REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 1 OF 2016

JOSEPH KIPNGETICH KORIR.....PLAINTIFF/APPLICANT

VERSUS

LITEIN TEA FACTORY COMPANY LIMITED.....1ST DEFENDANT/RESPONDENT

KENYA TEA DEVELOPMENT AGENCY.....2ND DEFENDANT/RESPONDENT

RICHARD LANGAT.....3RD DEFENDANT/RESPONDENT

RULING

1. The applicant in this matter was the plaintiff in the suit which he had filed by way of a plaint dated 7th January 2016. The basis of the suit was the applicant's disaffection with the manner in which the elections to the position of a director in Litein Tea Factory; the 1st defendant, had been carried out. The plaintiff alleged that the nomination exercise for the said position was carried out in a manner that amounted to clear and blatant violation of rules and regulations clearly set out in the Articles of Association of the 1st respondent.

2. The applicant further contended that the election process was marred with irregularities and fraud from the outset on the basis that the 3rd defendant was not fit to serve as a director on the basis that he does not meet the minimum requirements of good standing. The plaintiff sought the following orders in his plaint:

> ***a. An order of injunction restraining the 1st Defendant and 2nd Defendant from inter alia declaring , announcing , publishing and or confirming the 3rd Defendant as duly nominated director for Litein electoral area of LItein Tea Factory Ltd.***
>
> ***b. Nullification of the nomination exercise and order for a fresh nomination be carried out.***
>
> ***c. A declaration that the 3rd Defendant is not fit to serve in capacity as a director.***
>
> ***d. Costs of the suit.***
>
> ***e. Any other relief that this Honourable Court shall find fit and just to grant.***

3. On 25th October 2016, a Notice to Withdraw was filed under the provisions of Order 25 Rule 1. It was dated 25th October 2016 and was filed on the basis that the parties had compromised. The said notice was filed by G. M Maengwe & Co. Advocates, the Advocates on record for the applicant/plaintiff.

4. It would appear, however, that the applicant was not happy about the withdrawal of the suit. He filed the application now before me brought by way of Notice of Motion dated 6th March 2017 seeking that:

> ***(1) The orders made withdrawing the claim against the Defendants/Respondents herein and all the subsequent orders made be set aside and reviewed.***
>
> ***(2) This suit be reinstated for the proper determination of the rights and liabilities of each of the Defendants/Respondents.***

(3) The costs of the Application be in the course.

5. The application is based on the following grounds:

(1) The Notice of Withdrawal of suit dated 25th October 2016 was erroneously drawn and filed without the consent of the Applicant.

(2) The Plaintiff/Applicant has a valid case and if the Notice of Withdrawal of Suit dated 25th October 2016 and the consequential orders issued pursuant to the said Notice are not set aside and or reviewed the Applicant will suffer irreparable damage and loss.

(3) It is in the interest of justice that the Notice and any subsequent orders be reviewed and have the matter proceed for hearing and determination expeditiously.

(4) That the auctioneers/Interested party is at liberty and may proceed to auction and/or sell the said motor vehicle any time now.

(5) The Plaintiff has not been indolent and has brought this application expeditiously.

6. The application is supported by an affidavit sworn by the applicant, Joseph Kipngetich Korir, on 6th March 2017. Mr. Korir deposes that on 12th October 2016 he instructed the firm of M/s G.M. Maengwe & Co. Advocates to take over the conduct of the matter from Kipkoech Terer & Co. Advocates. However, the said firm failed to pursue the matter from where the former advocates had reached. The matter was coming up for hearing on 23rd February 2017, and he dutifully attended court on that day. He was, however, informed that the matter was not listed on the cause list for the day.

7. Upon further inquiry at the registry, he realised that a Notice of Withdrawal of suit dated 25th October 2016 had been filed in court withdrawing the case on the grounds that the parties had compromised. He also learnt that the respondents had filed their Bill of Costs and the Bill of Costs was scheduled for assessment on 8th March 2017. The Bill of Costs had not been served on him.

8. The applicant deposes that the notice marking the matter as withdrawn against the defendants/respondents was drawn and filed in error and without his consent and knowledge, and the orders made subsequent thereto were also made in error.

