



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & LC. NO.155 OF 2017

LILIAN CHEPKORIR LELEI PLAINTIFF

VERSUS

RICHARD KIPCHIRCHIR NYANGO DEFENDANT

RULING

{NOTICE OF MOTION DATED THE 12TH APRIL 2021}

1. The Defendant filed the notice of motion dated the 12th April, 2021 seeking for orders:

- i. *“THAT this Honourable court do review and set aside and or vary the orders of the court given on 1st March, 2021 and issued on the 16th March, 2021.*
- ii. *Any other order this Honourable Court may deem fit and expedient to grant in the circumstances.”*

The application is based on the six (6) grounds on its face marked (a) to (f) and supported by the affidavit sworn by Michael K. Chemwok advocate, on the 12th April, 2021. It is the defendant’s case that he was brought to court by the plaintiff thereby forcing him to incur expenses in engaging an advocate to act for him. That he was shocked to later learn that the suit had been closed without awarding him costs. That as costs should follow the event, the court should review its order and award him costs.

2. That in opposition to the application, the plaintiff filed the Grounds of Opposition dated the 24th June, 2021 through the firm of M/S Mukabane & Kagunza Advocates.

3. That during the mention of the 14th February, 2022 the counsel for the Defendant informed the court that they had filed and served their submissions to the application on 14th April, 2021 and that the plaintiff had filed none. The counsel then moved the court to fix a date for ruling of their application. I have in the process of preparing this ruling perused the record and have not seen the alleged submissions filed on the 14th April 2021, or receipt under which it could have been filed.

4. The following are the issues for the court’s determinations;

- a. *Whether the defendant has made a reasonable case for review of the order made on the 1st March 2021.*
- b. *Who pays the costs.*

5. I have considered the grounds on the notice of motion, affidavit evidence, grounds of opposition and come to the following findings;

a. That the application herein seeks for the review the order of court made on the 1st March 2021, and issued on the 16th March, 2021. That although the counsel for the Defendant did not attach a copy of the said court order to the application herein, the order is available in the court record. The terms of the order that the court made on the 1st March 2021, and issued on the 16th March, 2021 are as follows:

- i. *“**THAT** the suit be and is hereby marked as withdrawn with no orders as to costs;*
- ii. ***THAT** the file be closed.”*

b. That a perusal of the record confirms that the order was actually made on the 2nd March, 2021, when the matter came up for notice to show cause why the suit should not be dismissed for want of prosecution pursuant to the notice dated the 11th February, 2021. The copy of the notice in the record shows it was issued under *Order 17 Rule 2* of the Civil Procedure Rules, and was indeed coming up on the 2nd March, 2021. The date of 1st March, 2021 appearing at the start of that day's proceedings must have been in error, as the date at the end written by the Judge is 2nd March, 2021. The order of the court is reproduced verbatim herein below;

“Order- That though the matter was coming up for N.T.S.C, there is a notice of withdrawal of suit dated the 15. 2. 2021 that has been filed. The suit is therefore marked withdrawn with no order as to costs. The file be closed.”

That is the order the defendant seeks to be reviewed to enable him be awarded costs.

c. The record confirms that the suit was commenced through the plaint dated the 4th April 2017, that was filed through the firm of M/S Lel & Associates Advocates. The defendant then entered appearance through the firm of M/S Chemwok & Company Advocates, vide the memo dated the 29th June 2017. The said counsel also filed their notice of appointment of the same date and statement of defence among other pleadings and processes. That the firm of M/S Kiprof Luseria & Company Advocates filed the notice of motion dated 23rd March 2018, chamber summons dated the 26th March 2018 and replying affidavit sworn by Lilian Chepkorir Lelei, the plaintiff, on the 26th April 2018, without first filing and serving a notice of change of advocates as required by *Order 9 Rules 5 and 6* of the Civil Procedure Rules. That the said counsel subsequently filed the notice of change of advocate dated the 2nd July 2018, indicating that they were coming on record for the plaintiff in place of M/S Lel & Associates Advocates. That on the 19th February 2021, M/S Mukabane & Kagunza Advocates filed the Notice of Withdrawal of Suit dated the 15th February 2021 which is in the following words;

“TAKE NOTICE that the Plaintiff herein LILIAN CHEPKORIR LELEI has this day withdrawn this suit wholly with no orders to costs.”

