



Nyali View Limited v National Bank of Kenya Limited (Civil Case 07 of 2020) [2022] KEHC 16605 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16605 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 07 OF 2020
OA SEWE, J
DECEMBER 20, 2022**

BETWEEN

NYALI VIEW LIMITED PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. Before the court for determination is the notice of motion dated March 2, 2022. It was brought by the defendant under section 1A, 1B, 3A and 27 of the [Civil Procedure Act](#) and all enabling provisions of the law for orders that:
 - (a) The interlocutory judgment entered herein on April 22, 2021 be set aside;
 - (b) The costs of the suit be awarded to the defendant;
 - (c) The costs of the application be borne by the plaintiff.
2. The application was premised on the ground that by the time the court entered interlocutory judgment in this suit, the defendant had already filed a defence dated October 6, 2020; and therefore the interlocutory judgment was irregularly entered. It was further the contention of the defendant that the Notice of Withdrawal dated April 29, 2021 ought to have been served on it to enable it address the Court on costs. Thus, the defendant complained that it only came to learn of the interlocutory judgment and Notice of Withdrawal upon perusal of the file sometime in the month of June 2021.
3. In support of the application, the defendant relied on the affidavit of its Director, Legal Services/ Company Secretary, Mr Samuel Mundia, sworn on March 2, 2021. It was deposed by Mr Mundia that a Notice of Appointment was filed herein dated February 12, 2020 by the firm of Mohammed Muigai LLP; and that before it could respond to the plaintiff's Notice of Motion for injunction, the court operations were scaled down due to the outbreak of the global Covid-19 pandemic. The defendant



was to later file its response and pleadings via email in compliance with the Practice Directions issued by the Chief Justice on March 15, 2020.

4. At paragraphs 12, 13 and 14 of the supporting affidavit, Mr Mundia averred that, in the meantime, the parties were engaged in out of court negotiations and maintained communication in that regard via email; and that, as far as the defendant was aware, no precipitate action was taken by the plaintiff towards prosecuting the suit in the light of the ongoing negotiations. He added that, ultimately, the parties found an amicable solution, save for the issue of costs. It was therefore the averment of Mr Mundia that the defendant was surprised to learn in June 2021 that the plaintiff had obtained interlocutory judgment on April 22, 2021 and thereafter had the matter withdrawn on May 13, 2021 without any reference to counsel for the defendant.
5. It was under those circumstances that the defendant prayed that the interlocutory judgment to be set aside; and that the defendant be allowed to pursue its costs. To buttress his averments, Mr Mundia annexed several documents to his Supporting Affidavit, including a copy of the Defence dated October 6, 2020 and copies of the various emails exchanged between the parties.
6. In response to the application, the plaintiff filed a Replying Affidavit, sworn on its behalf by one of its directors, Mr Mohamed Khalif Godana. The affidavit was filed herein on March 28, 2022 to demonstrate that, in filing the Notice of Withdrawal dated May 17, 2021, the plaintiff acted in good faith and in the spirit of their out of court settlement. While conceding that the prosecution of this suit was hampered by the containment measures put in place to combat the Covid-19 pandemic, Mr Godana denied that the plaintiff was ever served with a Replying Affidavit or Defence as alleged by the defendant. He added that the Court could not have entered interlocutory judgment as it did if the defendant's alleged Defence and Replying Affidavit were filed and placed on the court file. Thus, at paragraph 9 of the Replying Affidavit, Mr Godana averred that, given the circumstances, it would be unfair to condemn the plaintiff to pay costs.
7. In its written submissions filed on July 15, 2022, Mr Mogere, counsel for the defendant faulted the Deputy Registrar of this Court for having entered an interlocutory judgment in favour of the plaintiff when there was already a Defence on the record. It was therefore his submission that the default judgment was irregular and ought to be set aside. He relied on *Magonjwa v Attorney General* [2000] eKLR, Civil Appeal No 75 of 1998: *Central Bank of Kenya v Uhuru Highway Development Ltd & others* (UR) and *Africa Telecom Solutions Limited v Kiwaka General Merchants Limited & another* [2016] eKLR, to support the argument that a defendant is at liberty to appear and file a Defence if there is no interlocutory or final judgment on record without seeking leave of the Court; and that a defence filed out of time is acceptable and valid if filed before judgment. Accordingly, Mr Mogere urged the Court to find that the interlocutory judgment dated April 24, 2021 was irregularly entered.
8. On costs, it was the submission of Mr Mogere that, while the withdrawal of a suit is unfettered, it requires permission of the Court; and the withdrawal may be subject to terms that the Court considers just, including payment of costs or filing of any other suit. He therefore was of the view that it was imperative that the Notice of Withdrawal be served on the defendant to afford the defendant an opportunity to be heard before the final orders could be granted. On the authority of *Pacis Insurance Company Ltd v Francis Njeru Njoka* [2018] eKLR, among others, Mr Mogere reiterated the stance that the defendant had instructed a firm of Advocates to act for it herein, and that pursuant to those instructions pleadings had been filed in the suit by the time it was withdrawn. It was on that account that Mr. Mogere contended that the defendant is entitled to costs.
9. On his part, Mr Omwenga for the plaintiff relied on section 27 of the *Civil Procedure Act* and *Party of Independent Candidates of Kenya & Another v Mutula Kilonzo & 2 others* [2013] eKLR for the



