



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL SUIT 343 OF 2009**

**TERRY WANJIRU KARIUKI.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**EDWARD NYINGI MUKUNDI.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

This ruling arises from two application dated the 7<sup>th</sup> February 2012 and 1<sup>st</sup> February 2012 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. Both applications are based on the fact that the summons to enter appearance in this suit have never been applied for, issued or served on the defendants and that the plaintiff has ever since the filing of the suit wilfully failed and/or neglected to prosecute her suit; thus the suit has abated. In the alternative the 2<sup>nd</sup> defendant prays that the injunctive order dated 28<sup>th</sup> May 2010 together with the caveat dated 28<sup>th</sup> May 2010 be discharged, varied or set aside on the ground that the said orders have lapsed as provided for under **Order 40 rule 6** of the *Civil Procedure Rules*.

The 1<sup>st</sup> defendant's application is supported by an affidavit sworn by **John Njenga**, the Head of Legal Services of the 1<sup>st</sup> Defendant. According to the deponent, although the suit was filed on 18<sup>th</sup> May 2009 and served upon the 1<sup>st</sup> defendant on 22<sup>nd</sup> May 2009, the plaintiff never bothered to apply for and extract summons for service upon the 1<sup>st</sup> Defendant to date. Accordingly, the deponent has been legally advised that as a result thereof the suit has abated and ought to be struck out with costs. It is further contended that after securing interlocutory restraining orders the plaintiff is no longer keen in setting down the suit for hearing.

On his part the 2<sup>nd</sup> defendant's application is supported by an affidavit sworn by himself on 1<sup>st</sup> February 2012 in which he deposes that following the institution of this suit on 18<sup>th</sup> May 2009, injunctive orders were granted on 28<sup>th</sup> May 2009 and since then no step has been taken by the plaintiff with a view to proceeding with the matter. According to the 2<sup>nd</sup> defendant the continued existence of this suit is oppressive and prejudicial to him as he continues servicing the loan advanced to him by the 1<sup>st</sup> defendant without developing the property in dispute. According to him the suit should be dismissed for want of prosecution as well as under **order 5 rule 1(6)** of the *Civil Procedure Rules*. In any case, the 2<sup>nd</sup> defendant contends, that the injunctive orders granted herein dated 28<sup>th</sup> May 2010 have lapsed by operation of **Order 40 rule 6** of the *Civil Procedure Rules* and should be formally discharged under **rule 7** thereof since the plaintiff has abused the existence of the injunction order and gone to sleep on the main suit.

In opposition to the application the plaintiff swore a replying affidavit on 23<sup>rd</sup> March 2012 in which she deposed that having seen the defendants in court several times she was under the impression that all procedures had been complied with. Apart from relying on the affidavits sworn herein earlier in this suit, the plaintiff, while admitting that interlocutory injunction was issued herein on 28<sup>th</sup> May 2010 contends that before she could proceed with the suit the defendants applied for the vacation of the said orders and the ruling therefrom rejecting the application was delivered on 10<sup>th</sup> May 2011. Thereafter a possibility of settlement was entered which would have been undermined by the setting the suit down for hearing. This course of events went on until November 2011 when a definite offer was proposed by her advocates and sent to the defendants' advocates for consideration but was amended and she was in the process of digesting the same when the first application was filed. Accordingly, the plaintiff contends that the circumstances of this case militate against striking out of the suit for non-compliance with the rules and indolence since the matter was last in court in November 2011. Following the breakdown in the negotiations, the plaintiff is now ready and willing to prosecute the suit and should not be prevented from doing so as a result of procedural slip on the part of her legal advisers.

The 2<sup>nd</sup> defendant filed a notice of preliminary objection that paragraphs 5, 6 and 9 of the said replying affidavit be struck out for being scandalous, irrelevant and oppressive and the exhibits thereto marked TWK-1 & 2 be expunged from the record on the ground that they offend the provisions of **section 23** of the **Evidence Act**.