9. He contends that this court has not downed its tools and can still exercise its unfettered discretion and set aside the said orders. He avers that it would be unjust to condemn and lock him out of the case because of the mistake of his advocates. He urges the court to find that it is in the interests of justice that the said Notice of Withdrawal of suit dated 25th October 2016 and subsequent orders made thereto be set aside, noting that the respondents will not be prejudiced in any way that cannot be remedied by costs. He contends that he has brought his application without delay and he is ready and willing to abide by the terms and conditions the court may give in exercise of its discretion.

10. In response to the application, the respondents filed a Notice of Preliminary Objection dated 8th December 2017 which is in the following terms:

(a) The application herein is incurably defective, incompetent, misconceived, frivolous, vexatious and therefore an abuse of the court process.

(b) There is no existing suit upon which the Applicant's application dated 6th March 2017 can be predicted.

(c) The court lacks jurisdiction to entertain and determine the application dated 6th March 2017 since there is no suit pending between the parties herein.

11. The respondents also filed a replying affidavit sworn by John Kennedy Omanga, the 2nd respondent's Group Company Secretary charged with the administration of the 1st respondent and also the 1st respondent's Company Secretary on 8th December 2017. Mr. Omanga dismisses the present application as being unmeritorious, brought in bad faith, an afterthought and a waste of the court's time. He also avers that the application is frivolous and an abuse of the court process.

12. Mr. Omanga deposes that the applicant/plaintiff, in consultation with his advocates, filed a notice to withdraw the suit under Order 25 Rule 1. The respondents thereafter instructed their advocates to file a Party and Party Bill of Costs which they did on 7th March 2017. He annexes a Taxation Notice marked as FM3(a) dated 14th January 2017. The taxation notice and party and party bill of costs were received by Maengwe & Co. Advocates on 7th March 2017.

13. Mr. Omanga deposes that after service of the Taxation Notice, the applicant/plaintiff sought to resuscitate an already finalized matter. He dismisses the present application as being a reaction to the Party and Party Bill of Costs filed by the respondents/defendants. It is his averment that the applicant has not laid any basis whatsoever to show that his advocate was working outside the scope of his instructions. Further, that a notice of withdrawal pursuant to the provisions of Order 25 Rule 1 does not equate to a consent to withdraw the suit and as such there is no basis for the defendants not to file a Bill of Costs.

14. With regard to the suit, it is his averment that the 3rd respondent, whose election was being challenged in the suit, has served his term as a Director, his term is almost coming to an end, and as such the suit has essentially been overtaken by events.

15. According to the respondents, upon the withdrawal of the suit, the court became *functus officio* and the matter was finalized. In any event, there had been inexcusable and inordinate delay in filing this application, and it had only been filed as an afterthought in order to deny the respondents their costs. The respondents urged the court to dismiss the application with costs.

16. By a consent order dated 6th March 2017 between the firms of Ndegwa Waweru & Co. Advocates and Maengwe & Company Advocates, it was agreed that the firm of Ndegwa Waweru & Co. Advocates could come on record for the applicant. However, another Notice of Change of Advocates dated 7th July 2017 replaced the firm of Ndegwa Waweru & Co. Advocates with the firm of Gacathi & Co Advocates. The parties agreed to canvass the application by way of written submissions.

17. In submissions filed on behalf of the applicant on 5th October 2017, Mr. Rotich submits that the decision to reinstate the instant suit is within the discretion of the court. That the court has inherent powers to make such orders as may be necessary for the ends of justice. He further submits that under the overriding objective in section 1A and 1B of the Civil Procedure Act, this court is enjoined to ensure that there is a just determination of the proceedings. He cite the case of **Suleiman vs Ambose Resort Limited [2004] 2 KLR 589** for the proposition that the court, in exercising its discretion, should always opt for the lower rather than the higher risk of injustice.

18. Counsel also cites the case of **Abdullahi Mohammud vs Mohammud Kahiye [2015] eKLR** where the court cited the Court of Appeal case **of Stephen Boro Gitiha vs Family Finance Building Society and 3 Others Civil Appeal Nairobi 263/2009** for the proposition that the overriding objective overshadows all technicalities, precedents, rules and actions which are in conflict with it and whatever is in conflict with it must give way. The overriding objective set out in section 1A and 1B of the Civil Procedure Act is to facilitate the just, expeditious resolution of disputes.

19. It is submitted on behalf of the applicant that he has offered sufficient reason to persuade this court to exercise its discretion in his favour in reinstating the instant suit. He cites the case of **Lucy Bosire vs Kehancha Div- Land Disputes Tribunal and 2 Others** to submit that where the justice of the caser mandates, mistakes by advocates should not be visited on the clients. The applicant had attended court on the date given by his former advocates as the date for hearing, and he had performed his duty as a litigant and constantly checked in with his advocate for the progress of his case.

