



No. 182/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 350 OF 2011

REDEMPTEER SYOMBUA MUSYOKI.....1ST PLAINTIFF

ROBERT MUSYOKI (suing as the legal representatives of the estate of JOSEPH MUSYOKI KING'OO)2ND PLAINTIFF

VERSUS

NGII NDAMBUKI.....1ST DEFENDANT

ROSEMARY NGII NICODEMUS KITAVI2ND DEFENDANT

RULING

1. This matter was placed before me on the **21st February 2013** for directions. Counsel for the defendants **Ms. Amalla** sought an award of costs based on a notice of withdrawal of the suit. She was, however, in doubt not being sure if the notice had been endorsed by the court. Notice of a subsequent suit **HCCC. No. 353/2012** involving the same parties herein was brought to the court's attention. **Mrs. Nzei** for the plaintiff sought an order for production of the subsequent suit for perusal by court.
2. The file having been availed today, the **22nd, January, 2014**, it is now the application of **Mrs. Nzei** for the plaintiffs that this case be stayed to enable the court proceed with **HCCC. No. 353 of 2012**.
3. The outcome in the later suit would automatically determine issues raised in this suit. Further, it was her argument that the intention to withdraw this particular suit was not communicated to his clients by their previous advocate who filed both suits.
4. **Ms. Gichuki**, representing the defendants argued that they filed a bill of costs in the matter acting on the notice to withdraw the suit. Admitting that it may have been erroneous as they had not confirmed if the order was endorsed by court. She, however, argued that it was procedural to have this particular suit stayed instead of the later suit. She prayed for an order in those terms.
5. **Mrs. Nzei** in her response argued that it was within the discretion of the plaintiff to choose which suit to stay.
6. It is admitted that a notice of withdrawal was filed by **Mutio Mutisya and Company Advocates**. The same was served upon the defendant's counsel. The said notice is however missing from the court record. This would mean there was some interference with the record or it was received and not filed. What is apparent is the fact that it was not endorsed by the court. Therefore, the suit was not withdrawn.
7. **HCCC. No. 353/2012** was filed on **20th September 2012** while this suit was pending hearing. Parties in the suit are the same as the ones herein. The matter in issue is the same. The relief

sought is the same. They actually duplicated what they were seeking in the instant suit. The plaintiffs were not candid by arguing that institution of the later suit was not within their knowledge as they signed the affidavit verifying the assertions in the plaint.

8. With regard to the prayer for stay of the instant suit, **Section 6 of the Civil Procedure Act provides:**

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” Emphasis mine.

9. **“Previous”** simply means something existing or occurring before something else in time or order. In the present scenario, the suit that came into existence first was **HCCC. No.350 of 2011**. This court cannot proceed with **HCCC. No. 353 of 2012** which was instituted while the previous suit was pending.
10. In the circumstances **HCCC. No. 353 of 2012** be and is hereby stayed pursuant to **Section 6** of the **Civil Procedure Act**. The instant suit shall proceed to hearing and determination.

DATED, SIGNED and DELIVERED at MACHAKOS this 31ST day of January, 2014.

L.N. MUTENDE

JUDGE