The applications were prosecuted by way of written submissions. According to the 1<sup>st</sup> defendant since the plaintiff has never applied for and issued summons to enter appearance, the suit has abated by operation of law since such a defect cannot be cured by the Oxygen Principle and relies on **Alfred Makhongo & 3 Others vs. Prof. Bishop Zablon Nthamburi HCCC No. 133 of 2005** and **Nagedra Saxena vs. Miwani Sugar Limited Civil Appeal No. 261 of 2008**. It is further submitted that the suit is clearly an abuse of the process of the court since the matter was last in court on 27<sup>th</sup> October 2010 and over one year has passed since then while contrary to the provisions of **Order 40 rule 6** of the Rules the plaintiff did not set the suit down for hearing. On the other hand, it is submitted that the caveat ordered to be lodged was to be in place pending the hearing and the determination of the application for injunction which application was determined hence the order is no longer justified.

According to the 2<sup>nd</sup> defendant's submissions, since the interlocutory application was disposed of on 28<sup>th</sup> May 2010 nearly 2 years have gone by without the plaintiff taking any step at all to prosecute the matter but has instead continued to enjoy the said injunctive orders. Accordingly, the suit should be dismissed for want of prosecution or for being an abuse of the process. Relying on **Fitzpatrick vs. Batger & Co. Ltd [1967] 2 All ER 657**, it is submitted that public policy demands that the business of the courts should be conducted with expedition. It is further submitted that under **Order 5 rules 1,(1), (2) and (5)** of the *Civil Procedure Rules* service of summons is a crucial in the prosecution of a suit and the failure to take out summons demonstrate clear lack of interest in prosecuting the suit and **Tifas Wangubo Mabina vs. Biketi Lukhoba [2006] eKLR** and **Alfred Makhomgo & 3 Others vs. Prof. Bishop Zablon Nthamburi HCCC No. 133 of 2005** are cited in support. It is further submitted in the alternative that the court should specifically and/or expressly discharge the injunction granted herein as well as the caveat

under the provisions of **Order 40 rule 6** aforesaid since the said order continues to unnecessarily burden the suit land at the expense of the 2<sup>nd</sup> defendant. The mere fact that the 2<sup>nd</sup> defendant was not satisfied with the orders of 28<sup>th</sup> May 2010, did not amount to stay of proceedings, it is submitted. On the preliminary objection, it is submitted that the offending paragraphs contravene the provisions of **section 23(1)** of the *Evidence Act* with respect to without prejudice communication and correspondences. Since no agreement was reached the said documents, it is submitted, are worthless papers and are therefore scandalous, irrelevant and oppressive and the 2<sup>nd</sup> defendant cites **Cross & Taper's Treatise on the Law of Evidence at page 497** and **Postal Corporation of Kenya vs. Kipkorir, Titoo & Kiara Advocates Milimani High Court Miscellaneous Case No. 658 of 2004.**

In response to the foregoing submissions the plaintiff submitted that the provisions of *Article 159(2)(d)* and **sections 1A and 1B** of the *Civil Procedure Act* had the effect of sealing the status of the rules made under the Civil Procedure Rules to that of truly “*handmaid*” of the law. Accordingly, the provisions contained therein were now in practical application all made directional or applied as a guide only and not meant to deny the court discretion to invoke the overriding objective. It is submitted that the failure to serve summons was a technical omission and since in this case both the plaint and the application were served and responded to by the defendants, no prejudice has been suffered by the failure to serve summons since they fully participated in the proceedings. It is contended that the procedural function of the summons to enter appearance was served by the service of the other documents. Accordingly the issue does not go the root of the matter. To contend that the suit has abated is to ignore that parties are in court to apply overriding objective why courts are established. It is further submitted that since the procedural lapse herein was as a result of an advocate’s omission the sins of the advocate should not be visited on the plaintiff and the plaintiff relies on **New KCC vs. Peter M. Mwau Civil Application No. 226 of 2011, Giro Commercial Bank Ltd vs. Jasvinder Singh Dhadialla [2005] eKLR** and **Farmers Limited vs. Ecumenical Development Co-operative Society Mwihangiri Farmers (EDCS)**. On the non-prosecution it is similarly submitted that it was the role of the advocate to fix the matter for hearing and in any case it would have been a sign of bad faith for a party to engage in negotiations while at the same time proceeding with the suit. Negotiations, it is submitted, should be encouraged to avoid expenses that accompany litigation and the defendants should have, as a matter of courtesy, informed the plaintiff of the failure of negotiations in order for the plaintiff to set the suit down for hearing instead of ambushing the plaintiff with an application seeking to dismiss the suit for want of prosecution. On without prejudice documents, it is submitted that the documents are exhibited not to show the terms of the settlement but rather to show that parties have been talking and to dispel the impression that the plaintiff was sleeping on the case and that the activities the plaintiff was engaged in were within the full knowledge of and with participation of the defendants. The delay to prosecute the case, it is submitted was mutual. It is submitted in conclusion that under **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as the provisions of the Constitution, the Court should only be concerned with considering what is just. It is submitted that instead of dismissing the suit or setting aside the injunctive orders granted herein, the court should instead set the timelines for hearing.

Having considered the foregoing, I now wish to deal with the issues raised. I first wish to deal with the legal principle behind the “*without prejudice rule*”. **Section 23(1) of the Evidence Act, Cap.80** of the Laws of Kenya provides for admissions made without prejudice in civil cases. It provides as follows:

***“In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given”.*** (Underlining mine).

In the case of **Geology Investments Ltd vs. Behal T/A Krishan Behal & Sons [2002] 2 KLR 447, Mwera, J** stated thus:

**“The rubric “without prejudice” has been used over ages particularly in correspondence between counsel for litigating parties to facilitate free and uninhibited negotiations to explore settlements of dispute. Until such time as there is a definite agreement on the issues at hand, such correspondence cannot be used as evidence against any of the parties. The rubric simply means “I make you an offer, if you do not accept it, this letter is not to be used against me. Or I make you an offer which**

you may accept or not, as you like, but if you do not accept it, my having made it is to have no effect at all". It is a privilege that is jealously guarded by the courts otherwise parties and their legal advisers would find it difficult to narrow down issues in dispute or to reach out of court settlements... The rule, however is strictly confined to cases where there is a dispute or negotiation, and suggestions are made for settlement thereof. Where this is not the case the sender of the letter cannot impose on the recipient any condition as to the mode in which it may be used by marking it "without prejudice".

In the case of Ongata Rongai Total Filing Station Ltd vs. Industrial and Commercial Development Corporation Nairobi (Milimani) HCCS No. 219 of 2007 (OS) Kimaru, J had this to say:

**"The 'without prejudice rule' is a rule governing the admissibility of evidence and is founded on the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. The rule rests on public policy and the convenient starting point of the inquiry is the nature of the underlying policy which is that parties should be encouraged so far possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should be encouraged freely and frankly to put their cards on the table and the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability. The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. This rule is recognised as being based at least in part on public policy. Its other basis or foundation is in the express or implied agreement of the parties themselves that communications in the course of their negotiations, should not be admissible in evidence if, despite the negotiations, a contested hearing ensures... It is therefore clear that as a general rule, communication between parties to a suit, made on "without prejudice" basis will not be admissible in evidence. However, there are exceptions to this general rule. Under section 23(2) of the Evidence Act, an advocate is not exempted from giving evidence in regard to any matter that he may be compelled to give evidence under section 34 of the said Act. Other examples are where the issue is whether the "without prejudice" communication had resulted in a compromise settlement; where it is admissible to show that an agreement concluded between the parties, during negotiations should be set aside on the ground of representation, fraud or undue influence; where a statement might be admissible as giving rise to an estoppel; where the exclusion of the evidence would act as a cloak for perjury, blackmail, threat or other unambiguous impropriety; where the evidence is admissible in order to explain delay or apparent acquiescence, for instance, in application to strike out proceedings for want of prosecution; and where in an action for negligence, the evidence is admissible to show that the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a third party".**

However, as was stated by Mbaluto, J in William Ochieng Mahinya vs. Kenya National Assurance Co. Kisii HCCC No. 289 of 1995:

**"When a claim is compromised, the cause of action becomes merged and is superseded by the compromise and the defence to the original cause of action is not a defence to an action brought to enforce the compromise... If an offer is made on "without prejudice" evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded and one can give evidence of the "without prejudice" letter of offer".**

In Postal Corporation of Kenya vs. Kipkorir, Titoo & Kiara Advocates Milimani High Court Miscellaneous Case No. 658 of 2004 Kimaru, J was clear in his mind that "the defendants cannot rely on communication made on "without prejudice" basis to support their contention that there was such an agreement".

My understanding of the principle is that a party cannot rely on such documents in order to prove that

there was a settlement of the dispute where the negotiations eventually failed. Where the negotiations are successful and an agreement is arrived at, the settlement subsumes the negotiation and the without prejudice status of the documents no longer apply. It is therefore not correct to issue a blanket statement that documents expressed to be ‘without prejudice’ can never be admitted under any circumstances. Such documents have been used in an application for extension of time to file a suit out of time. See **Lucia Wambui Ngugi vs. Kenya Railways & Another Nairobi HCMA No. 213 Of 1989** and **David Stephen Gatune vs. The Headmaster Nairobi Technical High School & The Attorney General Civil Appeal No. 79 of 1982 [1988] KLR 561**. It follows therefore that such correspondences are admissible for the limited purposes of showing that there were negotiations but not that a settlement was thereafter reached. Accordingly, I find no merit on the preliminary objection since the documents were referred to by the plaintiff, as he was entitled to, to show the reason for not taking a step in the proceeding.

I now wish to deal with the dismissal on the ground of want of prosecution. It is the duty of the plaintiff to take the necessary steps to ensure that the matter is fixed for hearing. The defendant's primary aim is to have the suit dismissed and therefore the defendant cannot be faulted for choosing the route of terminating the suit rather than sustaining it. In the case of *Pirbhai Lalji & Sons Ltd vs. Hassanali Devji Kampala HCCC No. 269 of 1962 [1969] EA 439* Russell, J emphasised that although the defendant had the right to set down the suit for trial it was not incumbent on him to do so as it might only have involved him in further and unnecessary costs. He was entitled to sit back and in due course make an application for dismissal of the suit for want of prosecution. Again in the case of *Sheikh vs. Gupta and Others Nairobi HCCC No. 916 of 1960 [1969] EA 140* Trevelyan, J citing other decisions on the subject stated as follows:

**“The purpose of rule 6 of Order 16 is to provide the court with administrative machinery whereby to disencumber itself of case records in which parties appear to have lost interest...In this matter the claim is now eight years, less four months, old and the plaintiff, so far as the court is concerned, has done nothing for more than three years to say the least. There is a prima facie negligence on the part of the lawyers or inexcusable delay on the part of the plaintiff or both, on his own say so. In deciding whether or not to dismiss a suit under rule 6 a court will be slow to make an order if it is satisfied that the hearing of the suit can proceed without further delay, that the defendant will suffer no hardship, and that there has been no flagrant and culpable inactivity on the part of the plaintiff...In the instant case there has been both culpable and flagrant inactivity on the part of the plaintiff in respect of his smallish claim and he cannot bring himself within the set of circumstances as stated...There is no reason why the defendant should not sit back and await remedies and rights coming to him by operation of law. It is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition. It is of the greatest importance in the interest of justice that these actions should be brought to trial with reasonable expedition. The plaintiff should not derive any advantage from the fact that the defendant did not apply earlier.** (Underlining mine)

In the case of **Et Monks & Company Ltd vs. Evans [1985] KLR 584** Kneller, J stated as follows:

