



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 140 OF 2013**

**HENRY MULI MUNGUTI Suing on his own behalf**

**and on behalf of GOOD HOPE REHABILITATION**

**CENTRE (Formerly Hope Bell Education Centre**

**CERTIFICATE OF REGISTRATION**

**NO.26442 OF 20-3-2008)..... PLAINTIFF**

**V E R S U S –**

**MARTIN MISCHRICK, JENIFFER OTIN & FRANCIS KIETI**

**(Sued on their own behalf and on behalf**

**GOOD HOPE REHABILITATION CENTRE CERTIFICATE**

**OF REGISTRATION NO.39956 OF 16-4-2013.....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF SOCIETIES..... 2<sup>ND</sup> DEFENDANT**

**KENYA COMMERCIAL BANK ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1) Martin Mishrick, Jeniffer Otin and Francis Kieti, hereinafter referred to the 1<sup>st</sup> Defendants took out the motion dated 15<sup>th</sup> February 2016 in which they applied for this suit to be dismissed with costs for want prosecution. The motion is supported by the affidavit of their advocate Marione Kinango. When served with the motion, Henry Muli Munguti, the Plaintiff herein, filed the replying affidavit of his advocate, Philip Karanja Wachira to resist the same.

2) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival oral submissions. It is the submission of the 1<sup>st</sup> Defendants that the Plaintiff has refused, neglected and or otherwise failed to take any steps to prosecute this suit for a period of over eight months since the last court attendance. Mr. Kinango, learned advocate for the 1<sup>st</sup> Defendants stated that Hon. Mr. Justice Waweru issued an order directing the Plaintiff to take out and serve summons to enter appearance within 21 days from 6<sup>th</sup> June 2013 but the Plaintiff failed to heed that directive and now three years have lapsed since the directive was

issued. The Plaintiff was accused of delaying to take the relevant steps to have the suit ready for hearing.

3) The Plaintiff on the other hand has opposed the motion claiming the same lacks merit and is based on falsehoods and technicalities. The Plaintiff alleged that the 1<sup>st</sup> Defendants have failed to comply with the provisions or Order 11 of the Civil Procedure Rules hence preventing the Plaintiff from listing the suit for hearing. The Plaintiff pointed out the number of times he has caused the matter to be mentioned at the registry to fix the same for hearing. It is also said that the 1<sup>st</sup> Defendants objected to the matter being fixed for hearing because summons to enter appearance had not been taken out and served as per the directive of Mr. Justice Hatari Waweru. The Plaintiff further alleged that the court file has all along been with Justice Waweru hence his inability to collect summons.

4) I have carefully considered the rival oral submissions plus the material placed before this court. It is not denied that Justice Waweru issued order directing the Plaintiff to take out and serve summons to enter appearance within 21 days from 6.6.2013. The Plaintiff admits he has done so. He avers that the court file was in the custody of Justice Waweru. I find the reason not plausible. There is no good reason why the court file could be retained by Justice Waweru. There was no pending ruling nor judgement. The Plaintiff has also alleged that since the 1<sup>st</sup> Defendants have not complied with Order 11 of the Civil Procedure Rules, he was unable to list the case for hearing. With respect, I find the reason to be flimsy. The Plaintiff cannot by any stretch of imagination be prevented from listing his case for hearing on the basis that a Defendant has not complied with order 11 of the Civil Procedure Rules.

5) In the end, I find the motion to be well founded. It is allowed as prayed with costs to the 1<sup>st</sup> Defendants.

Dated, Signed and Delivered in open court this 16<sup>th</sup> day of August, 2016.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant