



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

HC. COMM NO. 23 OF 2016

1. ELIUD KIPCHIRCHIR BETT

2. MWENDA THURANIRA.....PLAINTIFFS

VERSUS

1. CANYON PROPERTIES LIMITED

2. ABDULAHAKIM ABDALLA ZUBEDI

3. TWAHA ZUBEDI

4. MOHAMMED ABDALLA ZUBEDI.....DEFENDANTS

5. CHINA AFRICA TOTAL LOGISTICS LTDINTERESTED PARTYS

RULING

1. On 26.4.2016, one Boniface said to act on behalf of Balala and company advocates for the defendants respondents attended the registry and had the plaintiffs application dated 3.3.2015 as well as the Notices of preliminary objection dated 9/3/2016 and 10/3/2016 all fixed for hearing on the 21.6.2016.

2. Come 21.6.2016 the matter was listed before Lady M.N.Mwangi J who directed that the matter be placed before this court on the 11.7.2016. On the date so fixed, Ms.Mathee-Soni & co. advocates lodged in court what they called “NOTICE OF WITHDRAWAL OF NOTICE OF MOTION APPLICATION AND PLAINT DATED 03.03.2016.” That Notice read:-

“TAKE NOTICE that the plaintiffs hereby duly withdraw/discontinue the Notice of Motion application dated 3rd March 2016 and the suit instituted vide plaint dated 3rd March 2016 with no order as to costs.”

3. When the matter was called out in court, Ms. Muthee, who appeared for the plaintiff notified the court about the Notice of withdrawal and made an application that the suit be marked as withdrawn with no orders as to costs.

4. Mr. Balala for the 1st defendant did not object to the withdrawal provided his client was awarded the

costs of the suit. His contention was that the civil procedure rules did not provide for withdrawal of a suit by a plaintiff with no orders as to costs. He pointed out that the defendants had filed papers and participated in the proceedings and that it was the courts discretion to make an order as to costs.

5. In response Ms. Muthee agreed that the court has unfettered discretion in matters costs under section 27 of the Civil Procedure act and stressed the facts that costs should follow the event. She pointed out that as at the time the suit was withdrawn neither the applications nor the suit had proceeded to the level of being determined by the court. She urged the court to exercise the discretion judiciously and not punitively. She further informed the court that the reason informing the withdrawal was the long standing relationship between the plaintiffs and the interested party and that the plaintiffs had played a role in bringing the defendants and the interested party together and the successful sale of land between them. She therefore reiterated the prayer that the suit should be marked as withdrawn with no orders as to costs.

6. The court is therefore called upon to consider and determine whether or not this suit should be withdrawn against the defendants with or without costs.

7. The provisions of law regarding withdrawal of suit is to be found under order 25 of the Civil Procedure Rules. Rules 1 and 2(2) and 3 are worded as follows:

Order 25-WITHDRAWAL, DISCONTINUANCE AND ADJUSTMENT OF SUITS

1. Withdrawal by plaintiff {Order 25, rule1}

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. Discontinuance {Order 25, rule 2}

(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. Costs {Order 25,rule 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.

8. I have no doubt that as at the date of the withdrawal the suit had not been fixed for hearing hence the plaintiffs were within their legal rights to have it withdrawn without recourse to the defendants. I further interpret order 25 rule 2(2) to carry the spirit of section 27 of the act that it vests with the court to make an order on costs of a withdrawn suit.

9. As costs follow events the even envisaged by the law is whether or not a party has succeeded so that the costs are awarded not to punish the unsuccessful party but to reimburse the successful party the costs incurred in protecting his rights. In the instant case, the matter did not reach the point of determination by the court and I say was withdrawn at the earliest opportunity for the reasons the plaintiffs say, were informed by long standing relationship between them and the interested party. In fact by the statement of defence filed on behalf of the 1st defendant at paragraph 4 &5 tacitly conceded that the plaintiff could have acted as intermediaries in the sale between it and the interests party. It cannot be, therefore, said *prima facie*, that the plaintiff had no justification to bring the action. My finding is that having ended as it did no party has been adjudged successful or unsuccessful and there is no event that costs must follow.

10. The court takes notice that it has a duty to encourage alternative methods of dispute resolution.

Where parties take such initiatives without prompting and the suit is terminated, the initiating party need to be commended. I have made the foregoing comments as a way of ascertaining that the relationship between the parties as well as their actions leading to termination of the litigations are factors to be considered in the courts exercise of discretion in making an order on costs.

11. Mabeya J in ROSALINE NJERI MACHARIA –VS- DAIMA BANK LTD.[2012]eKlr had this to say on factors that need be taken into account:

“In my view the factors which a court has to consider in deciding whether or not to order costs, is the nature of the allegations the plaintiff has made against defendant, the nature before the claim the likelihood of success and the nature of liability that would attach against the defendant if he does not defend the claim. Also the court should consider the nature of the defence if any filed by the defendant and the stage at which the suit is being withdrawn as discontinued.”

12. I have said that the plaintiffs took the earliest opportunity to terminate the proceedings and deserve being commended. That to me is a factor that persuade me to order that each party shall bear own costs.

13. The suit is therefore marked as withdrawn with each party bearing own costs.

14. It is so ordered.

Dated, signed and delivered this 19th day of August 2016.

In the presence of

Ms. Muthee for the plaintiff

Mr. Mohamed for the 1st - 4th defendants.

Mr. Kariuki for the interested party.

P.J.O. OTIENO

JUDGE