**“The defendant(s) to an action may apply to set down a suit for hearing or apply for its dismissal if the plaintiff(s) do not set it down for hearing within three months after the close of the pleadings or removal of the suit from the hearing list or the adjournment of the suit generally. This is under Order 16 rule 5. The English RSC, Order 25, rule 1(14) is nearly the same but the defendant there may move if the plaintiff does not take out a summons for directions. This really provides that the defendant(s) cannot apply for dismissal of the suit until three months have passed from the close of the pleadings or (each time) it is removed from the hearing list or adjourned generally. The alternative is for the defendant(s) to have it set down for hearing (or do nothing). It does not imply that if the plaintiff does nothing about having it set down for hearing within 3 months or any time it will be dismissed for want of prosecution. It depends on many factors...It is the duty of the plaintiff's adviser to get on with the case and no advantage may be derived from the defendant's inaction. Unless he has waived or acquiesced in it...The court when pondering over an application to dismiss a suit for want of prosecution should among other things ask whether the delay was lengthy, has it made a fair trial impossible and was it inexcusable? Whether or not the application should be allowed is a matter for the discretion of the judge who must exercise it, of course, judicially. Each turns on its own facts and circumstances...If an action is dismissed for want of prosecution the plaintiff has certain options if it is not his fault. It may sue its advocate for negligence unless it has caused or consented to the delay which has resulted in the action being dismissed for want of prosecution. Advocates for the most part insure against the risk of liability**

for professional negligence. The plaintiff then has a remedy not against the defendants but against its own advocates. Should the trial proceed despite a prolonged delay the plaintiffs may not succeed because it cannot after such a long time establish liability and then it has no remedy against anyone else. If the plaintiff has caused or consented to the delay which led to its suit being dismissed for want of prosecution then it must blame itself...The court may consider the matter of limitation and whether or not the plaintiff might probably succeed in the action for negligence against its lawyers and might prefer to be slow in deciding to dismiss for want of prosecution, but looking at the matter as a whole may order the application be dismissed and award the defendants the costs of the suit and of the application...It is the duty of a plaintiff to bring his suit to early trial, and he cannot absolve himself of this duty by saying that the defendant consented to the position. A plaintiff who, for whatever reason, delays for over six years before bringing his suit for trial can expect little sympathy...If the court is satisfied that there will be prejudice to the defendant as a result of a delay of ten years if the case proceeds and it would be impossible to have a fair trial the suit dismissed for want of prosecution since the principle witness for the defence was dead and 3 others had left Kenya and their whereabouts were unknown”.

I accordingly disabuse the plaintiff from the notion that it can hide under the failure by the defendants to prod her after the failure of negotiations to get on with the suit. Both counsel and parties are under an obligation to both themselves and to the Court to get on with the suit as soon as possible. However, in the case of Agip (Kenya) Limited Vs. Highlands Tyres Ltd [2001] KLR 630 Visram, J (as he then was) stated thus:

“It is not correct that Order 16 rule 5(d) of the Civil Procedure Rules gives the Court no discretion but to dismiss the suit otherwise it would mean that every application by a defendant under the said provision would succeed automatically. The law and the practice of the Courts does not lend any support to such an argument. It is the function of the Courts to determine whether the interests of justice would be achieved in allowing or refusing an application. In another aspect, it is clear that the process of our judicial system requires that all parties before the Court should be given an opportunity to present their cases before a decision is given. It is not possible that the Rules Committee intended to leave the plaintiff without remedy and take away the authority to the Court when it made Order 16 rule 5. Otherwise such a rule would by itself be void if its effect were to deny the Court an opportunity to hear and determine a case on merit as that would amount to interfering with the Court’s inherent powers to do justice...A consideration of the principles to be applied in deciding whether or not a suit ought to be dismissed for want of prosecution, shows that an application by a defendant under Order 16 rule 5 of the Rules is not automatic and certain factors have to be considered such as (i) the delay whether inordinate (ii) whether the inordinate delay is excusable and (iii) whether the defendant is likely to be prejudiced by the delay...Delay is a matter of fact to be decided on the circumstances of each case. Where a reason for the delay is offered, the Court should be lenient and allow the plaintiff an opportunity to have his case determined on merit. Finally, the Court must consider whether the defendant has been prejudiced by the delay. To achieve justice, the Court must also consider the possible loss likely to be sustained by the plaintiff if his case is terminated summarily for a procedural default. Where a plaintiff has *prima facie* case, to determine his rights by the summary procedure under Order 16 rule 5 would result in great hardship to a plaintiff who has a reasonable excuse for his delay...The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant; so both parties to the suit must be considered and the position of the judge too. The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus even if the delay is prolonged if the Court is satisfied with the plaintiff’s excuse for the delay and that justice can still be done to the parties notwithstanding he delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time. Where the defendant satisfies the Court that there has been prolonged delay and the plaintiff does not give sufficient reason for the delay the Court will presume that the delay is not only prolonged but it is also inexcusable and in such case the suit may

be dismissed...Going by the practise of our Courts a delay of 8 months is not inordinate in the circumstances of this case where the plaintiff has offered a credible explanation for the delay and should be given an opportunity to pursue his claim. The conduct of the plaintiff in this case has also been considered. It has not been indolent and it would be unfair to punish it for an excusable delay. It has been vigilant in pursuing this claim up to this point as evidenced by its spirited effort to defend this application...The amount claimed is also relevant and is very important in determining the matter of prejudice. The plaintiff's claim is for a substantial sum of money which is said to stand at about Kshs 50,000,000/= presently. This is not a simple claim that can be dealt with lightly. This Court could not be up to its duty if it were to drive the plaintiff out of the seat of justice because of an eight month delay. The Court has been reminded time and again to participate in sustaining suits rather than throwing them out on minor procedural defaults...In effect there is no evidence to show that prejudice will be sustained by the defendant if its application is denied. Even if the said advocate's affidavit were to be considered, the prejudice in this case is not such that it cannot be compensated by an award of costs".

Again in the case of James K Horeria T/A Horeria & Company vs. Corporate Insurance Co. Ltd Nairobi (Milimani) HCCS No. 1053 of 2002 Kimaru, J stated:

"The test in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and the defendant; so both parties to the suit must be considered and the position of the judge too. The defendant must however satisfy the Court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the Court will exercise its discretion in his favour and dismiss the action for want of prosecution...In the present application, it is evident that the plaintiff made several attempts to fix this suit for hearing but for one reason or the other there were no sufficient judges in the station to hear his case and the hearing of the case was frustrated. Discovery has been concluded and the plaintiff has filed his list of documents. It is the view of the court that the plaintiff has always been ready to prosecute his case but for the fact that he has been frustrated by events beyond his control and cannot be at fault".

Accordingly I agree with **Khamoni, J** in the case of Lenny Kivuti vs. Provincial Insurance Co. of EA Limited Nairobi HCCC No. 3919 Of 1994 that a defendant who has contributed to the delay should not be allowed to drive benefit from it if the delay is not prolonged.

In this case the last step in the matter before the applications the subject of this ruling took place on 10<sup>th</sup> May 2011 when a ruling was delivered dismissing an application seeking to vacate the injunctive orders herein. I am not prepared to cast blame upon the plaintiff for the delay that took place before that date. These applications were filed in February 2012 less than one year thereafter. In the premises it is my view and I hold that these applications were prematurely filed. Even if that were not the position I would have been reluctant to dismiss the suit taking into account the fact that parties herein were attempting out of court settlement which *Article 159(2)(c)* of the *Constitution* requires the courts to promote.

