



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.299 OF 2017

ISSABELLA WAKESHO MSHIMBA.....PLAINTIFF/RESPONDENT

VERSUS

ELVIS DAVID ACKEL.....1ST DEFENDANT/APPLICANT

LINDA ADHIAMBO ACKEL.....2ND DEFENDANT/APPLICANT

JOHNSON OMWANDO JUMA.....3RD DEFENDANT/APPLICANT

CITADEL INSURANCE

AGENCY LIMITED.....4TH DEFENDANT/APPLICANT

RULING

This is a ruling on the Defendants' Notice of Motion application dated 8th February, 2018. It seeks orders that the Court stay all proceedings herein pending full settlement of costs ordered in ***Milimani CMCC No. 4778 OF 2013; Isabella Wakesho Mshimba Vs. Elvis David Ackel and 3 Others***, on 7th April, 2017 by the Plaintiff in the sum of Kshs. 58,045.00 together with interest thereon and costs of this application be granted the Defendants.

Grounds On The Face Of the Application

1. **THAT** the Plaintiff instituted proceedings being ***Milimani CMCC No. 4778 OF 2013*** against the Defendants herein in respect of the same cause action and suit was dismissed with costs by the Honorable Ms. L Kabaria, Senior Resident Magistrate, vide her judgment delivered on 7th April, 2017.
2. **THAT** the lower Court certified costs in the sum of Kshs. 58,045.00 as per the Certificate of Costs issued on the 19th May, 2017.
3. **THAT** the Plaintiff has refused to settle the Defendant's certified Costs in flagrant disobedience of a valid order of the Court.
4. **THAT** the Plaintiff in filing this suit without settling the Defendant's Certified Costs is in abuse of the process of the Court.

The application is supported by Affidavit sworn by Fredrick Orengo an Advocate for the Defendants herein dated 8th February, 2018. He averred that after the said matter ***Milimani CMCC No. 4778 of 2013*** went into full hearing and costs issued, his firm has written several letters to the Plaintiff's Advocate on record seeking settlement of the Defendant's Certified Costs to no avail.

He averred that to date the Plaintiff has refused, ignored and or neglected to settle her indebtedness pursuant to the judgment of the Court and which judgment has neither been appealed against, varied and or set aside by the Plaintiff. He further averred that the Plaintiff is resident in Germany and it is not possible to execute against her in the normal manner.

In response the Plaintiff/Respondent filed grounds of opposition dated 1st March, 2018 on the following grounds:-

1. **THAT** there is no provision for the compulsory payment of the costs in a suit “struck out for want of jurisdiction”;
2. **THAT** stay of proceedings pending settlement of costs is contemplated under Order 25 (Withdrawal, Discontinuance and adjustment of Suits) of the Civil Procedure Rules;
3. **THAT** the Applicants herein ought to pursue their costs vide the procedures available to them as in this instance, the Court has no jurisdiction the orders prayed for;
4. **THAT** in a suit “struck out for want of jurisdiction”, the Plaintiff is not estopped from filing suit in the appropriate Court; and
5. **THAT** this application is an abuse of the Court process and should be dismissed with costs.

ANALYSIS AND DETERMINATION

I have considered submissions by Counsel herein. What I wish to consider is whether this suit should be said pending payment of costs in the Milimani CMCC No. 4778 of 2013 that was dismissed for want of jurisdiction.

It is not disputed that the Applicant was awarded costs in **Milimani CMCC No. 4778 OF 2013**

The Applicant has indicated that demand has been made but costs have not been paid by the Respondent. The suit was dismissed for want of jurisdiction. That does not bar the losing bar from filing a similar suit in the right forum. Costs in respect of the previous suit are assessed in that suit and the normal process of recovery should follow if the unsuccessful party fail to comply with demand to pay. I do not agree with the Applicant herein that failure to pay costs should be used as a ground to stay this suit. The Applicant should use other available processes to recover costs.

I do not see merit in the application herein.

FINAL ORDERS

The application herein is hereby dismissed. No orders as to costs.

Dated and Delivered at Nairobi this 27th day of July, 2018

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

CATHERINE: **COURT ASSISTANT**

MS OLELO H/B FOR: **COUNSEL FOR APPLICANTS**

WAIGWA: **COUNSEL FOR RESPONDENTS**