



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MILIMANI HIGH COURT**  
**CIVIL CASE NO 46 OF 2015**

TATU CITY LIMITED.....1<sup>ST</sup> PLAINTIFF

KOFINAF COMPANY LIMITED.....2<sup>ND</sup>  
PLAINTIFF

NAHASHON NGIGE NYAGAH.....3<sup>RD</sup> PLAINTIFF

VIMALKUMAR BHIMJI DEPAR SHAH.....4<sup>TH</sup>  
PLAINTIFF

VERSUS

STEPHEN JENNINGS.....1<sup>ST</sup> DEFENDANT

FRANCES HOLLIDAY.....2<sup>ND</sup> DEFENDANT

HANS JOCHUM HORN.....3<sup>RD</sup> DEFENDANT

PIUS MBUGUA NGUGI.....4<sup>TH</sup> DEFENDANT

FRANK MOSIER.....5<sup>TH</sup> DEFENDANT

ANTHONY NJOROGE.....6<sup>TH</sup> DEFENDANT

CHRISTOPHER BARON.....7<sup>TH</sup> DEFENDANT

**RULING**

1. Before the Court was the application by the Plaintiffs dated 22nd October 2015. The application was brought under the aegis of Order 2 Rule 15(c) & (d) and Order 51 Rule 1 & 15 of the Civil Procedure Act and Sections 1A, 1B and 3A of the Civil Procedure Act. The prayers sought by the

Plaintiffs included inter alia;

**1. Spent**

2. The Notice of Withdrawal of the suit dated 22nd October 2015 filed by the firm of Ahmednassir Abdikadir & Company Advocates on behalf of the 1st and 2nd Plaintiffs be and is hereby struck out.

3. The order made by the Deputy Registrar on 22nd October 2015 withdrawing the suit by the 1st and 2nd Plaintiffs be and is hereby set aside and discharged.

4. The costs of this application be borne by Mr. Ahmednassir Abdullahi personally.

2. The application was predicated upon the grounds that the application seeking to withdraw the suit by the 1st and 2nd Plaintiffs was filed during the pendency of the order for stay of proceedings issued by the Court on 15th October 2015.
3. Further, it was premised on the grounds that there was pending before Court, an application challenging the Notice of Change of Advocate dated 24th September 2015 filed by the firm of Ahmednassir Abdikadir & Company Advocates, dated 29th September 2015. The Plaintiffs further grounds were that the application and the resultant order as endorsed by the Deputy Registrar are null and void ab initio, and otherwise, an abuse of the process of the Court.
4. These grounds were replicated in the affidavit in support of the application deponed by Nahashon Ngige Nyagah and sworn on 29th September 2015.
5. The application was opposed through the Replying affidavit of the 1st Defendant, Stephen Armstrong Jennings, sworn on 25th November 2015.
6. It was deponed to therein that by a Board resolution in a meeting held on 16th September 2015, the Board had resolved to appoint the firm of Messrs. Ahmednassir Abdikadir & Co. Advocates to represent the 1st and 2nd Plaintiffs in relation to the law suits filed against them.
7. Further, it was deponed to that the decision to revoke the appointment of Messrs. Havi & Co. Advocate was also adopted at that meeting, and therefore the application as filed was an attempt at interfering with the internal affairs and mechanisms of the Companies, and further, that the appointed advocate had been duly appointed and instructed to act on behalf of the 1st and 2nd Plaintiffs to withdraw the suit.
8. It was averred that the said firm of Messrs. Havi & Co. Advocates had neither authority whatsoever nor instructions to act on behalf of the 1st and 2nd Plaintiffs, in any matter relating to their legal affairs.
9. The 1st and 2nd Plaintiffs filed a Notice of Preliminary Objection dated 16th November 2015 with regards to the application, and reiterated that the Court had no jurisdiction in law to hear and entertain and as such, the application should be struck out with costs.

