



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 2 OF 2019

JOSEPHAT MWANGI MORACHA.....1ST PLAINTIFF

JIPA OIL COMPANY LIMITED.....2ND PLANTIFF

VERSUS

HFC LIMITED.....1ST DEFENDANT

GEOFFREY MAKANA.....PROPOSED 2ND DEFENDANT

KWANZA ESTATES LIMITED.....PROPOSED 3RD DEFENDANT

RULING

1. This interlocutory ruling is in respect of the determination of the propriety or otherwise of the notice of withdrawal dated 6th August, 2021 filed by the plaintiffs in respect of their application dated 2.8.2021 and filed in court on 3rd August 2021.

2. A brief background reveals that the said application was upon filing placed before the Judge (Hon. Lady Justice R. Wendoh) on the 4.8.2021. Prayers (b) and (d) of the application were allowed. The prayers were;

(b) That pending the hearing and determination of this application and the suit, an order be issued compelling the Defendants/Respondents to open the office of the 2nd Plaintiff/Applicant situate at that property known as **L.R. Kisii/Municipality/Block III/195**.

(d) That the O.C.S. Kisii Police Station be directed to ensure compliance with the orders.

A hearing date was set for the 11.8.21

3. Hot on the heels of the application dated 2.8.2021, the plaintiffs filed an application dated 4.8.21. Upon being placed before the Judge (again Hon. Justice Wendoh), the court expressed itself as follows;

“Before me is the notice of Motion dated 4.8.2021 brought under certificate of urgency. The court notes that it dealt with the same parties in a similar application dated 3.8.2021(sic) on 4.8.2021 whereby the court granted orders prayers (b) and (d). The applicants have not made reference to the said orders. They have not withdrawn the earlier application or sought to amend it. This court cannot give multiple orders on the same application even before it is heard. I direct that this application be served and be heard interparties together with the Notice of Motion dated 3.8.2021, on 11.8.2021 by Judge Ndung’u in Kisii High Court as directed”.

4. In the intervening period before the 11.8.2021, the plaintiffs filed a Notice of withdrawal dated 6.8.21 in respect of the application dated 2.8.2021 and filed in court on 3.8.2021.

5. The question that the court seeks to answer is whether the Notice of withdrawal filed effectively discontinues the application dated 2.8.2021 in light of the procedural Law applicable to the withdrawal of suits.

6. Pursuant to directions of this court dated 11.8.2021 all the parties have filed submissions regarding the propriety or lack thereof of the impugned Notice of the withdrawal. I have had due regard to the Learned submissions and will advert to them in this ruling even without necessarily setting out or reproducing the submissions here.

7. Before delving into the main issue set out above, a question has been raised as to whether the Notice of motion under reference is a suit as per the provision of section 2 of the Civil Procedure Act. The plaintiffs have proffered that section 2 excludes a notice of motion from being a suit and therefore not subject to the provisions of order 25 rule 2.

8. The court in **Chinese Centre for the promotion of investment, Development and trade in Kenya Ltd vs George Ndungu Kimani T/A George N. Kimani & Co Advocates (2006) eKLR** addressed itself as to whether an application was a suit for purposes of the then order 24 rule 1 of the Civil procedure rules (now order 25 rule 1). The court stated;

“Could the client withdraw the application dated 8th November 2005 as it purported to do? Rule 1 of order 24 is in the following words: -

“1. At any time before the setting down the suit for hearing the plaintiff may by notice in writing 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”

The definition of the term “suit” as found in section 2 of the civil procedure Act is that it means all civil proceedings commenced in any manner prescribed. So the application dated 8th November 2005 was a suit for the purpose of rule 1 of Order 24. But the application had already been fixed for hearing on 29th November, 2005. So the client could not withdraw it under that rule as it purported to do. The notice of withdrawal dated 23rd November, 2005 is thus void and of no effect as far as that application is concerned. It remains on record.

