Jethalal case (supra) is an incorrect statement of the law and should not be followed." I consider that the defendant has, by entering an unconditional appearance, waived this right to object to the two irregularities to which I have referred. I also consider that in as

much as these two irregularities have clearly not prejudiced the defendant in any way he has not shown good reason why the service of the summons should be set aside on the ground of those irregularities and, accordingly, I would not set it aside."

43. From the above Court of Appeal decisions whose principles I adopt as binding on this court, I would further invoke the provisions of Section 120 of the Evidence Act Cap 80 Laws of Kenya, the principle of estoppel as being applicable in the circumstances of this case. The section provides that :

" ***When one person has , by his declaration , act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representatives shall be allowed, in any suit or proceeding between himself and such person or his representative , to deny the truth of that thing."***

44. In this case, the defendants who were legally represented throughout, filed a memorandum of appearance to the summons, appeared and unconditionally participated in the proceedings, filed an application seeking to discharge the exparte orders of injunction granted to the applicant herein in the first instance under certificate of urgency. They cannot now be heard to recant and challenge the whole process on the ground that they were never served with summons to enter appearance and that in any event the whole suit has abated, which recant, as I have stated, is a procedural, theatrical gimmick and technical maneuver by the defendants intended to obstruct the cause of justice. This is a court of justice, and it cannot be caged by rules of procedure which will cause hardship and injustice to the parties.(See **Githere V Kimunge [1976-1985] EACAK 101 at page 103.**

45. The defendants, furthermore, have not shown what prejudice they would suffer in law or in equity having entered appearance voluntarily assuming they were not served with summons to enter appearance, having made the plaintiff believe that they had been served with summons to enter appearance and having ably participated in the proceedings hereto only to wake up after it dawned on them that they had not filed defence, to raise technical objections to the plaintiff's entire suit, contrary to the overriding objectives of the law as espoused in sections 1Aand 1B of the Civil procedure Act and the spirit and letter of Article 159 of the Constitution that courts shall administer justice without undue regard to procedural technicalities, which procedural technicality in this case does not go to the root or substance of the suit as explained above.

46. Before I conclude, I must mention that the authorities relied on by the defendant's counsel are all High Court decisions which are not binding on this court, however persuasive they are. The **Kenya Commercial Bank Ltd V Kenya Planters Co-operative Union** (supra) case on the other hand though of the Court of Appeal has no relevance to the issue of service of summons to enter appearance championed in this case.

47. There was also serious contention by the defendants' counsel that there was no supporting evidence to the application as the deponent of the supporting affidavit had since died while the proceedings herein(application) was pending hearing and determination.

48. First, I have examined the provisions for enlargement/extension of time and I have not come across any provision that the application must mandatorily be supported by an affidavit or affidavit evidence. The application had grounds supporting it and in my view, even without an affidavit, this court has the power to extend time in the interest of justice, where such time is sought even on an oral application. Nonetheless, there was a valid affidavit in support thereof and therefore the submission that supposing there was need to cross examine the deponent who is dead is pure speculation since no man or woman in their normal senses would wish to cross examine a dead witness.

49. Secondly, the argument that where a deponent dies then their evidence given by such deponent is no evidence is not supported by any rule or legal provision. If that were to be the case, majority of the cases would abate on the death of witnesses who have already testified.

50. Third, is that the suit was instituted in the name of the Board of Trustees of the AIPCA Church not in the name of the deponent who was one of the trustees of the church. It has also not been shown that the deceased Timothy Gachoya was the only Trustee of the Church. This court finds that the death of a deponent does not invalidate the affidavit sworn by that deponent and therefore the argument that supposing such deponent was to be cross- examined is speculative and demeaning of the deceased deponent since there was no such application for cross examination of the said Mr Timothy Gachoya who died while this application was pending hearing and determination. The argument by the defendants only goes to show how this dispute has escalated to the extent that it is following the dead into their graves to disturb their peace even when the dead tell no tales.

51. In the end, I find the preliminary objection rose on the non-service of summons to enter appearance upon the defendants unmerited, mischievous, frivolous and vexatious and proceed to dismiss it.

52. On the second important issue of whether the court can enlarge the period of validity of the conditional injunctive orders made on 4th December 2014, the defendants seriously contended that there is no order to be extended; no reasons have been advanced to warrant extension of the order; no evidence being collated was shown; there is inordinate delay in seeking for extension; that the purpose of 120 days was to set down the suit for hearing and not to set up a church tribunal to resolve the dispute; that there is no supporting evidence to the application since the deponent to the application Mr Timothy Gachoya died before determination of the application; and finally, that it is inequitable to extend those orders.

53. In my view, the main question to be answered on the second issue is whether a conditional time bound injunction can be extended beyond the time set and or whether an injunction order which has lapsed can be revived and or validated and extended and if so, whether the plaintiff/ applicant has proffered to this court sufficient reasons why the injunctive orders issued on 4th December 2014 and which lapsed on 4th April 2015 before this application was filed should be extended as contemplated in order 40 Rule 6 of the Civil Procedure Rules. It should be noted that the application herein for extension of time was lodged on 27th March, 2016 before the expiry of the said injunction on 4th March, 2016. Under Order 40 Rule 6 of the Civil Procedure Rules,

" where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

54. In the instant case, as at the time this application was lodged, twelve months had not lapsed and have only lapsed while this application was pending.

55. Under Section 59 of the Interpretation and General Provisions Act, Cap 2 Laws of Kenya, it is provided that:

" Where in a written law time is prescribed for doing an act or taking proceedings, and power is given to a court or other authority to extend that time, then unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed."

56. The above provisions of the law empower this court to extend time for doing any act prescribed even when the application for extension of time is made after the time prescribed by the Rules or by the order of the court has expired. The provisions of Section 59 of Cap 2 is what appears to be replicated by Order 50 Rule 6 of the Civil Procedure Rules which provides that:

" where a limited time has been fixed for doing act or taking any proceedings under these Rules or by summary notice of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, provided that the costs of any application to extent such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise."

57. In addition, Section 95 of the Civil Procedure Act is clear that:

" where any period is fixed or granted by the court for the doing of any act prescribed or allowed by the act, the court may, in its discretion, from time to time, enlarge such period even though the period originally fixed or granted may have expired."

58. From the above provisions of the law, it is trite that the power to enlarge or extend time for doing any act which time is fixed by the court can be exercised by the court in its discretion, even if that time has lapsed. The provisions of the law as cited above recognize that first, there must have been original time fixed and which time has either expired or is about to expire. Being a matter of discretion for the court, in granting such enlargement of time, the court will consider the circumstances of each case, which vary from case to case. Some factors to be considered include:

i. Whether there has been indolence or unexplained delay on the part of the applicant.

ii. Whether the applicant is guilty of abuse of the court process.

iii. Whether the enlargement will prejudice the defendant.

iv. Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.

v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.

vi. Whether it is just and fair to enlarge time in the circumstances of the case.

59. It therefore follows that once the court is persuaded that it is in the interest of justice to enlarge time, it will exercise its unfettered discretion in favour of the applicant and impose terms and conditions if any on which it will allow the enlargement, besides an award of costs to the respondent as espoused in the proviso to Order 50 Rule 6 of the Civil Procedure Rules, to ensure that the respondent is not unfairly prejudiced by such enlargement.

60. Even where there is a default clause in the orders made by a court, time can still be enlarged.

This position was considered by the Court of Appeal in the case of **Caltex Oil (K) Limited V Rono Civil Appeal/Application Nairobi No. 97/2008** (unreported) where the Court of Appeal said in part:-

"However, the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it always retains the power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the court still remains in control of the order, not withstanding that there has been default. That would necessarily depend on the true construction of the default clause."

61. In this case, no doubt the orders of injunction granted on 4th December 2014 automatically lapsed upon the plaintiffs failure to cause the suit to be heard and determined within one year as per the statutory provisions of Order 40 Rule 6 of the Civil Procedure Rules and secondly, the non fulfillment of the condition stated in Order No. 3 made pursuant to the Order of 4th December, 2014 that :

"……this injunctive order is conditional upon the plaintiff expediting the process of readying of the suit for hearing and disposal within 120 days from the date hereof failure to which the temporary injunction herein shall lapse."

62. The period of 120 days ended on 4th April 2015 by which time, the case had not been reached for hearing and disposal hence the serious opposition to this application by the defendants/respondents, who filed their response after such lapse of the one year from the date when the injunctive orders were made on 4/12/2014.

63. The plaintiff's explanation for the delay hence the lodging of this application on 27th March 2015 is that there were attempts to have the dispute herein which involves church leadership resolved through appointment of a church tribunal but that the defendants again went to the lower court and injuncted the operationalization of the said church tribunal. Further, that the plaintiff had to amend the plaint as annexed to the supporting affidavit and that even then, to date the defendants had not filed any defence to the suit herein.

64. It must be made clear that from the order of 4th December 2014, the interlocutory injunction did not provide a time frame within which the suit should be heard and determined but the process of readying the case for trial which process includes compliance with the mandatory provisions of Order 11 of the Civil Procedure Rules on pre-trial requirements and directions being given certifying the suit as ready for trial. In other words, the default clause was not intended to limit the duration within which the suit should be heard and determined. Rather, it was intended to limit the duration of the orders of injunction by making the duration of the orders dependent on the fact of readying of the suit for hearing and disposal to 120 days from the date of issue of the order on 4th December 2014, and to accord with Order 40 Rule 2(2) of the Civil Procedure Rules.

65. As stated earlier, this court still retains the control of the dispute herein until the suit is heard and fully determined. The court is not functus officio as regards the default clause. The application for extension of the orders made on 4th December 2014 was lodged before the said orders lapsed by operation of law, and reasons have been given for the delay.