**On Submissions & Authorities**

10. The Plaintiffs' and Defendants' advocates orally submitted at length on the instant application and the Preliminary objections raised herein. The advocates also filed and relied on a number of authorities. The court is grateful for the same and though it may not have alluded to all the cited authorities, same is not deliberate Act or a disregard but court had same in mind as it went about in making the decision. They provided valuable insight in arriving at the conclusion herein after.
11. The 1st, 2nd, 4th, 5th and 7th Defendants also filed their preliminary objection dated 16th November 2015. Therein, it was contended that the application was defective and bad in law, and that it went against the tenets and provisions of Order 49 Rule 7(2) and (3) of the Civil Procedure Act, and further, that the Court had neither the jurisdiction to hear the application as no appeal has been filed against the decision of the Deputy Registrar nor to interfere with the internal management of the 1st and 2nd Plaintiffs.
12. In the Grounds of Opposition filed by the 6th Defendant dated 7th December 2015, it was averred that the application was brought in bad faith with malicious intent, and, was contrary to both the

- express and implied provisions of Article 159(2) of the Constitution. It was further stated that the application was without any legal basis, and unconstitutional to the extent that it attempts to fetter with the Plaintiffs' absolute right to commence and terminate proceedings.
13. The instant application by the Plaintiffs disputed the Notice of Withdrawal filed by the firm of Messrs. Ahmednassir Abdikadir & Co. Advocates. The dispute was primarily against the notice being filed during the pendency of the order for stay of proceedings pending appeal issued by this Court on 15th October 2015. Further, it was disputed that the resultant order for withdrawal as endorsed by the Deputy Registrar was null and void, and that the same should be struck out.
  14. In so far as the issue of the appointment of Ahmednassir Abdullahi, SC practicing in the name and style of Messrs. Ahmednassir Abdikadir & Co. Advocates was brought up in the 1st Defendant's Replying Affidavit, the issue of the said appointment is pending hearing and determination vide the application filed by the Plaintiffs dated 29th September 2015.
  15. The said application was filed ostensibly to challenge the said appointment. The Court will not deal with the said application, its merits, or demerits as the case may be, at this juncture, but will issue its rendition on the same at the appropriate time.
  16. On 15th October 2015, the Court issued orders for stay of proceedings pending an intended appeal by the 7th Defendant. The Court had earlier dismissed an application by the 7th Defendant, and who now sought to appeal against the said decision.
  17. The orders for stay were issued to last for fourteen (14) days, to allow time for the 7th Defendant to file his appeal. The learned Judge had also directed the parties to appear before him on 6th November 2015 for further directions. All the parties to the suit were present or were represented in Court at the time the said orders were issued.
  18. On 22nd October 2015, the firm of Messrs. Ahmednassir Abdikadir & Co. Advocates filed a Notice of Withdrawal of the suit, which notice was endorsed by the Deputy Registrar on the same day. The Plaintiffs, having become aware of the said Notice, on the same day wrote a letter to the Deputy Registrar imploring her to refrain from endorsing and allowing the Notice of Withdrawal.
  19. However, the Deputy Registrar had since allowed the Notice and had effected resultant orders for the withdrawal of the suit. The Plaintiffs relied on the case of **HCCC No 63 of 2009 Manchester Outfitters Ltd v PravinGalot & 4 Others** (UR), in which Apondi, J (as he then was) allowed an application setting aside a discontinuance of a suit. In his determination, the learned Judge rendered that there had been a dispute in the representation of the parties, and that therefore, the Deputy Registrar in endorsing the discontinuance, had failed to take into consideration the prevailing circumstances of the matter.
  20. The Plaintiffs further contended that the Deputy Registrar upon issuing the orders, was in disobedience of the Court orders as issued by Ogola, J on 15th October 2015, and even after being made aware of the prevailing circumstances, did not dismiss the order. It was not denied that it was the 1st and 2nd Plaintiffs right to withdraw the suit in accordance with the provisions of Order 25 rule 1, but that the said withdrawal was inconsistent with the provisions of the law, and should thus be struck out (**see Manchester Outfitters Limited v PravinGalot & 4 Others** (supra)).
  21. On their part, the 1st and 2nd Plaintiffs reiterated that the provisions of Order 25 Rule 1 had been adhered to, with the applicants filing and serving the requisite notices for hearing. It was contended that the notices for the hearing had been issued on 23rd October 2015, which was one (1) day after the notice had been heard and determined by the Deputy Registrar and orders issued ex-parte.
  22. The 1st and 2nd Plaintiffs further averred that the Court did not have jurisdiction to hear and determine the instant application, and that pursuant to the special power conferred upon the Deputy Registrar under Order 49 rule 7(1), the only recourse available to the Plaintiffs was an appeal of the order of the Deputy Registrar. They also contended that; (1) only the party that had made an application for stay could file a complaint challenging the action taken by any other party infringing upon the stay order and (2) that the Notice of Withdrawal was not a proceeding that was capable of being stayed.
  23. The 1st, 2nd, 4th, 5th and 7th Defendants contended that the withdrawal could not be challenged, but only recourse was in filing an appeal. In reiterating that the application was incompetent for this reason, they relied on the decisions of **Shamsha Singh vs. John Kitiyu & 2 Others (2005) eKLR** and **Nyamongo & Nyamongo Advocates vs. Barclays Bank of Kenya (2015) eKLR**.
  24. They contended that it was the absolute right of the Plaintiffs to withdraw the suit as it deemed it

