



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE. NO 79 OF 2007

BONVENTURE TOURS AND

TRAVEL LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

JULIUS KIPLAGAT &

EDISON KIPLAGAT BUNDOTICH.....1ST DEFENDANT/RESPONDENT

LINROSE INVESTMENTS LTD. &

INTERFAARM INVESTMENTS LTD ..2ND DEFENDANT/RESPONDENT

ROSE CHEBET &

ROBERT GICHURA.....3RD DEFENDANT/RESPONDENT

ARCHMAN HOLDINGS LIMITED.....4TH DEFENDANT/RESPONDENT

MYTA DEVELOPMENT LIMITED.....5TH DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI.....6TH DEFENDANT/RESPONDENT

COMMISSIONER OF LANDS.....7TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....8TH DEFENDANT/RESPONDENT

RULING

Before me for determination are two applications filed by the 5th defendant dated 15th and 27th May 2013. The Notice of Motion dated 15th May 2013 (hereinafter referred to as the “First Application”) was brought under **Order 5 Rule 1 (6) and 2(7), Order 17 Rule 2(3), Order 51 rule 1** of the **Civil Procedure Rules** and **section 3A** seeking for orders that the court declares that the suit has abated or in the alternative this court dismisses this suit for want of prosecution with costs to the defendant.

The application is premised on the grounds on the face of it together with the supporting affidavit of Kennedy Ochieng, an advocate of the High Court of Kenya on record for the 5th Defendant. He stated that this suit was filed by the plaintiff against the defendants on 27th April 2007, which is over six years ago. He further said that the suit was filed simultaneously with the plaintiff's application dated 27th April 2007 seeking for injunctive orders which has never been set down for hearing inter parties and has apparently been abandoned for unknown reasons. He stated further that the plaintiff has now filed a parallel application dated 3rd May 2012 also seeking injunctive orders in respect of the same subject matter and in the meantime the summons to enter appearance has never been served upon the 5th defendant to date so as to enable it to enter appearance and file a statement of defence. He further averred that the suit has abated and is fit for dismissal for want of prosecution. He further indicated that it is unfair to have this suit hanging over the head of the 5th defendant indefinitely therefore the court should order the same to have abated.

This application is opposed. The plaintiff filed its grounds of opposition on 19th June 2013 stating that this application is incompetent and the orders are not capable of being granted, that the supporting affidavit was defective and could not be admitted in law and that the application is frivolous and an abuse of the court process denying the plaintiff the opportunity to be heard which is against the tenets of natural justice.

The second application is the Notice of Motion dated 27th May 2013 (hereinafter referred to as the "Second Application") brought under **Order 25 (4), Order 51 Rule 1** of the **Civil Procedure Rules** and **section 1A, 1B** and **3A** of the **Civil Procedure Act** seeking for orders that the court stays this suit pending payment of costs in the previous **Nairobi HCCC No 794 of 2003** which was between the same parties on the same subject matter and was withdrawn by the plaintiff herein and in the alternative this suit be dismissed.

This application is based on the grounds appearing of its face together with the supporting affidavit of Kennedy Ochieng where he stated that prior to the filing of this suit, the plaintiff had filed **HCCC No 794 of 2003** against the same parties and over the same subject matter which was withdrawn by a Notice dated 25th April 2007. He stated further that the court entered judgment on costs for the defendants in the said suit on 20th June 2007 which were assessed at Kshs. 291,215/-. He further stated that the plaintiff has not made any efforts to settle the said costs. He relied on **Order 25 Rule 4** of the **Civil Procedure Rules** which states as follows:

"If any subsequent suit shall be brought before payment of the costs of a discontinued suit upon the same or substantially the same cause of action the court may order a stay of such subsequent suit until such costs shall have been paid."

He asserted that in the circumstances the application falls under the said provision therefore this suit should be stayed pending the settlement of the defendant's costs assessed at Kshs. 291,215/-.

This application is contested by the plaintiff through its grounds of opposition filed on 19th June 2013 stating that the application is incompetent and orders cannot be granted, that the application is supported by a defective affidavit which cannot be admitted in law and ought to be struck out. Further to the grounds of opposition, the plaintiff through Alex Wainaina filed a replying affidavit dated 21st June 2013 stating that the application dated 27th May 2013 and the supporting affidavit are defective as they indicate 9 defendants while the 9th defendant had not been made a party to the suit by any order of the court yet. He further asserted that the application for costs was made by the defendants' advocates and that the costs awarded was for 9 defendants and not the 5th defendant alone. He further deposed that the defendants have never served the plaintiff with the certificate of costs as alleged and in any case the defendants have also sat on the certificate of costs for over 6 years without asking the plaintiff to pay costs. He therefore prayed that the court declines to grant the orders sought in the application dated 27th

May 2013 and deal with all the issues in the suit once and for all.

