



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NUMBER 517 OF 2014

JULIUS KIMANTHI WAMBUA. APPLICANT

VERSUS

CHUMA FABRICATORS LIMITED. RESPONDENT

R U L I N G

The application before the court as I understand it, is the Notice of Motion dated 27th June, 2014 which seeks that: -

- a. **There be a stay of proceedings in Milimani CMCC No. 7732 of 2006 Julius Kimanthi Wambua Vs Chuma Fabricators Ltd, pending the determination of an intended appeal to be filed by the original Defendant, Chuma Fabricators Limited.**
- b. **That the Applicant/Original Defendant be granted leave to file an appeal out of time.**
- c. **Costs.**

The facts behind this application do not appear clear nor straight forward. To the court the said facts appear as follows: -

The original Plaintiff, Julius Kimanthi Wambua, filed a lower court suit, Milimani CMCC No. 1119 of 2005 against the Defendant **Chuma Fabricators Limited**, by a plaint dated 7th October, 2005.

It is alleged on oath on record herein by the said Plaintiff, Julius Kimanthi Wambua that his advocates, Morara Apiemi & Company Advocates did not inform him of their filing of the suit Number CMCC No. 1119 of 2005. That however, cannot be easily accepted by this court since the verifying affidavit accompanying the Plaint in CMCC No. 1119 of 2005 appears to be properly signed by the Plaintiff himself. The position this court takes is that the Plaintiff properly instructed the firm of Morara Apiemi & Co. to file CMCC No. 1119 of 2005. There is no doubt that when later the Plaintiff understood irregularity arising from the duplicity of the suits CMCC No. 1119 of 2005 and CMCC No. 7732 of 2006, he purported to rectify it by filing in court on 6th August, 2009 a Notice of Withdrawal of suit of CMCC No. 1119 of 2005, dated 5th August, 2009. It will however be noted and it is not denied that the withdrawal Notice was signed and filed by the Plaintiff Julius Kimanthi Wambua, himself. He has not claimed or deponed that his relevant advocate in relation to that suit was aware of the said notice or withdrawal or was consulted in relation thereto. The Plaintiff does not even aver that with the presence of his advocates still on the said record, he had authority or power to withdraw a suit properly filed by and still being represented by the Advocate. The mere fact that he uprooted or intended to serve the notice upon the several advocates acting in relation to the two suits, did not alone in the court's view validate his

action. The Plaintiff has neither claimed that he had fired his advocate before taking over the suit personally and no Notice of Change or Representation was asserted.

The result, therefore, was that the said Notice of Withdrawal of Suit, filed by the Plaintiff himself invalid for being signed by a party who had no power or authority to sign it. The position that this court takes, contrary to the Plaintiff's belief, is that the suit CMCC No. 1119 of 2009, is still valid and has never been successfully or validly withdrawn.

The materials before me also show that an application dated 1st August, 2007 filed by the Plaintiff's earlier advocate, sought to strike out or stay proceedings of suit no. CMCC No. 7732 of 2006 on the ground of Res Subjudice. The application ended up being misdirected to CMCC No. 7733 of 2006 which was a different suit and must have concerned different parties. The application was later amended and purported to be aligned to CMCC No. 7732 of 2006. How all these antics and acrobatics could be achieved without serving the other parties who were affected in these cases and in their absence, is no less than a wonder. But it confirms how far the parties and the counsel involved in the two suits could bend court rules and processes to obtain or achieve their irregular intentions.

That the parties and their counsel in both suits could easily obtain irregular orders without orders without disclosing proper facts to the lower court raises anxiety in relation to the integrity of the relevant trial courts but that is all that can be said to it at this late hour.

All said, the lower court on 13/2/2008, granted the Applicant in the application dated 1/8/2007, the orders of striking out of the suit. However the court failed to address itself to the alternative prayer for stay of proceedings.

The court has considered the orders of the lower court in relation to the application dated 1/8/2007, seeking the striking out or staying of proceedings. It has come to the conclusion that the first order sought and granted, was that of striking out. Once it was granted as both sides agree, it struck out the suit once and for all. The suit could not again remain alive awaiting a staying order. The finding of this court accordingly, is that on 13/2/2008, the suit CMCC No.7732 of 2006 was struck out and cannot thereafter have been available to be fixed for a hearing for 26th November, 2012 as claimed by the Plaintiff, Julius Kimanthi Wambua.

I have considered all the materials on record. The application for striking out suit CMCC No.7732 of 2006 was properly fixed for hearing on 12/8/2013 in the presence of both parties. Ruling was fixed on 18/9/2013 when it was duly delivered in the absence of both parties. It purported to reinstate a suit which had been properly struck out for being Res subjudice. The trial court was trying to do the impossible against the provisions of Section 8 of the Proceedings Act, Cap 21 which states:-

“Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.”

The conclusion I reach therefore is that all the trial court's efforts to revive an invalid suit did not succeed to validate suit CMCC No.7732 of 2006. This leave the valid suit between the parties herein, to this moment, to be CMCC No. 1119 of 2005, at whatever stage the suit is found today.

That means that the application for leave to appeal out of time will achieve nothing and is hereby dismissed as the application for stay is also hereby dismissed.

Costs are in the circumstances of this case not awarded to either party. Orders are made accordingly.

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D.A. ONYANCHA

JUDGE

DATED and delivered at Nairobi on this 29th day of September 2015

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JUDGE