- fit (see John Ochanda vs. Telkom Kenya Ltd [2014] eKLR), and that the order of stay as issued by the Court could not bar the Deputy Registrar from acting on an application seeking to withdraw the suit as it was a Ministerial act on the matter (see Justice Philip K Tunoi & Another vs. The Judicial Service Commission & 2 Others Civil Appeal No 167 of 2015 (Unreported)).
25. The 6th Defendant contended that there was no legal basis for the application in accordance with the provisions of Order 25 rule 1, and further that there was no requirement for a hearing for such an application to be determined. It was further averred that the application was a technical objection, which was inconsistent with the provisions of Article 159(2)(b) of the Constitution.
26. The 6th Defendant also averred that the right of withdrawal of suit was absolute, and that no leave was required to withdraw the suit. As with regards with the stay orders, it was contended that the same did not freeze all actions that may have been made during its pendency, and that an order pursuant to Order 25 rule 1 was not subject of the stay of proceedings.
27. On its part the 3rd Defendant agreed to the sentiments expressed by the 1st and 2nd Plaintiffs, as well as those of the 1st, 2nd, 4th, 5th, 6th and 7th Defendants. He stated that a notice was not a proceeding, and was therefore excluded from the stay order as issued by Ogola, J. Further, it was contended that there would be no prejudice occasioned upon the Plaintiffs if the suit was withdrawn against the Defendants.
28. The provisions of Order 2 Rule 15 were referred to, and further reiterated to imply that there would be no prejudice occasioned as the 3rd and 4th Plaintiffs would still be parties to the suit.
29. The instant application challenged the withdrawal of suit notice filed by the 1st and 2nd Plaintiffs, and the subsequent order as endorsed by the Deputy Registrar on 22nd October 2015. However, the two (2) issues that the Court, however, needs to consider were that; (1) what is a proceeding and (2) what are the effects of a stay of proceedings order?
30. All the parties are cognizant of the fact that there were stay orders that had been issued by the Court on 15th October 2015. The orders were pending the filing of an appeal to the Court of Appeal challenging the decision of Ogola, J dismissing an application filed by the 7th Defendant dated 10th September 2015.
31. The 1st and 2nd Plaintiffs, as well as the Defendants were in agreement that the Notice of Withdrawal of the suit was not a proceeding capable of being stayed under the stay orders as issued, and that the instant application was bereft of merit and inconsistent with the provisions of Article 159(2)(b) of the Constitution, as read together with Order 25 rule 1 and Order 49 rule 7(1) of the Civil Procedure Rules.
32. The first question that the Court would endeavour to answer would be, therefore, what is a proceeding? According to the Black's Law Dictionary, Ninth Edition, a proceeding is defined as;

**“(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing.”**

33. In defining what a proceeding was, it was further stated, citing Edwin E. Bryant, *The Law of Pleadings Under the Codes of Civil Procedure 3-4* (2d Ed 1899), that;

**“Proceedings is a word much used to express the business done in Courts. A proceeding in Court is an act done by the authority or direction of the Court, express or implied. It is more comprehensive than the word “action” but it may include in its general sense all the steps taken or the measures adopted in the prosecution or defense of an action, including the pleadings and judgment.**

34. As applied to actions, the term proceeding may include; (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) all motion made in the action; (7) the trial; (8) the judgement; (9) the execution; (10) proceedings supplementary to the execution in code practice; (11) the taking of the appeal of writ of error; (12) the remittitur, or sending back of the record to the

**lower court from the appellate or reviewing court; (13) the enforcement of the judgment, or a new trial, as may be directed by the Court of last resort.”**

35. In **The Major Law Lexicon, 4th Ed, Vol 5**, proceedings were defined as follows;

- a. **“Proceeding inter alia means a particular step or series of steps adopted for doing or accomplishing something. (Webster’s Third International Dictionary at 1807).”** It was also stated that the word proceedings could be defined as;

