REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 167 OF 2010

MUNICIPAL COUNCIL OF EMBU.....….....….....PLAINTIFF

VERSUS

POSTAL CORPORATION OF KENYA..... DEFENDANT/APPLICANT

R U L I N G

1. The application dated 22nd October 2013 and filed by the Defendant seeks the following orders;

   (a) That the plaintiff's suit against the defendant be dismissed for want of prosecution.

   (b) That the costs of this application and suit be borne by the plaintiff.

2. The application is based on the grounds that;

   a. Summons to enter appearance expired and no application to extend their validity was made by the plaintiffs.
   b. That the plaintiff has not taken any steps to prosecute the suit for over one and a half years.
   c. That the continuing inaction and undue delay is prejudicial to the defendants as the plaintiff continues to enjoy orders of the injunction.

3. In the replying affidavit, the deponent stated that he had initially filed a suit on behalf of the Plaintiff/Respondent in the name of Municipal Council of Embu, a name which ceased to exist after the new constitution came into force. He stated that it has now become necessary to substitute Municipal Council of Embu with Secretary Embu County and Embu County. That the Defendant/Applicant was inadvertently not served with the summons to enter appearance and that the mistake was highly regrettable.

4. The respondent in his further affidavit states that the matter was last in court on 16th December, 2011 and that they were still very much interested in its conclusion. That after the Environmental and Land Court was established in Kerugoya the respondent assumed that his file was transferred there only to learn later that it had not been transferred after they were served with the present application. The respondent averred that they are still keen on prosecuting the case speedily. It also noted that both parties had not complied with order 11 which is mandatory and that they had filed an application for substitution of names.

5. In the written submissions the Applicant states that the respondent was on 16th December, 2011 granted interim orders restraining the applicant from dealing with the suit property pending hearing and determination of the main suit. That since the grant of the said order the Respondent has no taken any steps to prosecute the suit and has not even taken out summons to enter appearance. The applicant

relies on Order 5 Rule 1 which states that summons to enter appearance shall be taken out not more than 30 days after filing the suit. The applicant also relies on Order 5 Rule 6 which states that summons shall be collected for service within 30 days of issue or notification failure to which the suit shall abate. That the Plaintiff/Respondent has not provided evidence of any attempt to prepare or file the summons. The Applicants aver that the Respondents have not given a satisfactory explanation as to why the summons were never filed in time and that no evidence of the alleged application for extension of time was provided. On this ground the applicant relied on the case of **EPHANTUS WACHIRA NGOCHI VS CO-OPERATIVE BANK OF KENYA LIMITED** in which the court held that it was the duty of the plaintiff to prepare and file summons for the court to issue failure to which the suit should abate. The Plaintiffhad failed to prepare summons for over 24 months.

6. On whether the suit should be dismissed for want of prosecution, the applicant relied on order 17 rule 2 of the civil procedure rules which provides that in any suit where no application has been made or step taken, the court can give notice to parties asking them to show cause why the suit should not be dismissed.To support this point the applicant relied on the case of **ALLEN VS SIR ALFRED MCALINE & SONS** in which the court held that for a party to succeed in an application for dismissal for want of prosecution he must show that;

(a) There has been inordinate delay.

(b) The inordinate delay is inexcusable

c. The defendants are likely to be seriously prejudiced by the delay.

7. On inordinate delay, the applicant claims that the suit has been pending for over three years without any action by the respondent. On the fact that the inordinate delay was inexcusable the applicant relied on the case of **INDUSTRIAL COMMERCIAL DEVELOPMENT BANK VS PETER RUTO** in which it was held that until a credible excuse is made out, the natural inference would be that it is inexcusable.

8. The Applicant also claims that the Respondent attempted to justify indolence in prosecution by shifting the blame to the court registry but fails to provide proof for the allegations. For instance he has not availed a letter to the executive officer informing him of the missing file. On the issue of the parties failure to comply with order 11, the applicant states that there is no way it would have been expected to comply without being summoned to enter appearance and to file a defence. On the issue of substituting the names, the applicant avers that the respondent has again failed to provide evidence that it has filed the application for substitution.