proposition that, although it is in the discretion of the Court to award costs to the successful party, the exercise of such discretion must be premised on a sound basis. He posited that, since this suit was compromised, the defendant cannot claim success for purposes of section 27 of the Civil Procedure Act. According to Mr Omwenga, the defendant did not take part in the suit before it was withdrawn; and is therefore not entitled to costs.

10. Further to the foregoing, Mr Omwenga urged the Court to bear in mind that the object of an award in costs is not to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending the suit. He made reference, in this regard, to Judicial Review No 6 of 2004: *Republic v Rosemary Wairimu Munene (Ex parte Applicant) v Ihururu Dairy Farmers Co-operative Society Ltd* as applied in *Cecilia Karuru Ngayu v Barclays Bank of Kenya Ltd & another* [2016] eKLR and *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, and pointed out that, in this instance, the successful termination of the dispute is attributable to both parties.
11. A perusal of the court record confirms that this suit was filed by the plaintiff on the February 5, 2020 along with a Notice of Motion of even date by which the plaintiff sought temporary injunction pending the hearing of the application and the suit. The Court (Hon Chepkwony, J) granted interim injunction on February 6, 2020 pending the inter partes hearing of the application. The matter was consequently fixed for inter partes hearing on February 13, 2020. Although directions were thereafter given by consent for the filing of responses along with written submissions in readiness for hearing of the application on May 5, 2020, that was not to be. The applicant has explained, and indeed it is a matter of common notoriety that, soon thereafter, there was the outbreak of the Covid-19 pandemic and the resultant scale-down of court operations.
12. Thus, although the defendant now contends that it filed and served its Replying Affidavit and Defence via email in line with the prevailing Practice Directions, no such documents are on the file. Therefore, when a Request for Judgment dated April 19, 2021 was made by counsel for the plaintiff, the Deputy Registrar had not reason to decline that request. This explains why, on April 22, 2021, interlocutory judgment was recorded herein in favour of the plaintiff. Thereafter, on May 4, 2021, the plaintiff filed a Notice of Withdrawal of Suit pursuant to order 25 rule 1 of the Civil Procedure Rules. The suit was accordingly marked as wholly withdrawn on May 13, 2021.
13. In the light of the foregoing, the two issues arising for determination in respect of the instant application are: -
 - (a) Whether sufficient cause has been shown to warrant the setting aside of the interlocutory judgment entered herein on April 22, 2021; and,
 - (b) Whether the defendant/applicant is entitled to costs of the suit, including costs of the application.