20. It was his submission that it is the duty of the court to guard against undue hardships or irreparable loss being caused to a litigant due to his Advocate's negligence as the applicant had no role to play in the actions leading to his advocate's actions. He had filed the instant application as soon as he found out what had happened, and had approached the court with clean hands.

21. The applicant relied on the provisions of Order 45 and section 80 of the Civil Procedure Act which he submitted give the court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. He cites the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation v Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** where the court held that there is no reason why *"any other reason"* need be analogous with the grounds in Order 45 as section 80 confers an unfettered right to apply for review.

22. It was his further submission that under Order 45 (1), the applicant has justification to apply for review as there is discovery of new and important evidence which, after the exercise of due diligence, was not within the applicant's knowledge. Counsel therefore urged the court to allow the application, set aside the orders of the court, and reinstate the suit.

23. In his written submissions in response dated 8th December 2017, Learned Counsel for the respondents, Mr. Koech, identified four issues for determination. He submitted, first, that the court would need to determine whether the applicant's advocate then on record had the authority to file a notice of withdrawal of the suit. The respondents relied on the decision in **Kinuthia Eston Maina & 3 Others vs Coffee Board of Kenya [2015] eKLR** for the proposition that a duly instructed advocates has an implied general authority to compromise and settle a suit. A client cannot avail himself of any limitation by him of the implied authority unless such limitation was brought to the notice of the other side.

24. The respondents further relied on the case of **Hiten Kumar A. Raja vs Green Span Limited & 4 Others [2015] eKLR** to submit that where a firm of advocates had authority to act for a party, the said firm had the ostensible and general authority to compromise the suit. Consequently, the notice of withdrawal in this case was well within the authority of the applicant's advocate's firm to file. In their view, the applicant/plaintiff cannot now claim that he had not instructed his advocate on record to act on his behalf and that such an allegation is an afterthought meant to muddle the issues at hand while ensuring that the plaintiff does not meet the consequences of withdrawal of his suit.

25. The second issue was whether there is a valid or proper suit before this court. The submissions by Counsel for the respondents are that Order 25 Rule 1 of the Civil Procedure Rules makes provision for withdrawal, discontinuance and adjustment of suits, but does not make provision for reinstatement of a suit once it has been withdrawn. In the respondents' view, the applicant had only one option, which was to file a fresh suit. The respondents were of the view that the applicant had rushed to court with the present application after being served with a taxation notice as well as the Party and Party Bill of Costs. This application was a reaction to the issue of costs.

26. According to the respondents, once a suit is withdrawn, the court becomes functus officio. Mr. Koech cited in support the case of **Kinuthia Eston Maina & 3 Others vs Coffee Board of Kenya [2015] eKLR**. He also relied on **Antony Kyaya Juma vs Humphrey Ekesa Khaunya [2004] & The District Land Registrar Busia [2004] eKLR** in this regard and submitted that in the circumstances, there is no proper suit before the court for determination.

27. The third issue raised by the respondents is what the consequences of withdrawal of the plaintiff's suit were. Counsel for the respondent submitted that the only recourse that the applicant/plaintiff has at the moment is to file a fresh suit as there is now no suit capable of being determined.

28. Finally, the respondents submitted that the final question was whether the plaintiff was entitled to any relief sought in the application. It

was the submission of the respondents that the applicant/plaintiff had conducted this matter in a highly suspicious manner, having appointed over 4 firms of advocates to represent him. His submission was that the present application must fail, and he prayed that it be dismissed with costs.

Analysis and Determination

29. Having considered the pleadings and submissions of the parties, I believe that two main issues arise for determination:

(a) Whether the applicant/plaintiff's suit was properly withdrawn;

(b) Whether the applicant had made out a case for reinstatement of his suit.

Whether this suit was properly withdrawn

30. The applicant's then advocates on record, G.M Maengwe & Co. Advocates, filed a notice of withdrawal of the suit on 25th October 2016. The provision for withdrawal of suits is contained in Order 25 Rule 1 of the Civil Procedure Rules which provides as follows:

"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".

