



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 204 OF 2012

AERA COMPANY LIMITED:..... PLAINTIFF

- VERSUS -

KENYA LOCAL GOVERNMENT OFFICER'S

SUPER ANNUATION FUND 1ST DEFENDANT

CRYSTAL VALUERS 2ND DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** application dated **16th July 2013**. It seeks the following orders:-
 - a. ***That this suit be struck out with costs.***
 - b. ***That the Plaintiff pay costs of this application.***
2. The application is supported by affidavit of **HOSEA KILI** filed in court on **18th July 2013** and on the grounds set out in the application.
3. The application is not opposed. Although it appears to have been served upon the Respondent's advocates on **30th July 2013** the Respondents have not filed any reply to the application. A Hearing Notice to the application was served on **19th November 2013**. There is an affidavit of service filed in court on **18th November 2013**.
4. So, on **22nd January 2014** I allowed M/s Mbaabu to proceed with the application *ex-parte* on the basis that she had served a Hearing Notice on the Respondent's firm of advocates.
5. I have carefully considered the application. The Plaintiff filed the suit herein in April 2012 together with an application for injunction dated **3rd April 2012** which was heard and by a Ruling dated **28th June 2012** the Plaintiff was granted an injunction restraining the Defendants from attaching its goods pending hearing and determination of the suit. The Plaintiff has refused and or neglected to have summons issued and served on the Applicant to enable them enter appearance and file defence. It is more than one year since the suit was filed and the Respondent wants to continue enjoying the orders and appears to have no interest in the suit.
6. Under Order 5 Rule 2, summons have a lifespan of 12 months. They may be extended by court as may be necessary. However, under Order 5 Rule 7, where no application has been under sub rule (2) for extension a court may without notice dismiss the suit at the expiry of twenty-four months from the issue of original summons. The suit herein was filed on **3rd April 2012** together with the

- application for injunction. Twenty-four months have not elapsed, but this is an application by the Defendant and not where a court acts *suo moto* which requires twenty four months to have lapsed.
7. It appears to me that the Plaintiff is not just negligent in this matter. The Plaintiff is also acting in a calculated manner to avoid having the matter determined yet it is enjoying an order of this court. This is an abuse of the court process.
 8. The Plaintiff cannot plead ignorance. By their letter dated 30th July 2012 the Defendant's advocates wrote to the Plaintiff's advocates asking the latter to serve the former with summons to enable them enter appearance. This letter was received in the Plaintiff's advocate offices on 31st July 2012 but there was no response.
 9. Again, the Defendant served this application, and two hearing Notices on the Plaintiff's advocates but there was no response.
 10. Since the Plaintiff has refused to respond to this application, and has also refused to take out the summons, this alone amounts to an abuse of the court process and under Order 2 Rule 15 this court can strike out the Plaintiff.
 11. I am satisfied that this application is merited, and under the powers conferred by Sections 1A, 1B, 3A of Civil Procedure Act, Order 2 Rule 15 and Order 5 Rule 7 of the Civil Procedure Rules, I herewith strike out the suit with costs of this application to the Defendant.

DATED, READ AND DELIVERED AT NAIROBI

THIS 11TH DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiffs

Sirima holding brief for M/s Mbaabu for Defendants

Teresia – Court Clerk