That there is no evidence that the said counsel had properly come on record by filing and serving a notice of change of advocate in accordance with *Order 9 Rules 5 and 6* of the said Rules, or whether the defendant had been served with a copy of the notice to withdraw the suit.

d. That the record does not have any evidence that the Notice to Show Cause (N.T.S.C) why the suit should not be dismissed for want of prosecution that was coming up on the 2nd March 2021, had been served upon the counsel on record for the defendant. The foregoing findings, and the fact that the notice of withdrawal of suit had not been served upon counsel for the defendant meant the defendant did not get an opportunity to address the court on the issue of the costs by the time the order sought to be reviewed was made on the 2nd March 2021.

e. That the record confirms that the Defendant had participated in the prosecution of this matter during its subsistence in court. The Defendant through his advocate on record filed the Memorandum of Appearance and Statement of Defence dated 29th June, 2017. Subsequently, he filed the Notice of Motion dated 14th March, 2018 seeking for orders of injunction, and the Notice of Motion dated 30th May, 2018 seeking for contempt of court orders against the Plaintiff. He must therefore have incurred expenses, including advocates fees, to defend this suit, by the time it was withdrawn by the plaintiff.

f. The Defendant seeks for the review, setting aside and varying the orders of the court given on 1st (sic) March 2021, and issued on 16th March 2021. The heading of the application shows it is brought *“Under section 26 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, section 3 and 3A of the CPA and All Enabling Provisions of the law.”* That sections 26 of the Civil Procedure Act provides for interest, while sections 3 and 3A of the said Act deals with the special jurisdiction, and inherent powers of the court. The relevance of the foregoing three sections of the said Act to the application before the court is not apparent.

g. That *Order 45* of the Civil Procedure Rules and *section 80* of the Civil Procedure Act provides for review. *Section 80* of the said Act provides as follows:

“80. Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

And *Order 45 Rule 1 (1) (a) and (b)* of the Civil Procedure Rules provide as follows:

1. (1) *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 the 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

That from the foregoing, I discern that an application for review may be grounded on the following grounds:

- a) *Discovery of new and important matter or evidence, not previously within the knowledge of a diligent applicant.*
- b) *Mistake or error apparent on the face of the record.*
- c) *Any other sufficient reason.*

h. That although the Defendant has not specifically stated which of the three possible grounds for review he was relying on in the prosecution of his application, I find that the ground of “*any other sufficient reason*”, comes to his aid. This ground allows the court to exercise its discretion to remedy a situation that may result in unnecessary hardship on the party that has moved the court without unreasonable delay, to review an order in issue, and which has not been appealed against. That the case of **STEPHEN GATHUA KIMANI V NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS [2016] eKLR** cited with approval the decision of the Court of Appeal of Tanzania in the case of **The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)** where the Court discussed what constitutes sufficient cause as follows:

“It is difficult to attempt to define the meaning of the words ‘sufficient cause’. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant”

And in the case of **BONIFACE KIVINDYO MUTISYA V ALFRED KAVILA KIVINDYO & 2 OTHERS [2019] eKLR** the court cited with approval the decision in the case of **Shanzu Investments Ltd vs Commissioner for Lands (Civil Appeal No. 100 of 1993)** where the Court of Appeal stated as follows in addressing itself to what amounts to sufficient cause to issue an order of review:

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act ... and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

That in view of the provision of the Statute, Rules and the foregoing decisions of the superior courts, and noting that the defendant had actively participated in defending the suit through counsel, I find that the defendant was entitled to an award of costs, upon the plaintiff’s suit being withdrawn on the 2nd March 2021. I further note that the Defendant was not given a chance to make representations before the court on the issue of costs, as the notice of withdrawal of suit, and the notice to show cause had not been served upon his counsel, before the court proceeded to issue the order marking the suit as being withdrawn with no order as to costs.

i. The defendant has been accorded a hearing through the instant application on the issue of costs, and the court is of the view that he has finally received justice on that issue. That in the case of **CECILIA KARURU NGAYU V BARCLAYS BANK OF KENYA & ANOTHER [2016] eKLR** the court cited the decision in **Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2014** where the court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”

j. That further, section 27 of the Civil Procedure Act that deals with costs, carries the proviso that “*Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise order.*” **[emphasis added]**. That as the plaintiff had not given any good cause in the notice of withdraw of suit why the costs should not follow the event, I find that the Defendant’s Notice of Motion dated the 12th April 2021, has merit.

6. That flowing from the above, the defendant’s application dated the 12th April, 2021 has merit and is allowed. That the order of 2nd March, 2021 that was issued on the 16th March, 2021 is hereby reviewed as follows:

- a. **THAT** the suit be and is hereby marked as withdrawn *with costs to the Defendant*.
- b. **THAT** the file is closed.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 27TH .DAY OF APRIL, 2022

S.M.KIBUNJA, J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF:Absent

DEFENDANT: ...Absent

COUNSEL:Mr. Chemwok for Defendant.....

.....

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET