



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 446 OF 2010**

**ROY PARCEL SERVICES LTD.....PLAINTIFF**

**-VERSUS-**

**DHOKIA TRANSPORTERS LIMITED.....DEFENDANT**

**RULING**

Before me is a Notice of Motion dated 26<sup>th</sup> June, 2012 by the Defendant, under the provisions of Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules and sections 3A of the Civil Procedure Act. The application seeks to have the suit filed by the Plaintiff on 30<sup>th</sup> September, 2010 dismissed for want of prosecution. It also seeks costs of the application and the suit.

The Application is based on the grounds on the face of the same and its supported by the Affidavit of **FREDRICK OTIENO MEGE** sworn on 26<sup>th</sup> June, 2012 wherein it is deponed that the Statement of Defence in the matter was filed in Court on 16<sup>th</sup> March, 2011 which was the last pleading in the matter and that since then, the Plaintiff has not fixed the matter for hearing or otherwise taken any step towards prosecuting the suit. The Defendant deponed that the Plaintiff is not interested in prosecuting the Suit. The Plaintiff did not file any response to the application.

When the application came up for hearing on 22<sup>nd</sup> January, 2018, M/s Jan Mohammed held brief for the Plaintiff whereas M/s Juma held brief for the Defendant. However, when the Court directed that the hearing proceeds, M/s Jan Mohammed notified the Court that she did not have further instructions and begged to be excused which request was granted by the Court. The Defendant's Counsel informed the Court that when the matter came up in court on 31/11/2017 the court ordered the applicant to serve the application and a hearing notice. The Counsel further stated that they served as ordered by the Hon. Judge but the Plaintiff did not file any response.

I have considered the Application, the Supporting Affidavit and the oral arguments made in Court by counsel for the Applicant. I have also perused the court file. When this matter came up for hearing on 31/10/2017, the court noted that there was no evidence that the Notice of Motion dated 26/6/2012 had been served upon the Plaintiff and as such the application could not proceed exparte. The hearing was therefore adjourned with directions that parties do obtain a hearing date from the registry.

In the court file, there is an Affidavit of Service wherein the process server depones that he served the Plaintiff's Advocates with a Notice which was acknowledged by stamping and signing on the face of the principal copy. I have examined the said Affidavit of Service and no received copy of the Notice of Motion is annexed to it. The only annexure is the hearing notice dated 1<sup>st</sup> December 2017.

That being the case, the Court is in doubt as to whether the Application was indeed served upon the Plaintiff and for that reason I have no choice but to dismiss the Application. Since this is an old case having being filed in the year 2010 I further order that the same be prosecuted within 120 days from the date of this ruling failing which it shall stand dismissed.

There shall be no orders as to costs.

**Dated, Signed and Delivered at Nairobi this 19<sup>th</sup> Day of March, 2018.**

.....

**L. NJUGUNA**

**JUDGE**

***In the Presence of***

.....*For the Applicant*

.....*For the Respondent*