



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC NO: 315 OF 2009

JOHN KENNEDY MATACHWA.....PLAINTIFF

VERSUS

**NAIROBI CITY COUNCIL.....]
PETER N. KLIONZO.....]
EDWARD NDINGURI NJOROGE].....DEFENDANTS
SILAS DOMINIC MUGERIA]
ESTHER MUGERIA.....]**

RULING

The applicants in the Notice of Motion dated 9th June 2011 are the 4th and 5th defendants in this suit, in which they were enjoined under an amended plaint filed on 7th July 2009. They have filed this application praying that the suit against them be dismissed, for want of prosecution, on the ground that the plaintiff/respondent has not taken any steps towards prosecuting the same since 23rd October 2009.

The applicants state that, not only have the respondents failed to set the suit down for hearing but have also not extracted the requisite Summons for service upon the applicants. The applicants therefore feel aggrieved in having this suit hanging over their heads, while it appears that the respondents have lost interest in the same. The applicants contend that the respondents’ non prosecution of the suit is neither justifiable nor excusable and the suit should therefore be dismissed under **Order 17** of the **Civil Procedure Rules**.

The respondent does not appear to have filed any of the documents stated in **Order 51 Rule 14** in reply to the Notice Motion. Orally though, learned counsel for the respondent, Mrs. Kwamboka, submitted that Summons to Enter Appearance had been extracted and served. However what counsel showed the court, and which appears to be the only summons to have been extracted are summons to the 1st defendant, dated 8th July 2009. There is no evidence to prove that summons were ever served on the applicants, despite the submissions from the bar that the same were served at the applicants’ business premises.

The respondent also argues, through counsel, that the filing of the plaintiff/respondents’ list and bundle of documents on 13th July 2010 is a step towards prosecuting the suit, and blames the applicant for the delay occasioned herein, which they say is as a consequence of the applicant’s failure to file a reply to their injunction application filed simultaneously with the amended plaint.

Order 17 Rule 2 of the Civil Procedure Rules 2010 provides for dismissal of suits for want of prosecution in the following terms:-

“2 (1) 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, and if cause is not shown to its satisfaction, may dismiss the suit.

(2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1”.

I have carefully considered the submissions made herein. The record clearly shows that the respondent never extracted summons after filing the amended plaint to kick start the prosecution of the suit as against the 4th and 5th defendants. The delay attributed to the applicants by the respondents is not understood, nor is the reference to the pending injunction application which, as implied by counsel for the respondent, appears to be standing in the way of further progress in the matter.

I accept the applicant’s submission that the respondent, rather than the applicants is the driver of the suit. He has not, in my view, demonstrated any vigilance in the prosecution of the suit since the delivery of the court ruling of 23rd October 2009, allowing the joinder of the applicants to these proceedings. The respondent does not appear serious in his pursuit of his claim against the applicants.

I find that the respondent has not shown good cause why the suit filed against the applicants should not be dismissed for want of prosecution. I therefore allow the application and grant the orders sought with costs. Accordingly, the suit against the 4th and 5th defendant/applicants is hereby dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI this 23rd day of February 2012.

M.G. MUGO
JUDGE

In the presence of :

Ms. Muthoni for the applicant. ____Mr. Kimani holding brief for Ms. Kwambokafor the respondents.