REPUBLIC OF KENYA

IN THE HIGH COURG OF KENYA AT MERU

CIVIL CASE NO. 29 OF 2015

JOSEPH KOBIA NGUTHARI.....PLAINTIFF

VERSUS

KIEGOI TEA FACTORY LIMITED AND 2 OTHERS .....DEFENDANT

RULING

1. The court records show that on the 13.5.2019 when the matter was in court for purposes of direction by the judge, Mr. Ngunjiri Advocate for the plaintiff invited the court to mark the matter as settled for having been overtaken by events and requested to be awarded costs. That request, notably, was made by counsel in the absence of his colleague for the defendant. The request was acceded to by the court by an order that the matter is overtaken by event and costs be granted to the plaintiff.

2. That order has aggrieved the defendant who has sought to have the same reviewed and set aside on the basis that it was made without regard of the fact that the plaintiff was withdrawing a suit he had brought against the defendants and in which the defendants had incurred costs. The affidavit in support narrates the developments in the file from the ruling dated 22.9.2015 which he says did not award any costs to the plaintiff but disposed the suit by ordering an election within 60 days from the date of the ruling and that when the matter was fixed for hearing of the main suit, the judge adverted to the matter having been overtaken by events leading to the plaintiff making the request, I have adverted to at the beginning of this ruling. For the reason that the plaintiff was awarded costs upon withdrawing his suit against the defendants, the defendants consider the order to be prejudicial and thus amenable to review and setting aside.

3. The application was resisted by the plaintiff by the Replying Affidavits sworn by the plaintiff himself on the 9.9.2020 whose gist was that costs of an interlocutory application are different from the costs of the main suit and that the court awarded on the 13.5.2020 were costs of the suit and not the interlocutory application. It was added that he instructed counsel to seek the award of the whole suit and not just the application and that costs are at the discretion of the court which ought not be interfered with unless it be shown that the same was exercised in an abusive manner; that the defendant was guilty of inordinate and unreasonable delay in bringing the application to make the current application an abuse of the court process and lastly that there were no grounds put forth to merit the orders sought. The conclusion was made that costs follow the event and to grant the application would be injustice to the applicant who would loss the costs met in pursuing justice after his rights were breached by the defendants.

4. On the 1.10.2020 the court gave direction that the application be canvassed by way of written submissions pursuant to which directions the applicants filed submissions dated 13.10.2020 with the respondents doing so on the 26.10.2020.

5. I have had the advantage of reading the two sets of submissions. From there, I read and hear the applicants to contend and urge that, they as defendants, had filed a defense, a replying affidavits and successfully resisted applications whose order the plaintiff had sought to review and tinker with on the basis that the defendants were hurriedly planning elections in collusion with some candidates but such application never saw the light of day after the court decree the scheduled elections to proceed and suit then became wholly spent.

6. Based on such facts and happenings, the applicant contends that there is an error apparent on the face of the record in that the matter was marked closed without their participation and that even withdrawal would only have been with the participation and concurrence of the defendant. The provisions of order 45 rule 1 and the decisions in **Nyamogo & Nyamogo Vs Kogo (2001) EA 170 AND Cecilia Karuru Ngaya Vs Barclays Bank of Kenya (2016) eKLR** cited on when grant orders of review and who gets costs in the event of withdrawal. The defendant then contended that the orders of 13.5.2020 was tantamount to the court sitting on appeal over own decision.

7. For the respondent the submissions dated 26.10.2020 faulted the application for being fatally defective and that the threshold for orders sought had not been made as grant of costs was duly made. Counsel cited the decision in **Suleiman Murunga Vs Nilestar Holdings Ltd (2015) EKLR** was cited for the proposition that a plain reading of order 45 rule 1 was clear that an application for review ought to have the order sought to be reviewed annexed thereto as a prerequisite and that an application that fails in that regard is fatally defective.

8. On the merit, the respondent took the position that the reasons advanced did not constitute an error apparent on the face of the record and relied on the decision in **Zablon Molwa Vs Solomon M. choti (2016) eKLR** for the proposition that the error apparent on the face of the record must be self-event and which needs no strenuous and elaborate argument to establish. To the plaintiff, the defendants' wrongful

actions against him had been established in the ruling.

9. It was equally submitted that there is no provisions of the law which prohibits the court from awarding costs to a plaintiff who chooses to withdraw his suit against the defendant and the decision in ***Cecilia Karuru Ngayu vs Barclays Bank of Kenya Ltd (supra)*** was cited to support that position. For those reasons the plaintiff/respondent urged that he was entitled to the costs of the suit and that the application lacks merit and should be dismissed with cost.