**“The word proceeding ordinarily relates to forms of law, to the mode in which judicial transactions are conducted. (2) The term proceeding is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right and hence it necessarily embraces the requisite steps by which a judicial action is involved. (Words & Phrases, Permanent Edition Vol 34).”**

36. In accordance with the definition of a proceeding, is a Notice of Withdrawal of suit, therefore, a proceeding as defined herein above? The procedure for filing a Notice of Withdrawal of a suit is prescribed under **Order 25 rule 1 of the Civil Procedure Rules**. The said provision reads inter alia;

***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.***

37. From a reading of the said provision, it can be deduced that there is a prescribed procedure that has to be followed before an action for withdrawal of a suit may be effected by the Court. The steps are that; (1) the notice may be filed before the matter is set down for hearing; (2) the notice shall be in writing; and (3) that the notice shall be served upon all parties.

38. This in any sense of definition, is a prescribed course of action, which enforces the legal right of the Plaintiff, or Plaintiffs as the case may be, to withdraw a suit. In seeking to enforce this right for withdrawal, certain steps are prescribed, and which are requisite, before accomplishing the action or satisfying the right of withdrawal.

39. In accordance therefore to the definition of a proceeding, a Notice of Withdrawal of Suit as prescribed and provided under Order 25 rule 1 of the Civil Procedure Act, is a proceeding, as the same is prescribed by the law and procedure under the Civil Procedure Rules. By filing the Notice of Withdrawal of Suit, the Plaintiffs were seeking to exercise their right as prescribed by law of withdrawing any claims they may have made against any party to a suit.

40. Further, the filing of the Notice of Withdrawal was a proceeding, in the sense that in order for the Court to exercise its mandate and objective as provided under Sections 1A and 1B of the Civil Procedure Act, the Plaintiffs had to come before the it through a process prescribed by law under Order 25 rule 1 of the Civil Procedure Rules. The Notice in itself is not a proceeding; the process in which the said Notice is presented to the Court before it can be effected is what the proceeding is.

41. A proceeding is therefore, a process or an activity, prescribed by law or procedure, which seeks to invoke the power of the Court, or a tribunal as the case may be, to enforce a law, or obtain legal remedies pursuant to a law. The withdrawal of the suit was therefore, a step, or process properly defined under the phrase proceedings.

42. Given that the filing and service of the Notice of Withdrawal of the Plaintiffs suit against the Defendants was a proceeding as defined, what then was the effect of the stay order issued by Ogola, J on 15th October 2015? Under Order 42 Rule 6 of the Civil Procedure Rules, the Court is empowered to order for stay of execution or proceedings pending an intended appeal.

43. A stay if issued, has the effect of staying or suspending a particular proceeding from continuing which if allowed to proceed, may affect the right or rights of any of the parties to the suit.

44. In **Ferdinand Ndung’u Waititu vs. Independent Electoral & Boundaries Commission & 8 Others (2013) eKLR**, it was stated that;

**“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court’s discretion.”**

45. In **Church Road Development Co. Ltd v Barclays Bank of Kenya Ltd (2007) eKLR**, Ochieng, J in making his determination in the matter, held thus;

**“Black’s Law Dictionary defines ‘stay of proceedings in the manner following;**

**‘The temporary suspension of the regular order of proceedings in a cause, by direction or order of the Court, usually to await the action of one of the parties in regard to some omitted step or some act which the Court has required him to perform as incidental to the suit; as where a non-resident plaintiff has been ruled to give some security for costs. It is similar to an injunction with which a Court freezes its proceedings at a particular point. It can be used to stop the prosecution altogether, or to hold up some phase of it, such as an execution about to be levied on a judgment.’**

**Evidently, the scope of an order for stay of proceedings is wide as it is varied. It could relate to a specific action, such as taxation or execution; and it could also relate to the prosecution of the suit altogether. If the Plaintiff here were allowed to urge its application for an interim injunction, it would have been allowed to undertake further proceedings within this suit. And as the Court already ordered that there would be a stay of proceedings until the Plaintiff pays the costs in HCCC No 55 of 2006, I do hereby uphold the preliminary objection. To hold otherwise would be to negate the orders of this Court without either compliance with the conditions already set by the Court or alternatively without the said order being reviewed, varied or discharged. That would not be right. Therefore, it is hereby reiterated that until the Plaintiff pays the costs in HCCC No 55 of 2005, it will not be permitted to undertake any further proceedings in this case. In other words, the Plaintiff may not canvass its application dated 3rd November 2006.”**