9. The applicant alleged that it would be prejudiced by the delay as the memory of the witnesses has faded, documents have been lost considering that three years have passed and that the applicant has suffered the mental anguish that follows an implication in a suit such as this. The applicant relied on the case of **TRUST BANK VS KIPRONO KITONNY & 2 OTHERS [2002]** in which it was held that that it was not in dispute that legal disputes cause anxiety to parties and that if the anxiety is extended for a long period of time it would be naturally be prejudicial to the other party if not justified.

10. On the issue of the delay being blamed on the advocate the applicant relied on the case of **JOHN OKURU ODORWA VS MADISON ASSURANCE LIMITED HCCC NO. 804 OF 2004** in which it was held that a suit filed by the plaintiff belongs to the plaintiff and that a plaintiff has a duty, where there is delay in the prosecution of the matter to be concerned and to see to it that what is causing the delay has been removed. He should not be allowed to sleep and have no responsibility for prosecution of his case simply because he has an dvocate.

11. **UNDISPUTED FACTS**

(a) That the respondent failed to take out summons to enter appearance.

(b) That was there inordinate delay on the part of the respondent.

12. **DISPUTED FACTS**

(a) That the respondent has filed an application for substitution of parties/names

(b) That the suit has abated

(c) That the suit should be dismissed for want of prosecution.

13. **ISSUES FOR DETERMINATION**

i. Whether the suit has abated
ii. Whether the suit should be dismissed for want of prosecution.
iii. Whether the respondent's advocate should be blamed for the delay.
iv. Whether the inordinate delay is execusable.
v. Whether the applicant was prejudiced by the respondents delay.
vi. Whether the plaintiff can rely on Article 159 of the constitution for reprieve.

14. **ISSUE NO. (i)**

Order 5 Rule 1 provides that every summon except where the court is to effect service shall be collected for service within thirty days of issue or notification failure to which the suit shall abate. Order 5 Rule 2 states that summons other than concurrent summons shall be valid for a period of twelve month and that the court may extend the validity of summons if not served. In the present case, the suit was filed on 5th November, 2010. However the plaintiff never took out summons to enter appearance as required under Order 5 Rule 1. Though not attached in the application, a perusal of the court file shows that the plaintiff filed an application to extend validity of summons on 19th February, 2014 which is after the original summons had expired and after the present application had been filed.

15. In **NAIROBI ELC CIVIL SUIT NO.250 OF 2010,** the 1st Defendant had sought to have the suit struck out as summons to enter appearance were never served upon them to enable them to appear and file a defence. The Judge held that:-

> *"Under Order 5(1) subrule 3, 5, and 6 the plaintiff had an obligation to ensure that summons are prepared and signed by the court to facilitate service on the defendant. The provisions of Order 5 Rule 1 are elaborate and comprehensive and couched in mandatory terms and where for some reason the plaintiff has experienced difficulty in service Order 5 Rule 2 provides reprieve in that the plaintiff can apply for the validity of summons to be extended. Service of summons is a vital step in initiating litigation and thus until the summons are properly served upon the defendant, the defendant has no valid invitation to defend the suit''*

The plaintiff attempted to remedy the situation by filing an application to extend the validity of summons long after the original summons had expired and after the present application had been filed. A question therefore arises as to whether the validity of expired summons can be extended.

16. In **NAIROBI HCCC NO. 52 OF 2012** the plaintiff sought to extend the validity of summons that had already expired. The judge quoted several decisions that were all of the view that extension of summons can only be done while the original summons are still valid. In view of the fact that summons were never taken out on time as required by Order 5 Rule 1 of the Civil Procedure Rules and the fact that the application by the plaintiff to have the validity of summons extended was done long after the said application is a nullity and cannot alter the current position.