(a) On Whether The Interlocutory Judgment Entered On April 22, 2021 Ought To Be Set Aside:

14. As indicated hereinabove, on the basis of the documents on the file, the interlocutory judgment was regularly entered. This is because there is on record an Affidavit of Service sworn by Alex P Nzuki confirming that the Notice of Motion dated February 5, 2020 along with a plaint and Summons to Enter Appearance, the plaintiff's list and statements of witnesses, as well as the plaintiff's list and bundle of documents were duly served on the defendant on February 8, 2020. Indeed, although the Notice of Appointment by M/s Mohammed Muigai LLP was filed on February 12, 2020 no Defence was thereafter filed in the matter. More importantly, there is no Defence on the file thus far. Hence, on the basis of the documents on the file the Deputy Registrar cannot be faulted for accepting the Request for Judgment.



15. The defendant now contends that it did file its response and Defence via email. A copy thereof was annexed to the Supporting Affidavit as Annexure SM 4. The defendant also exhibited a copy of the relevant emails to buttress that assertion (see Annexures SM 5 and SM 7). In addition, the defendant exhibited a receipt (Annexure SM 6), which confirms that the defendant paid the requisite filing fees on October 8, 2020 for a Defence and List and Bundle of Documents. It appears then that the omission, in not printing and placing the documents on the file, was that of the court registry staff. I am therefore satisfied that good cause has been shown as to why the otherwise regular interlocutory judgment ought to be set aside.
16. The foregoing notwithstanding, it is also an indubitable fact that the suit was thereafter withdrawn; and that it was as a result of the said negotiations that the plaintiff took a decision to withdraw the suit vide the Notice of Withdrawal dated April 29, 2021. That notice was filed on May 4, 2021 and the suit herein was thereafter marked as withdrawn on the May 13, 2021. The question to pose then is, what is the effect of the withdrawal on the previous proceedings, including the interlocutory judgment dated April 22, 2020?
17. The withdrawal, discontinuance and costs upon withdrawal of suits are provided for under order 25 of the Civil Procedure Rules. Rule 1 thereof states as hereunder: -

At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

18. Hence, the withdrawal of a suit marks its termination, as there is nothing in order 25 of the Civil Procedure Rules to suggest that such an order can be revoked or recalled. I therefore agree with the position taken by Hon. Mativo, J (as he then was) in Priscilla Nyambura Njue v Geochem Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR, that: -

“...Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. Certain consequences arise from the withdrawal which prevent a party from revoking the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by the courts. In the same vein, the rules do not confer the court with power to reinstate a suit once withdrawn. Order 25 rule 1 provides that the withdrawal shall not be a defence to any subsequent action. Before me is not a subsequent action, but the same suit....

19. Accordingly, the suit herein was having been terminated on the May 13, 2021 the application for setting aside interlocutory judgment is as misconceived as it is untenable; and I so find.



On Whether The Defendant Is Entitled To Costs Of The Suit.

20. The defendant staked a claim to costs herein on the basis that it duly filed a Statement of Defence dated October 6, 2020; but even if that were not the case, it is common ground that a Notice of Appointment of Advocates had been filed in the matter on behalf of the defendant. It was therefore imperative for the Notice of Withdrawal to be served on the defendant. That the parties were engaged in out of court negotiations is all the more reason why the plaintiff ought to have involved the defendant in the withdrawal of the suit, so as to afford the defendant an opportunity of being heard on the aspect of costs.
21. It is the law that costs follow the event. Section 27 of the [Civil Procedure Act](#) is explicit that: -
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
- Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
22. Additionally, order 25 rule 3 of the [Civil Procedure Rules](#) states as hereunder:
- Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.
23. Needless to underscore the fact that the award of costs by a court is discretionary and that in the main, costs are awarded to the successful party. In [Morgan Air Cargo Limited v Everest Enterprises Limited](#) [2014] eKLR, Hon. Gikonyo, J held: -
- “...The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the [Civil Procedure Act](#) is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case...”
24. There is no indication that the defendant was notified of the plaintiff’s intention to withdraw suit. No doubt the defendant had incurred expenses by the time the suit was withdrawn and should have been notified of intention to withdraw and invited to appear before the court for issue of costs to be addressed.
25. In the result, the application dated March 2, 2022 is partially successful on the issue of costs. It is accordingly hereby ordered that:
- (a) Costs of the suit be borne by the plaintiff.
- (b) Each party to bear own costs of the application.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 20TH DAY OF
DECEMBER 2022.**

OLGA SEWE

JUDGE

