REPUBLIC OF KENYA

IN THE HIGH COURT

AT

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.406 OF 2010

TANA TRADING LIMITED ….... PLAINTIFF

VERSUS

NATIONAL CEREALS AND

PRODUCE BOARD ..... DEFENDANT

RULING

1. This suit filed was on 10th June, 2010. On the same date, the Court certified the accompanying interlocutory application for injunction as urgent. The Court then allowed the application for injunction on 29th August, 2011 upon interpartes hearing. Since then, there seem to be no other step taken to fix the suit for trial.
2. On 13th February, 2013, the Defendant filed a Notice of Motion dated 6th February, 2013 for the dismissal of the suit for want of prosecution or alternatively, strike out the suit due to the failure by the Plaintiff to extract and/or serve summons to enter appearance upon the Defendant. The Defendant also prayed for the discharge of the order for injunction granted on 29th August, 2011. The motion was anchored on Sections 1A, 1B and 3A of the Civil Procedure Act and Orders 17 Rule 2 (3) and 40 Rule 7 of the Civil Procedure Rules. The Defendant relied on the grounds on the body of the motion and the Supporting and Supplementary Affidavits of Patrick Karanja sworn on 6th February, 2013 and 22nd April, 2013, respectively.
3. It was contended that on 29th August, 2011, the Plaintiff obtained an injunction restraining the Defendant from exercising its statutory power of sale enshrined in a charge registered at the Kajiado District Land Registry on 17th January, 2008 over the property known as Kajiado/Kaputiei/2078 (***"suit property"***). That since then, the Plaintiff had failed to take any step in the suit and had in addition failed to honour its obligations to the Defendant under the charge instrument.
4. The Defendant further complained that since the inception of the suit, the Plaintiff had failed to extract summons to enter appearance and serve the same upon the Defendant and as such the suit was incompetent and should be struck out. The Defendant however, admitted that the parties had tried to negotiate the matter out of Court, but that the Plaintiff had declined to address certain conditions in pursuit of settling the dispute. That even though the negotiations failed in September, 2012, the Plaintiff did not thereafter move fast to prepare the suit for hearing. It was therefore contended that, in view of the foregoing, the Plaintiff was not interested in prosecuting

the suit and the same should be dismissed.

5. The application was opposed by the Plaintiff through a Replying Affidavit sworn by Gideon Mwiti Irea on 5th April, 2013. The Plaintiff conceded that the suit was filed under a Certificate of Urgency on 10th June, 2010 together with an application for injunction. That the said application was certified as urgent and fixed for interparties hearing on 17th June, 2010. The Plaintiff contended, however, that the Defendant failed to attend Court on that date and the application was heard ex-parte and a ruling reserved for 5th July, 2010. That, those proceedings were set aside by the consent of the parties on 7th July, 2010. That the injunction application was finally allowed vide a ruling delivered on 1st September, 2011. That in the meantime, the parties were engaged in negotiations to explore the possibilities of an out of Court settlement between the year 2011 and 2012. The negotiations collapsed when the Defendant's Advocate refused to sign the consent letter as agreed by the parties. It was therefore the Plaintiff's contention that the matter had been active between the Advocates on record and also as between the parties' directors. In the Plaintiff's view, it had already proved that it had a strong case with a probability of success and as such the Court should not consider the technicalities raised by the Defendant and shut it out from being heard on merit.
6. At the hearing of the application, it was agreed that the application be disposed of by way of written submissions. Learned Counsel for the Defendant submitted that the application was meritorious, that the Plaintiff had gone into a deep slumber and had not bothered to take steps to list the suit down for hearing after the Court issued an injunction stopping the defendant from selling the suit property. That in effect, the injunction issued by the Court on 29th August, 2011 had lapsed by operation of law by tint of Order 40 Rule 6. Counsel emphasized that it was the Plaintiff's duty to set down the suit for hearing which it had failed. As such, it was submitted that the delay of two years was inordinate and inexcusable and had severally prejudiced the Defendant.
7. With regard to the negotiations between the parties, it was argued that the Plaintiff was not truthful as the cheques paid to the Defendant in the settlement of the matter had bounced. That it was therefore clear that the Plaintiff had attempted to defraud the Defendant. Counsel further submitted that the Plaintiff had never prepared nor extracted summons for service, more than three years after filing the suit. That owing to this, the suit was still born and any negotiations to settle the matter as suggested by the Plaintiff were without foundation. Counsel relied on the cases of ***Antony Wechuli Odwisa -v- alfred Khisa Munyanganyi [2006] eKLR, Jairo angote Okonda -v- Kenya Commercial Bank Limited (UR) HCCC No.3089 of 1996*** *and* ***Mobile Kitale service station -v- Mobil Oil Kenya Limited [2004] 1 KLR*** in support of those submissions.
8. On his part, Counsel for the Plaintiff submitted that the Plaintiff was still interested in prosecuting the suit. That it was not in dispute that the parties had engaged in out of Court negotiations after the injunction was issued on 29th August, 2011. That in the circumstances, the Defendant was trying to evade justice through the instant application. In the view, Counsels submitted the suit was not yet ripe for prosecution as the Defendant had not filed its defence, that the Defendant had been served with the Plaint and Chamber Summons application which was heard inter parties. That having participated in the proceedings at the interlocutory stage, the defendant should have filed its defence. As such, it was argued that the prayer to strike out the suit for failure to take out and serve summons to enter appearance should not be entertained. Counsel relied on the Case of ***Empress Dawger Co. Ltd -vs- Kenya Cultural Centre Ltd Milimani HCCC No.670 of 2001 (UR)*** in support of his submissions. It was therefore urged that the application be dismissed with costs.
9. I have considered the affidavits of the respective parties, the written submissions and the authorities relied on. The issues that fall for determination are whether to dismiss the suit for want of prosecution or in the alternative strike out the suit for failure by the Plaintiff to take out and serve summons to enter appearance. The court shall also determine whether to discharge the injunction granted to the Plaintiff on 29th August, 2011. I propose to start with the prayer for dismissal of the suit for want of prosecution.

10. Under Order 17 Rule 2 (3) of the Civil Procedure Rules, a suit is liable for dismissal for want of prosecution if no step is taken for a period of one year since the last time the case was in Court for

hearing. The principles governing an application for want of prosecution is that, the Applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the Defendant is likely to be prejudiced by such delay. See the case of **Allan -v- Sir Aflred McAlpine and sons Ltd [1968] 1 ALL E.R.543.** The power of the Court to dismiss a suit for want of prosecution is discretionary but as in all other discretions, the same should not be exercised fancifully. In addition, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same. Bearing this in mind, has the Defendant met this threshold?

11. It is alleged that the Plaintiff has failed to take any step to have the suit fixed for hearing for more than one year. I have perused the record and it is clear that the Plaintiff did not take any step after the injunction was granted on 29th August, 2011. Nothing appears on record to have taken place until 6th February, 2013 when the Defendant filed the current motion. Thus, delay of more than one year has been established. However, delay being a matter of fact it has to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court will always allow the Plaintiff an opportunity to have his case determined on merit. See the case of ***Agip (Kenya) Limited -v- Highlands Tyres Limited [2001] KLR 630.***
12. In this case, the Plaintiff explained that the delay was occasioned by the fact that the parties were engaged in out of court negotiations. It was, specifically deponed in the Replying Affidavit that the Advocates for the parties had been constantly communicating with each other seeking to record an out of Court settlement during the period of delay complained of. According to the Plaintiff, the Defendant only filed and served the instant application when it realized that an out of Court settlement was not in the offing. The Defendant has not specifically controverted those averments.
13. In paragraph 4 of the affidavit of Patrick karanja, it was admitted that the Defendant and the Plaintiff had engaged in negotiations although the parties were unable to come to an amicable conclusion. The Plaintiff produced in its Replying Affidavit correspondence exchanged between the parties between 2nd August, 2011 through 10th September, 2012 whereby the parties were attempting to settle the matter. That effort stalled around September, 2012. In my view, these letters proved that negotiations to resolve the dispute were actually taking place and supports the Plaintiff's assertion.
14. In view of the foregoing, find that the conduct of the Plaintiff cannot be said to be that of someone who has lost interest in pursuing its case. The Court is therefore satisfied with the reasons advanced by the Plaintiff for the delay. With regard to the prejudice suffered by the Defendant, I find that the same can be adequately compensated by way of costs. For these reasons, I refuse to dismiss the suit for want of prosecution and the said prayer is hereby dismissed.
15. I now turn to the prayer for the striking out of the suit for failure by the Plaintiff to extract and/or serve the summons to enter appearance. Learned Counsel for the Defendant submitted that the Plaintiff has never prepared nor extracted summons for service on the Defendant for more than three years after filing the suit. That the suit was stillborn and any negotiations to settle the matter were without foundation. In rebuttal, Learned Counsel to the Plaintiff submitted that the Defendant had participated in all the proceedings in this matter and as such, nothing stopped the Defendant from filing a defence.
16. I have given due consideration to the opposing arguments by the parties. It is not in dispute that the Plaintiff has not not taken out summons and no service of the same has ever been effected. Order 5 Rules (1) and (5) states as follows:

5 (1) (1) When a suit has been filed a summons shall issue to the Defendant ordering him in appear within the time specified therein.

(2) ….

(3) ….

(4) ….

(5) Every summons shall be prepared by the Plaintiff or his Advocate and filed with the Plaint to be signed in accordance with subrule (2) of this rule."

17. It is clear from Order 5 Rule 1 (5) that every summons shall be filed with the Plaint in question. There is a Plaint on record that was filed together with the Chamber Summons application dated 10th June, 2010 and filed on the same date. There were no summons filed together with that Plaint or Chamber Summons. However, there are copies of summons to enter appearance on record that are undated and bear neither the signature of the Deputy Registrar nor the seal of the Court. The same are annexed to a letter dated 11/4/2013 by the Plaintiff's advocates to the Deputy Registrar of this Court requesting for the issuance of the summons in this suit.
18. From that letter, it is clear that the Plaintiff, only embarked on extracting the summons as at 11th April, 2013. That was almost 2 years and 9 months after the filing of the suit. It was also about two (2) months after the present application had been filed. This long delay is inconsistent with the mandatory provisions of Order 5 Rule 1 (1) and (5) of the Civil Procedure Rules and in my view, is unfathomable. The same calls for sanctions against the Plaintiff to remind it of the mandatory provisions of the law requiring timely filing and service of summons to enter appearance so as a suit once filed can be prosecuted notwithstanding negotiations that might exist. See the case of ***Mobile Kitale Service Station -v- Mobile Kenya Limited & Another [2004] 1 KLR.***
19. Further, the Plaintiff's approach is rather casual. To merely state that the Defendant had participated in the proceedings at the interlocutory stage and that nothing stopped it from filing its defence will not do. The failure to serve process cannot be wished away as a mere technicality. Failure to serve process where process is required is a failure which goes to the root of the conceptions of proper procedure in litigation. See the case of ***Antony Wechuli Odwisa -v- Alfred Khisa Munyanganyi [2006] eKLR.*** Given the mandatory terms in which Order 5 Rule 1 (5) is coached, I do not think the Court has discretion on this. The failure to observe rules of procedure as set out in Order 5 Rule 1 (5) is in my view fatal. The suit never commenced. It remained still born.
20. I also note that the Plaintiff pointed out that the course of justice should not be circumvented by mere technicalities because it has already proven that it had a strong case with a probability of success. That may be so, but justice is meant for all parties including a Defendant. I agree with the Defendant's submission that the failure by the Plaintiff to issue summons made it impossible for the Defendant to respond to the suit through a Defence. Order 5 of the Civil Procedure Rules has set procedures which parties must adhere to including the Plaintiff. Those procedural rules are not of a technical nature. They are the very essence of commencement of lawful proceedings. Without summons being issued to command a Defendant to appear and defend a Plaintiff's claim, a suit remains still born. The delay in complying with Order 5 in this case is unacceptably inordinate.
21. In the circumstances, I allow prayer number 3 in the Notice of Motion dated 6th February, 2013. The suit herein is declared incompetent and is hereby struck out. With the suit being struck out, the prayer for the discharge of the injunction given on 29th August, 2011 is granted as a matter of course. The Plaintiff shall bear the Defendant's costs of the suit and the present application.
22. It is so ordered.

DATED and SIGNED at BUNGOMA this …. day of January, 2014.

A. MABEYA

JUDGE

DATED, Signed and delivered at NAIROBI this 23rd day of January, 2014.

H. B. HAVELOCK

JUDGE