I have considered the written submissions filed by the 5th Defendant/Applicants and the Plaintiff/Respondents.

I will deal with the First Application first before delving into the Second Application, if necessary. In the First Application, the 5th defendant seeks for an order from this court to the effect that this suit has abated for failure to serve summons to enter appearance or in the alternative for the dismissal of the suit for want of prosecution. It is true that this suit was instituted in the year 2007, which is seven years ago. In his supporting affidavit, at paragraph 8, Mr. Alex Wainaina stated that the reason why they could not serve the pleadings upon the defendants was because they could not be traced therefore ordinary service would not be possible. The 5th defendant stated that the advertisement that was placed in the newspaper was not summons to enter appearance but a Notice to Show Cause. While arguing for this suit to be dismissed for want of prosecution, the 5th defendant cited **Order 17 Rule 2** of the **Civil Procedure Rules** which provides that in any suit in which no application has been made or step taken by either party for one year the court may give notice in writing to the parties to show cause why the suit should not be dismissed. He argued that this rule was meant to ensure expeditious disposal of suits, justice to all parties and to prevent abuse of the court process. It cited the case of **Eco bank Ghana Limited –vs-Triton Petroleum Company Limited (in receivership) & Others Civil Case No 24 of 2009** where the plaintiff had failed to set down the suit for hearing for two years, the court held that where an application is made under **Order 17 Rule 2 (3)** of the **Civil Procedure Rules** the court must subject the matter to the test whether the respondent has shown satisfactory cause why the suit should be not dismissed. It also cited the case of **Trust Bank (in liquidation) -vs- Kiprono Kittony & 2 others Civil Suit No 223 of 2002** where it was stated as follows:

“ legal disputes do cause anxiety to parties and if that anxiety is extended for a long period of time it would naturally be prejudicial to the party if not justified ”

I note that the plaintiff took out summons on 7th June 2007 but there is no evidence of service of the same. The provisions of **Order 5 Rule 1 (5)** states that, ***“every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.”*** Under that rule it is a mandatory requirement that the plaint must be accompanied by summons. In the case of **Mobile Kitale Service station –vs- Mobil Oils Kenya Limited & Another [2004] 1 KLR Warsame J** held that, ***“Parties ought to respect the rules of engagement for they are promulgated to achieve justice to the rival parties. Summons is a judicial document calling a party to submit to the jurisdiction of the court and if a party is not given that opportunity, how else would he submit to the jurisdiction of the court”***. The procedures that have been laid down by the law must be followed for the ends of justice to be met without compromising or inconveniencing one party. Once a party commences a suit in court it is incumbent upon him to prosecute his suit to conclusion and not in piecemeal as the plaintiff in this case is doing. One cannot file suit then come to court 7 years later seeking for orders that had been denied by the court in the guise that it was not able to trace the defendants. This court also notes that there are other means of service that have been provided in the law for the plaintiff to use should it have had any difficulty with personal service. If it effected service by way advertisement in the application dated 3rd May 2013, then it should have done so some five years back with the plaint. Just like Waki J said in the case of **Kiptalum Runo –vs- Agricultural Finance Corporation HCCC 2348 of 1998 (UR)** that ***“Orders 5 in my view is tailored for those vigilant plaintiffs who obtain summons to enter appearance when they ought to under order IV and made unsuccessful attempts to serve it over a period of 12 months”***. The plaintiff admits that summons was neither issued nor served. Failure to serve process where service of process is required is a failure which goes to the root of the commencement of proper procedure of litigation. The summons having remained unserved for over seven years, the interest of justice requires that the suit be declared to have abated as provided for in the **Civil Procedure Rules**. Arising from the foregoing, I hereby allow the First Application with costs to the 5th Defendant.

On the Second Application where orders are sought that this suit be stayed pending the payment of costs for **Nairobi HCCC No 794** of 2003 which was withdrawn by the plaintiff, I see no use in addressing the

same in view of my earlier finding in respect of the First Application.

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2013

MARY M. GITUMBI

JUDGE