That being the case, the present application which seeks the same orders sought in the earlier application dated 8th November, 2005, is not properly before the court. I respectfully agree with counsel for the Advocate that the application is an abuse of the process of the court. That being the case I need not consider the merits of the application. It is hereby struck out with costs to the Advocate. Order accordingly. [Emphasis supplied]

9. Similarly, in **David Sang Kipsoi & Another vs John K. Kosgei (2011) Eklr**, Koome J (as she then was) stated;

It is common ground that the applicant filed a multiplicity of applications. The notice of motion dated 20th January, 2011, another notice of motion dated 21st February, 2011, then he purported to withdraw the notice of motion 20th January, 2011 without following the laid down procedure by just dropping a notice of withdrawal which was not endorsed by the court and then he proceeded to file yet another notice of motion dated 23rd March, 2011. Obviously, this is an abuse of court process. The applicant should have informed the court and sought leave to withdraw or sought the concurrence for the other side as provided for under order 25 of the Civil Procedure Rules. A reference to a suit under the provisions of section 2 of the civil procedure Act also refers to civil proceedings commenced in any manner.

In the circumstances, I order the notice of withdrawal which was irregularly filed be and is hereby struck out. The applicant should comply with the provisions of Order 25 (2) of the Civil Procedure Rules if he intends to withdraw the notice of motion dated 20th January 2011. It follows also that the application dated 23rd March, 2011 is an abuse of the court process as it is a duplication of the notice of motion dated 20th January 2011. It also faces the same fate of being struck out with costs to the respondent. [Emphasis supplied]

10. From the foregoing it is clear beyond per adventure that an application like the Notice of Motion under reference is a suit and thus subject to the provision under **order 25** of the Civil Procedure rules.

11. So, what is the effect of the Notice of withdrawal filed by the Plaintiffs on 6.8.2021 in respect the application dated 2.8.2021? It is common ground that the said application was placed before the Judge on 4.8.2021 and a hearing date set for the 11.8.2021. In those circumstances the provisions of **order 25 rule 2 (1) and (2)** kick in.

Order 25 of the Civil Procedure rules provides;

Order 25;

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.

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.

2. Where the 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.

12. For clarity and certainty, a party has the liberty to withdraw whichever suit or application as may be desired. Such withdrawal has, however, to be in conformity with the procedure provided for in Law. Such procedure is found under order 25 of the Civil Procedure Rules

and specifically in our instant suit, under rule 2 sub rule (1) & (2). Such a withdrawal is not a mere formality.

13. Learned counsel for the defendant has in his submissions emphasized on the importance of rules of Procedure in the administration of justice in terms of providing a definite mechanism for ensuring order, confidence and consistency in judicial processes. I can't agree more, and in doing so, seek refuge in the decision in **Nicholas Kiptoo Arap Korir Salt v IEBC & 6 Others [2013] eKLR** where Kiage J.A stated;

“... I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned” (underlining supplied).

14. In my view and contrary to popular misapprehension, the advent of Article 159 of the Constitution did not bastardize any law of the land including Laws on Procedure and it is only in exceptional cases where Laws of procedure appear to choke the ends of justice that an interpretation of the Law may be made in a manner favorable to achieving substantive justice. Such a scenario, I surmise,, does not exist in the present case before me.

15. The interpretation of order 25 Rules 1 and 2 of the Civil Procedure Rules was very ably made by the Court of Appeal in **Beijing Industrial Designing and Researching Institute vs Lagoon Development Limited [2015] e KLR**, where the court expressed itself thus;

“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 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 a 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. In this scenario too, the plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality”. (Underlining supplied).

16. The application dated 2.8.2021 having been set for hearing on 11.8.2011, the Notice of withdrawal filed on 6.8.2021 was irregular and of no effect by dint of order 25 rule 2 (1) & (2). Should the plaintiff be still desirous of withdrawing the Notice of Motion dated 2.8.2021, compliance must be had to the provisions of **order 25 rule 2** of the Civil Procedure rules.

17. With the result that the Notice of withdrawal dated 6.8.21 in respect of the Notice of Motion dated 2.8.2021 is found to be irregular and of no effect. The same is struck out. Collateral damage to the striking out is the Notice of Motion dated 4.8.2021 which, on the material before court, is an abuse of the court process as it is a duplication of the notice of motion dated 2.8.21 which is now, by the finding herein, alive before the court. The notice of motion dated 4.8.21 is in those circumstances struck out with costs to the respondents.

DATED SIGNED AND DELIVERED AT KISII THIS 26TH DAY OF AUGUST, 2021

A.K NDUNG'U

JUDGE