



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MISC. APPLICATION CASE NO. 70 OF 2007**

**CITY COUNCIL OF**

**NAIROBI.....PLAINTIFF**

**VERSUS**

**NAIROBI HOLDINGS**

**LIMITED.....DEFENDANT**

**RULING**

This Ruling is delivered in the Chamber Summons dated 9<sup>th</sup> August, 2010 in which the Plaintiff/Applicant seeks orders for the extension of the validity of Summons issued on 20<sup>th</sup> February, 2007 for a period of 12 months. The application is stated to have been brought under **Order V Rules 2, 5 and 32** of the **Civil Procedure Rules**.

The applicant states in its grounds in support of the application that, although the Summons were issued and served subsequent upon the filing of the plaint on 9<sup>th</sup> February, 2007, the suit was nonetheless not prosecuted, leading to the issuance, by the court, of a Notice to Show Cause why the same should not be dismissed in accordance with **Order XV1 Rule 2(1)** of the **Civil Procedure Rules**. That was on 26<sup>th</sup> February, 2010.

At the hearing of the Notice to Show Cause, counsel for the applicant attended before the Honourable Lady Justice Koome, having filed a Notice of Change of Advocates and an affidavit sworn by one Abwao Erick Odhimabo, the acting Assistant Director – Legal Affairs of the plaintiff.

The explanation given to the court for inaction, is indolence on the part of a past counsel said to have been on record for the applicant. It is deponed in the supporting affidavit that the deponent had once applied for judgment in default of appearance but the same was denied, on the grounds that the deponent was not on record and could not validly request for any orders of the court. The documents on record show that the deponent's request for judgment was made by the deponent while he was an employee of the Plaintiff/Applicant. This is despite the fact that the advocate on record for the Plaintiff/Applicant was M. N. Ngethe Advocate.

After the refusal of the default judgment the deponent purported to effect a Change of Advocates by filing a Notice of Change of Advocates on 6<sup>th</sup> September, 2007. The same appears not to have been served on M/S M. N. Ngethe Advocates, given the fact that, on the face, it is expressed to have been for service upon the defendant personally. After the purported change, the deponent continued to enquire on the fate of the default judgment, the last enquiry being one of 12<sup>th</sup> June, 2007.

The matter was thereafter forgotten until the plaintiffs were woken up from their slumber by the

service of the Notice to Show Cause why the suit should not be dismissed for want of prosecution.

I am not satisfied of the merits of this application for the following reasons.

1. **The Notice of Change of Advocates dated 17<sup>th</sup> July, 2007 and filed on 6<sup>th</sup> September, 2007, having not been served on M. N. Ngethe Advocate (previously on record) then the same was of no effect.**
2. **In view of the above, the firm of M. N. Ngethe was not replaced and Abwao Erick Odhiambo cannot be deemed to have been on record when the present Advocates, Masire & Mugusu Advocates filed their Notice of Change of Advocates on 28<sup>th</sup> April, 2010 purporting to come on record in place of Abwao Erick Odhiambo.**
3. **Even if the said Abwao Erick Odhiambo can be presumed to have validly come on record, the reason for non prosecution of the suit since 12<sup>th</sup> June, 2007 until a Notice to Show Cause was served is not explained.**
4. **The Notice of Change of Advocates served on Abwao Erick Odhiambo by Masire Mugusu Advocates is of no effect since M. N. Ngethe Advocate has not been validly replaced.**
5. **There has been great indolence in the matter in respect of which the innocence of the applicant cannot be presumed, given that the blame for such indolence falls squarely on the shoulders of the said Abwao Erick Odhiambo , who has been seized of this matter throughout both as an advocate and as the responsible officer at the plaintiff's offices.**

In the premises, I find no merit in the application before court and the same is hereby dismissed.

**DELIVERED and SIGNED at NAIROBI this 5<sup>th</sup> day of NOVEMBER, 2010**

**M. G. MUGO  
JUDGE**

In the presence of :

Mrs. Gulenywa holding brief for Mr.Abuga

For the Applicant

No Appearance

For the Respondent