I then proceed to decide the tricky issue of failure to serve summons to enter appearance. I have perused the Court file and it is clear that there are summons signed by the Deputy Registrar of the Court on 29<sup>th</sup> May 2009. It is therefore not correct that **summons were never** issued. Whereas the 1<sup>st</sup> defendant has averred that it was served on 22<sup>nd</sup> May 2009, the 2<sup>nd</sup> defendant is silent on when he was served. If the service was effected prior to 29<sup>th</sup> May 2009, there is no way the summons could have been served together with the plaint and the application since the summons were not signed till that date. The plaintiff has, however, not contested the fact that the summons were in actual fact not served and no evidence has been adduced that they have ever been served. What are the consequences of failure to serve summons? In *Tifas Wangubo Mabina vs. Lukhoba Biketi* [2006] eKLR Ombija, J was of the view that the failure to take out and serve summons in an Originating Summons was fatal to the suit. With due respect, the learned Judge's attention was not drawn to the case of *Harit Sheth T/A Harit Sheth Advocate vs. K H Osmond T/A K H Osmond Advocate Civil Appeal No. 276 of 2001* [2011] eKLR where the Court of Appeal stated as follows:

**"Order 5 rule 1(2) has no application to proceedings brought by Originating Summons. Order 37 of the Civil Procedure Rules sets out the procedure for bringing suit by Originating Summons. The Rules Committee has in form 26 provided standard forms to guide litigants on how to draw an originating summons and such summons is generally drawn as a chamber summons. Although it is a suit by definition, no separate summons to enter appearance is needed. The originating summons originates the suit and is at the same time a summons to enter appearance. True, the appellant did not, in the originating summons invite the respondent to enter appearance in terms of the standard**

form but that, is not a fundamental omission, the respondent having responded to the originating summons by timeously filing grounds of opposition to it. Besides, under order 52 rule 10, no appearance needed to be entered by the defendant on service upon him of the originating summons filed under Order 52 rule 7”.

In Alfred Makhongo & 3 Others vs. Prof. Bishop Zablon Nthamburi HCCC No. 133 of 2005 Waweru, J following in the footsteps of Mobile Kitale Station vs. Mobil Kenya Limited & Another [2004] 1 KLR 1 held that issuance and service of summons to enter appearance go to the jurisdiction of the court and failure to comply therewith cannot be cured by **section 1A** and **1B** of the *Civil Procedure Act*. It must be noted that in that case the court was dealing with both the failure to issue and serve summons to enter appearance. In this case, we are only dealing with the failure to serve already issued summons. As rightly pointed out by **Waweru, J** the courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to **section 1A(2)** “*the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective*” while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. Since the enactment of the said provisions the Court of Appeal has made pronouncements on the same. In Stephen Boro Gituha vs. Family Finance Building Society & 3 Others Civil Application No. Nai. 263 of 2009, Nyamu, JA on 20/11/09 held *inter alia* that:

**“the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. If the often talked of backlog of cases is littered with similar matters, the challenge to the courts is to use the new “broom” of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible”.**

The same Judge in Kenya Commercial Bank Limited Vs. Kenya Planters Co-Operative Union Civil Application No. Nai. 85 of 2010 held that:

**“where there is a conflict between the statute (overriding objective principle) and a subsidiary legislation (rules of the court) the statute must prevail. Although the rules have their value and shall continue to apply subject to being O2 complaint, the O2 principle is not there to fulfil them but to supplant them where they prove to be a hindrance to the O2 principle or attainment of justice and fairness in the circumstances of each case”.**

In Kenya Commercial Finance Company Limited vs. Richard Akwesera Onditi Civil Application No. Nai. 329 of 2009 the Court of Appeal expressed itself as follows:

**“the applicant’s submissions that the omission to include primary documents rendered the appeal incurably defective would have had no answer to them if they were made before the enactment of section 3A and 3B of the Appellate Jurisdiction Act..The advantage of the CPR over the previous rules is that the court’s powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.In applying the principle or concept of overriding objective, each case must be viewed on its own peculiar facts and circumstances and it would be a grave mistake for anyone to fail to comply with well settled procedures and when asked why, to simply wave before the court the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. The Court still retains an unqualified discretion to strike out a record of appeal or a notice of appeal; the only difference now is that the Court has wider powers and will not automatically strike out proceedings. The Court, before striking out, will look at available alternatives”**

It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not mean that all precedents are ignored but must be interpreted in a manner that gives effect to the said objective.