Analysis

10. Both parties contest an order allegedly made on the 28.2.2019 and awarding costs of the suit to the plaintiff. A perusal of the court file however reveals that no such order was made on that day. The record reveals that on the 28.2.2019 the matter went before the deputy registrar who fixed it before the judge for directions on 13.5.2019. It is on 13.5.2019 that the judge made the following order in the court file-:

> **"Matter overtaken by events. The plaintiff shall have costs of the suit. Matter finalized".**

11. This is the only order I have come across in the court file that awarded costs to the plaintiff and I take it to be the order subject to the application on which parties have filed affidavits and submissions. I will therefore proceed from the premise that it is the order dated 13.05.2019 which is the subject of attack by the application dated 12.2.2020.

12. Now, the application even if expressed in so many words, seeks to review and set aside the orders on the basis that it was done in the absence of the defendants and gave costs to the plaintiff after he withdrew his suit against the defendant. I get the complaint by the applicant to ask the question '*who pays costs for a withdrawn suit'*.

13. While the applicant says that the order was neither just nor lawful, the respondent contends that the same was proper because no law forbids the court from proceeding the way it did.

14. My starting point must be the stipulations in Order 25 rule 1,2 and 3 which say:

> **Order 25, rule 1. - Withdrawal by plaintiff.**
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> **1. 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.**
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> **Order 25, rule 2- Discontinuance.**
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> > **2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.**
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> > **(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just. (3) The provisions of this rule and rule 1 shall apply to counterclaims.**
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> **Order 25, rule 3. Costs.**
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> **3. 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.**

15. I read the rules to say that the plaintiff is free at any time before the matter is set down for hearing and even after the same is set down to withdraw the claim or part thereof and once the request to withdraw is endorsed, the defendant has the liberty to request for costs. I do not see the rules to contemplate a plaintiff withdrawing the suit to get an entitlement to costs.

16. The Supreme Court in **JASBIR SINGH RAI & 3 OTHERS VS TARLOCHAN SINGH RAI & 4 OTHERS (2014) Eklr** interpreted the law in this area in the following words.

> **"It emerges that the award of costs would normally be guided by the principle that costs follow the event: the effect being that the party who calls forth the events by instituting the suit will bear the costs if the suit fails, but if this party shows legitimate occasion by a successful suit, then the defendant or respondent will bear the costs."**

17. The supreme court sets and reiterates the all-time principle that costs follow events but goes on to add that ultimately costs are at the discretion of the court when all material factors are considered including special circumstances of the case while being guided by the ends of justice.

18. The circumstances under which the orders of 13.5.2019 were made are similar to those depicted in the decision of the court of appeal in **Canyon Properties Ltd Vs David Kipchurchir (2018) Eklr**. In that case, the trial court had ordered that each party bears own costs upon

withdrawal of the suit by the plaintiff and gave the reason to have been that the matter was withdraw at the earliest opportunity before it was set down for hearing. On appeal the court of appeal remarked, while interpreting Order 25, as follows-;

> **"The above provisions have been discussed at length in several decisions of this Court. A case in point is Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] eKLR wherein this Court succinctly observed that-**
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> > ***"The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just."(Emphasis added).***
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> **In our view, the circumstances of this case fall within the third scenario. We say so because from the record it is clear that in response to the respondents' suit and application, the appellants entered appearance; filed their respective defences; preliminary objection and an application to set aside the *exparte* orders. Furthermore, it is also evident from the record that the parties herein were heard in respect of the joinder of the interested party; extension of the interim orders and adjournment sought on behalf of the respondents. These were steps taken by the appellants to defend the suit against them and could not be ignored by virtue of the main suit having not been set down for hearing.**
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> **We have outlined above the steps that had been taken in the matter before the High Court. While appreciating that the main suit had not been listed for hearing, the learned Judge ought to have considered the fact that there were appearances and actual prosecution of some applications in court which must have involved preparations on the part of counsel. "**

19. Being guided by the said decisions, and while I fully appreciate that I am handling an application to setting aside and not an appeal, with my eyes fixed on the ends of justice, I do consider that the plaintiff indeed withdrew his suit and it was the defendants and not him the plaintiff to seek and get the costs of the same suit.

20. By the time the matter was marked settled, I consider it abandoned, even though it had not been heard on the main suit, steps had been taken that involved application by counsel and therefore costs. At that time, the matter had not been determined to reveal any event of success or failure. However, to me, the plaintiff came to court seeking in the main to stop an election conducted without the participation of the plaintiff and for declaration that all votes cast before the judgment date be declared null and void. None of those remedies were ever given to the plaintiff hence the suit can safely be said to have ended in failure. In those circumstances, I do find that the stipulations of section 27 and Order 25 militated against the plaintiff being awarded costs. On the date the order was made, the record reveal, the defendants were never present and no record exist to suggest that they were never served.

21. Weighing the facts and the developments in the matter as at the date the order was made, and that the defendant never participated in having the matter marked as settled, I find that the same was never settled but was abandoned by the plaintiff. I do consider that justice would not be served by letting the order of 13.5.2019 to persist. I do set it aside and order that the parties attend court on the 19.05.2021 to address the court whether there still exists a need to pursue the matter and the question of what orders should be made as to costs.

Dated, signed and delivered in open court this 15th day of February 2021

Patrick J O Otieno

Judge