46. The 7th Defendant had on 15th October 2015 made an oral application before the Court seeking for a stay of further proceedings of the Court as he intended to file an appeal to the Court of appeal, challenging the decision made by Ogola, J on its application dated 10th September 2015. The orders as issued by the Court were as follows;

- a. **Leave to appeal is granted.**
- b. **A limited stay of proceedings for 14 days is allowed on condition that the applicant shall make the said application for stay of proceedings directly to the Court of Appeal.**
- c. **Copy of the ruling shall be availed to all parties at own costs.**
- d. **I also order the typing of the proceedings.**
- e. **The matter will be mentioned on 6th November 2015 for further directions.”**

47. The 1st and 2nd Plaintiffs, as represented by the firm of Ms. Ahmednassir Abdikadir & Co. Advocates, filed and served a Notice of Withdrawal of Suit, pursuant to the provisions of Order 25 rule 1 of the Civil Procedure Rules. This, to the Court, was contrary to the order issued by Ogola, J directing that proceedings would be stayed pending the filing of the intended appeal by the 7th Defendant to the Court of Appeal.

48. The filing of the Notice of Withdrawal of Suit was a proceeding as hereinabove defined, and was therefore, a proceeding suspended awaiting the action of the 7th Defendant for filing an appeal to the Court of Appeal.

49. The issues as canvassed by the parties was not for the issue of appointment of the firm of Ms. Ahmednassir Abdikadir & Co. Advocate as advocate for the 1st and 2nd Plaintiffs, nor for the order as endorsed by the Deputy Registrar. What the parties should have concerned themselves more of was the question of the stay orders issued on 15th October 2015, and whether the same had been lifted or lapsed before the Notice of Withdrawal had been filed.
50. The issue of appointment of the said firm of advocates is yet to be determined as the same was raised in an application dated 29th September 2015. It is neither within the purview of the Court at this particular juncture to determine whether the Notice was properly endorsed or not, or whether it was a determination made pursuant to the special powers of the Deputy Registrar as provided under Order 49 rule 7(1) of the Civil Procedure Rules, and which challenge would only lie in an appeal to this Court.
51. What is therefore ascertainable at this time was that (1) there was an order for stay of proceedings pending an intended appeal by the 7th Defendant; (2) that the filing of a Notice of Withdrawal of Suit was a proceeding as prescribed under Order 25 rule 1 of the Civil Procedure Rules; and (3) that the 1st and 2nd Plaintiffs in utter disregard to the said order for stay, proceeded to file the Notice of Withdrawal of Suit notwithstanding the said stay orders.
52. The action of the 1st and 2nd Plaintiffs would, in any other instance, amount to have flagrantly disregarded a valid Court order.
53. The firm of Ms. Ahmednassir Abdikadir & Co. Advocates are deemed officers of the Court as provided under Section 1A(3) of the Civil Procedure Act, and therefore, have the duty to assist the Court in achieving the overriding objective as enunciated under Section 1B thereof. They should have ably stated to the Deputy Registrar that there was an order for stay of proceedings pending appeal previously issued by this Court, or done the more honourable action, of not filing the Notice of Withdrawal until the stay orders were either varied, lifted or lapsed. Had the Deputy Registrar been made aware of this fact, she would have hesitated in endorsing the Notice of Withdrawal. (**See Manchester Outfitters Ltd v Pravin Galot & 4 Others** (supra).
54. The Deputy Registrar, in consideration of the order for stay pending appeal, had no jurisdiction to make or issue the order as she did, and to such extent, such order was void. In **Nguruman Limited vs. Shompole Group Ranch & Another [2014] eKLR**, Musinga, J rendered that an order made when the Court had no jurisdiction to do so, such order was null and void. He reiterated that;

**“I think the Court had no Jurisdiction to grant the orders it did and to that extent such orders were void. In the words of Denning, L.J. in Macfoy v United Africa Co. Ltd. [1961] 3 ALL ER 1169 at 1172:**

**‘If an act is void, it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.’**

55. In consideration of the foregoing, the upshot is that the Notice of Withdrawal of suit filed by the 1st and 2nd Plaintiffs on 22nd October 2015 was invalid and incompetent, and that the same is struck out. The consequential endorsement of the said Notice by the Deputy Registrar is therefore without legal basis, and the same is hereby set aside.

56. Costs in the main cause.

**Dated, signed and delivered in court at Nairobi this 26<sup>th</sup> day of February, 2016.**

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**C. KARIUKI**

**JUDGE**