31. The basis of the applicant's application for reinstatement of the suit is that he had not consented to the withdrawal of the suit by way of the Notice to Withdraw dated 25th October 2016, and that he did not instruct his advocates then on record to withdraw the matter. In its decision in **M & E. Consulting Engineers Limited vs Lake Basin Development Authority & Another [2015] eKLR** the Court of Appeal stated as follows:

"19. We re-affirm the dicta in the High Court case of Kenya Commercial Bank Ltd. -v-Specialised Engineering Company Ltd., 1982 KLR 485 as was upheld by this Court in Civil Appeal No. 43 of 1980 thereof where it was stated as follows:

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

3. An advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.

4. The fact that a material fact within the knowledge of the client was not communicated to the advocate when he gave his consent to a court order is not sufficient ground for the client withdrawing his consent to the order before it is passed and entered even if the advocate concedes he would not have given his consent had he known these facts.

5. The making by the court of a consent order is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds."

32. In **John Waruinge Kamau vs Phoenix Aviation Limited [2015] eKLR** the court considered the circumstances in which a consent order can be set aside and observed as follows:

"The circumstances under which a consent order may be set aside are grounds which would justify the setting aside of a contract, or if the conditions required to be fulfilled by the agreement have not been fulfilled. The grounds for setting aside contracts are fraud, coercion, mistake or misrepresentation.

33. The material before the court in this case indicates that the withdrawal of the suit was done by way of a consent between the applicant's advocate on record and the advocates for the respondents. The advocate who filed the notice of withdrawal was properly on record for the appellant, there being no evidence by the applicant that he did not have such authority to act as he did, or that such limitation of his authority had been communicated to the respondents. In **Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd [1982] KLR 485**, the court considered whether the applicant had met the threshold for setting aside of a consent judgment and held that:

1. ***A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.***

2. ***A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.***

34. *There* is no indication that there was fraud or collusion in the filing of the Notice of Withdrawal in this matter. Had there been such fraud or collusion, then the applicant had a duty to place evidence before the court that demonstrated such fraud or collusion. In its decision in **Board of Trustees National Social Security Fund vs Michael Mwalo [2015] eKLR**, the Court of Appeal took the view that a party who seeks to set aside a consent judgment had a duty to lead evidence to show that thee was fraud or any form of illegality in the consent judgment. Mere allegations were not enough. The court stated as follows:-

> ***"36. The appellant did not place any evidence to show illegality in the consent giving rise to the judgment, and the allegations of collusion and connivance had not even a scintilla of evidence to support them. They remained mere allegations without more and coming as they did after the appellant's decision to challenge the consent, they were hardly credible."***

35. I am unable to find in the present case any evidence that the advocates for the applicant/plaintiff did not have authority to withdraw the suit as they did in the notice of withdrawal dated 24th October 2016.

36. The applicant's Counsel has argued that there is sufficient reason to review the order of withdrawing the suit by consent. He has cited in this regard Order 45 of the Civil Procedure Act and submitted that there is "sufficient reason" to review the order withdrawing the suit.

37. It is to be noted, however, that the order of withdrawal that the applicant wishes to have reviewed was a consent order between him and the respondents. As a consent order compromising the suit, it can only be set aside on the basis set out in the cases that I have set out above. It is not the subject of review under the provisions for review set out in section 80 of the Civil Procedure Act and Order 45 of the Rules. **Order 45 Rule 1 (1)** provides that:

> ***"Any person considering himself aggrieved –***
>
> a. ***by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> b. ***by a decree or order from which no appeal is hereby allowed, and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay."***

38. In its decision in **National Bank of Kenya Ltd v. Ndungu Njau Civil Appeal No. 211 of 1996** the Court of Appeal stated as follows with respect to the jurisdiction of the court to review orders or judgments:

> ***"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

39. In my view, there is nothing in the application before me that would require the court to exercise its discretion and make an order of review under Order 45. An advocate properly on record exercised his authority to compromise a suit on behalf of a client. The notice of withdrawal was filed on the basis that the parties had compromised the suit. There is no error apparent on the record, nor discovery of new evidence that was not available to the parties at the time of withdrawal, nor is any other sufficient cause that would allow the court to exercise its discretion in favour of the applicant shown.

40. Having reached the conclusions set out above on the issues that arise for determination, I find that the applicant is not entitled to any relief in this matter. The application dated 6th March 2017 is hereby dismissed with costs to the respondents.

Dated Delivered and Signed at Kericho this 28th day of November 2018.

MUMBI NGUGI

JUDGE