



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 324 OF 2012**

**FREDRICK KIRITU T/A SAATCHI**

**KABIRO & ASSOCIATES:.....: PLAINTIFF/RESPONDENT**

**- VERSUS -**

**TURN-O-METAL :.....: DEFENDANT/APPLICANT**

**R U L I N G**

1. The **Notice of Motion** application before the court is dated **25th April 2013**. It is brought under Order 5 Rule 1 (6) and 2 (7), Order 17 Rule 2 (3), Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
  - a. *That this Honourable court be pleased to declare that the suit herein has abated as against the Defendant and that costs be awarded to the Defendant accordingly.*
  - b. *That in the alternative to prayer (a) above, this Honourable court be and is hereby pleased to dismiss the suit herein with costs to the Defendant for want of summons.*
  - c. *That the cost of this application be borne by the Plaintiff in any event.*
3. The application is premised on the grounds set out therein and is supported by **affidavit** of **KENNEDY O. OCHIENG** dated **25th April 2013**. The application is not opposed. The application was served upon the Defendant. The Notice of Hearing was also served and the Plaintiff filed an Affidavit of Service in court on **29th May 2014** to prove service.
4. The brief facts about the application are that this suit was filed by the Plaintiff against the Defendant on 25th May 2012 simultaneously with an interlocutory application for injunction orders which were granted by this court on 16th July 2012. The Plaintiff has to date not taken out summons. Neither has the Plaintiff sought to set the matter for hearing as there is no defence to the suit, hence this application.
5. I have considered the application. Under Order 17 Rule (2) (3) any party to a suit may apply for its dismissal in a matter in which no application has been made or step taken for a period of one year. Also, under Order 5 Rule 2 (7) a court can dismiss a suit at the expiry of twenty-four months from the issuance of original summons. However, in this case, summons have never been issued. This failure offends Order 5 Rule 1 and subsequent rules thereunder which require summons to be

issued with a copy of the Plaint. But even where it is not possible to comply with that direction, summons still must issue within a period before which summons must expire. There is no evidence that this direction will ever be complied with as the Plaintiff is evidently not interested in the suit.

6. In the upshot I allow the application dated 25th April 2013 as prayed with costs of both the suit and the application for the Defendant/Applicant.

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

No appearance for Plaintiff/Respondent

Ataka for Defendant/ Applicant

Teresia – Court Clerk