17. **ISSUE NO. (ii), (iv) & (v)**

In **NAIROBI HCCC NO 720 OF 2009,** the Judge quoted the case of **UTALII TRANSPORT**

COMPANY LTD VS NIC BANK & ANOR in which the principles developed by law to guide the exercise of discretion by court in an application for dismissal of suit for want of prosecution were set out. The principles are:-

(a) **Whether there has been inordinate delay on the part of the plaintiff in prosecuting the case.**

In the present case the suit has been pending and has been inactive since 5/11/2010.The only form of activity seen on the plaintiff's side is when he filed an application to extend the validity of summons on 19/2/2014.The explanation given by the plaintiff on the delay in my view is not satisfactory (That he all along thought that the file had been transferred to Kerugoya Environmental and Land court).

(b) **Whether the delay is intentional and therefore inexcusable**

The delay in my view is not excusable. The plaintiff claims that he was unable to trace the file from the registry. It is worth noting that the plaintiff has not offered any evidence to prove that he was keen to follow up and have the disappearance of the file resolved. For instance he did not provide any letter that was written to the Deputy Registrar and/or Executive officer informing him of the missing file and no application for reconstruction of the file was ever done.

(c) **Whether the delay is an abuse of court process**

A suit filed by the plaintiff belongs to the plaintiff and where there is delay he has a duty to see that whatever is causing the delay is removed. The fact that the plaintiff did not make any effort to ensure that this matter was concluded expeditiously (by serving summons on time or by extending their validity on time, by confirming whether the file was at Kerugoya of Embu and by reconstructing another file) and was only woken up from slumber by the present application to dismiss the suit for want of prosecution, is an abuse of the court process.

(d) Whether the delay gives rise to substantial risk to fair trial or cause serious prejudice to the defendant

The defendant/applicant has stated in their submissions that the over three years delay will prejudice their efforts to build a strong defence case due to the fact that the memory of the witnesses has faded. The applicant also states that they have suffered emotional anguish that comes with the implication of a suit.

(e) What prejudice will the dismissal occasion the plaintiff

The plaintiff only states that they will suffer great prejudice if the suit is dismissed but does not disclose what prejudice it will suffer. The allegation can therefore not be substantiated.

18. **ISSUE NO. (iii)**

The plaintiff in his written submission has blamed his advocate for not serving the summons and for not fixing the matter for hearing and begs the court not to punish him for the mistake of his advocate. It is however worth noting that the applicant has not demonstrated what steps he took to follow up of his case with a view of ensuring that summons were taken out and the matter was fixed for hearing.

In **NAIROBI JR MISC APPLICATION NO.44 OF 2011,** the court quoted several cases in holding that the applicant was guilty of negligence for not following up on his case and that it was not enough for a party to simply blame his advocate without showing tangible steps taken up by him to follow up his case.
I therefore find that the plaintiff/respondent inaction confirms that he was not keen on having this suit

heard expleditiously. It cannot shift blame to his advocate. The delay is in ordinate and inexcusable.

Its unthinkable that the Plaintiff who filed this suit on 5th November, 2010 has never taken out summons to enter appearance to date!

19. **ISSUE NO.(vi)**

In **NAIROBI HCCC NO 52 OF 2012** the court held that the objective of Article 159(2)(d) of the constitution of Kenya was not to validate actions that are null and void but disguised as procedural technicalities. The court further held that these provisions cannot be invoked by a party who has been indolent and fails to comply with the laid down provisions of the law to ride on a ground of a mere irregularity or procedural technicality.

I therefore find that Article 159(2)(d) of the Constitution is not available to the Applicant.

20. I do find the application to be well founded and I allow it with costs.

The orders of injuction issued on 16th December, 2011 are vacated.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2014.

H.I. ONG'UDI

JUDGE

In the presence of:-

Ithiga for Mr. Okeyo for Defendant/Applicant

Njue CC