66. In my view, it is logical and reasonable to consider an amicable settlement of disputes of this nature involving church leadership and therefore although the 120 days given was not specified for establishment of a church tribunal, and whereas parties cannot be compelled to resolve their disputes amicably, this court is mandated under Article 159 of the Constitution of Kenya 2010 to promote the

use of alternative dispute resolution mechanisms. Indeed, from the onset of this dispute, this court has always implored parties to this church dispute to explore amicable avenues for the resolution of the ever escalating dispute which involves church leadership in an amicable manner but it has not been possible for the parties to concede to resolve the dispute amicably. The fact that there was an attempt to establish a tribunal by the church to attempt to resolve this dispute is in my view, a step in the right direction, in my view, since every order of this court only appears to be tearing the AIPCA Gatanga church apart and not helping in resolving the dispute which is a very unfortunate scenario. Therefore, in my view, the delay in readying the suit herein for hearing is reasonably explained and which explanation is acceptable to the court as it has not been denied that there was resistance to the establishment of the said church tribunal.

67. Further, the fact that the defendants have to date not filed any defence in view of my findings that they were properly served with the summons to enter appearance on 4th October 2014 leaves many questions unanswered. That means that pleadings in this case are still open for the defendants to seek leave to file their defence out of time to facilitate disposal of this dispute in an expeditions manner, now that the plaintiff only amended its plaint on 27th March, 2015.

68. Sections 1A of the Civil Procedure Act is clear that the overriding objective of the Act and the Rules there under is to facilitate the "**just proportionate and affordable resolutions of disputes governed by the Act."** And Section 1A (2) of the said Act enjoins the court in the exercise of its powers under the Act or in the interpretation of any of its provisions, to seek to give effect to the overriding objectives specified in subsection (1). Subsection 3 thereof declares that a party to civil proceedings or an advocate for such party is under a duty to assist the court to further the overriding objectives of the Act and, to that effect, to participate in the process of the directions and orders of the court. On its part, Section 1B (1) of the Act obliges the court in the furtherance of the overriding objectives specified in Section 1A to handle all matters presented before it for the purposes of attaining the following aims:

a. The just determination of proceedings.

b. Efficient disposal of the business of the court.

c. The efficient use of the available judicial and administrative resources.

d. The timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

69. In this case, the injunctive orders granted on 4th December 2014 were about to lapse when the application herein was filed and as at now, they have indeed lapsed pursuant to the provisions of Order 40 Rule 6 of the Civil Procedure Rules since the suit has not been determined within 12 months from the date of grant of the injunction. But the same Order and Rule allows for extension for sufficient reasons. In this case, I find that there has not been compliance with Order 11 of the Civil Procedure Rules which is mandatory in nature. Further, the defendants have not filed their defence. Out of the aims of the overriding objectives is the need to ensure equality of arms, the principle of proportionality and the need to treat all parties coming to court on equal footing. Such power and discretion must however be exercised judiciously and for sound reasons.

70. In the instant case, and at this point in time, the grounds upon which the interlocutory injunction was initially granted have from the rival positions placed before this court, not changed. The only question is whether the lapsed injunctive order should be reinstated. Considering the positions of the applicant (trustees of the AIPCA Church) and the defendants who are church worshippers /faithful seeking to change the leadership of the AIPCA church and to assert their rights to worship and or minister in that church(Gatanga Diocese) and considering that there is a strained relationship between the plaintiff and the defendants, the ends of justice dictate that the suit be determined on its merits after hearing of all the parties , unless they heed to the pleas of the court that they embrace mediation and or conciliation and record settlement on terms. This is so for reasons that indeed, if the orders sought enlarging the injunctive orders are not granted maintaining status quo, the substratum of the suit herein, which the injunctive orders were preserving would be lost since the defendants who are still under suspension of the embattled top church leadership have not received any reprieve and neither have they challenged their suspension by way of a counterclaim to this suit. The purpose of the injunction is to conserve and preserve the subject matter pending hearing and determination of the suit (See **George Orango V George Liewa Jagola & 3 others [2010] e KLR.** And in **Ougo & another Vs Otieno [1987] e KLR 364** the Court of Appeal held inter alia, that ***"where there are serious conflicts of facts, status quo should be maintained until the dispute has been decided at the trial."*** This, however, is not to sanction a suit to remain archived in court in perpetuity, for public policy demands that justice must be administered without undue delay(see Article 159 2 (b) of the Constitution) and **FitzPatrick V Batger & Company Ltd [1967] 2 ALL ER 657.**

71. In the instant case, and as it had not been demonstrated that the plaintiff has no interest in prosecuting the suit, or that the defendants are in any way prejudiced by the injunction since they are serving suspension which they have not challenged, and as no misconduct of the plaintiff has been demonstrated, I find no reasons why I should not extend the injunctive orders made on 4th December 2014 and hereby extend the said order for a further 12 months from the date hereof.

72. I also exercise my discretion and order that the defendants be and are hereby granted leave of 14 days from the date hereof to file and serve their statement(s) of defence upon the plaintiff's counsel. Both parties shall comply with all the pretrial requirements under Order 11 within 45 days from the date when pleadings close. This matter shall be mentioned on 17th May 2016 to confirm compliance with pretrial requirements.

73. Each party shall bear their own costs of the application and the preliminary objection, this being a church dispute.

Dated, signed and delivered in open court at Nairobi this 14th day of March 2016.

R.E. ABURILI

JUDGE

14/3/2016