



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 1307 OF 2013**

**FORMERLY CIVIL CASE NO. 122 OF 2013**

**PATRICK KARIGE MUNGE.....PLAINTIFF**

**VERSUS**

**FRANCIS GATIBA NG'ANG'A.....DEFENDANT**

**RULING**

Coming up for determination is an application dated **23<sup>rd</sup> May 2013** filed by the Defendant brought under **Order 17(1) (2) & (3) of the Civil Procedure Rules**. The Defendant seeks an order that the suit be dismissed for want of prosecution. The application is on the basis that the Plaintiff has not taken any steps in fixing the matter for hearing since the interlocutory application was determined by **Mwera J. (now JA.)** on **26<sup>th</sup> September 2011**. Therefore, it is in the interest of justice that the suit be dismissed with costs.

The application is opposed by the Plaintiff who filed a Replying Affidavit on **21<sup>st</sup> June 2013** wherein he deposes that the application is incurably defective and bad in law and thus should be struck out since the Defendant has not filed a memorandum of appearance and defence in the matter neither has he complied with **Order 11 of the Civil Procedure Rules**.

The application was canvassed by way of written submissions. The Defendant submitted that the Plaintiff failed to serve him with summons to enter appearance or fixed the matter for hearing years after the interlocutory application was determined. Therefore, there is a delay that is inordinate and inexcusable and the failure to serve the summons is proof enough that the Plaintiff did not have the intention of pursuing the suit to its logical conclusion. The Defendant also submitted that the Plaintiff had not advanced a good reason for the delay in prosecuting the matter. The Plaintiff on his part submitted that the delay has been occasioned by the Defendant who has failed to put in a defence, thus prejudicial to him as he has been unable to finalize his case. The Plaintiff urged the court to disallow the application.

On perusal of the Court record, it is evident that the Plaintiff did not take out summons to enter appearance for service upon the Defendant. The Plaintiff in his response to the application has also not refuted the Defendant's claim that in deed summons was not taken out. Other than not being served with summons, the Plaintiff has also not taken any steps to have the matter heard since the ruling of the Court of **26<sup>th</sup> September 2011**, a period of 2 ½ years to the date of filing the application. The Plaintiff in response states that the Defendant has not filed a defence nor complied with **Order 11 of the Civil Procedure Rules** which has contributed to the delay in the prosecution of the suit.

I have carefully perused the rules of procedure and taken note that **Order 11** takes effect after the close of pleadings since only then can the Court issue pre-trial directions. It follows therefore that before a party can be faulted for not complying with **Order 11**, there must be closure of pleadings. This now leads to us to **Order 5** which provides for issue and service of summons. **Order 5 Rule 1(1)** states that, “*when a suit has been filed a summons shall issue to the Defendant ordering him to appear within the specified time therein*”. According to **Orders 6(1) and 7(1)**, it is only when the Defendant has been served with summons to appear that he shall file his appearance within the time prescribed in the summons and files a defence within 14 days of the date of entering appearance. Sequentially, therefore, the Plaintiff has the responsibility under **Order 5 Rule 1(5)** to prepare the summons and **Rule 1(3)** together with the Plaintiff serve upon the Defendant who on receipt of service enter appearance and file a defence.

Courts have explained that the purpose of the summons is to notify the Defendant of the existence of a suit. Onyancha J. in the case of **Karandeep Singh Dhillon & Another vs- Nteppes Enterprises Ltd & another (2010) eKLR** made an observation as follows:

*“A plaint filed in court on its own, carries no power to summon a Defendant to court. The Plaintiff will lie there impotently. It will alone have no power to bring the parties before the court for its adjudication”.*

See also Mutungi J. **Grace Wairimu Mungai v Catherine Njambi Muya Nairobi ELC Civil Suit No. 584 of 2011 [2014] eKLR**

*“My understanding of orders 5 Rules 1 and 2 and order 6 Rule 1 and order 7 Rule 1 is that until the Defendant is served with the summons to enter appearance there is no basis for him to answer to the suit. In the present suit the plaintiff served the suit documents excluding the summons to enter appearance and the Defendant’s Advocates filed a notice of appointment ostensibly to defend the application for injunction that had been served and required to be responded to”.*

There is no explanation as to why the Plaintiff did not take out summons to enter appearance, or has failed to take steps to prosecute the matter. The delay is inordinate and the Plaintiff does not deserve the discretion of this Court. The upshot is that the Defendant’s application is allowed. I make no order as to costs.

Dated, Signed and Delivered this 17<sup>th</sup> day of **July, 2015**

**L. GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff

None attendance for the Defendant

Hilda: Court Clerk

**L. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the absence of the parties. Date was taken in open Court in the presence of M/s Ngania holding brief for Mr Odongo for Plaintiff/Applicant and in the absence of the Defendant’s Advocate.

**L. GACHERU**

**JUDGE**