Whereas it is true that where a plaint is filed without summons to enter appearance and hence the summons are not issued, the defect would be fatal to a suit since there is no jurisdiction to sign and issue original summons after 12 months from the date of filing of the suit, as rightly pointed out by **Waweru, J** the period for service of summons may be extended by the court where the same are issued and not served. In other words there is an alternative remedy available in event of default. Whereas **Order 5 rule 2(7)** provides that where no application has been made under **subrule (2)** (to extend the validity of the summons) the court may without notice dismiss the suit at the expiry of twenty-four months from the issue of the original summons, that provision is discretionary and must be applied in light of the circumstances of a particular case as well as the overriding objective. Even if we were to apply, by virtue of the provisions of **Order 54** of the said Rule, the provisions of **Order 5 rule 1(6)** which provides that every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate, there is no evidence that such notification was given.

Therefore taking into account the unique circumstances of this case, I am not inclined to adopt the more drastic approach of terminating these proceedings for failure by the plaintiff to comply with the dictates of the rules of procedure. I have also perused the Court file and I have not been able to find how the first advocates for the defendants brought themselves on record. Whereas the defendants had no obligation to enter appearance without being summoned to do so, the practice that is common in this jurisdiction is for one to enter appearance under protest. However, at the very minimum one would have expected that the advocates instructed by the defendants to appear on their behalf would have filed notices of appointment of advocates in absence of which they may as well have had no locus in the matter. The closest document to that is a notice of change of advocates filed by the firm of **Sichanji & Company** Advocates on 6<sup>th</sup> February 2012.

Taking into account the foregoing circumstances, it is my considered view that this is a case which in my view should be saved under the provisions of *Article 159(2)(d)* of the Constitution. This, however, is not to say that the Courts would readily ignore the rules of procedure where the same are ignored with impunity whether by advocates or parties. The overriding objective is not a panacea for all ills and in appropriate cases the court will still strike out pleadings. In fact one of the aims of the overriding objectives is to expeditiously dispose of frivolous suits or suits which are brought for purposes of achieving collateral objectives. With due respect to the plaintiff the overriding objective was not meant to override all existing precedents and is not meant to be a panacea for all ills. The only difference is that in exercising its jurisdiction to strike out a process the court will also take into account the overriding objective.

Having said that it is clear from the provisions of **Order 40 rule 6** of the *Civil Procedure Rules* that the lifespan of an injunction is 12 months from the date the same is granted and no express order is required to vacate such orders. The only order required is to extend the lifespan of an injunction beyond the said period. However, in the circumstances of this case and the matter having been brought to the attention of the court, it would be an abdication of duty on the part of the Court if it were to avoid dealing with the same. Consequently I make the following orders:

- (1) That the applications dated 7<sup>th</sup> February 2012 and 1<sup>st</sup> February 2012 are hereby dismissed with costs to the defendants.**
- (2) That the validity of the summons to enter appearance issued herein are extended for a further period of one month.**
- (3) That the plaintiff shall extract the said summons as amended and serve the same within the next 14 days.**
- (4) That the lifespan of the injunction granted herein is extended for another period of 6 months from the date hereof.**
- (5) That the plaintiff shall ensure that all the pre-trial procedures are completed and a date for**

hearing is secured within 30 days of the close of pleadings.

**(6) In default of compliance with (3) above this suit shall stand dismissed and the injunctive orders granted herein including the said caveat shall stand vacated with costs to the defendants.**

**Ruling read, signed and delivered in Court this 25<sup>th</sup> day of May 2012.**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

Mr. Adere for Plaintiff

Mr. Anam for Mr. Liko for 1<sup>st</sup> Defendant

Mr. Mungla for 2<sup>nd</sup> Defendant