



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND DIVISION

ELC SUIT NO. 473 OF 2010

ABDIRASHID ADAN HASSAN.....PLAINTIFF

VERSUS

MASTERWAYS PROPERTIES LIMITED.....DEFENDANT

RULING

This ruling is on a preliminary issue raised by the Defendant's Advocate as to whether the Plaintiff's Advocate was properly on record. The Plaintiff's Advocate had filed a Notice of Motion dated 13th March 2013 seeking orders of stay, review, setting aside or in the alternative the revocation and annulment of a consent order dated 24th January 2013 and other subsequent orders. The main ground for the Notice of Motion was that the Plaintiff's previous Advocates entered into the consent without the Plaintiff's authority and knowledge, and which consent was contrary to instructions given to them, and to their client's detriment.

When the Notice of Motion came up for hearing on 6th June 2013, the Advocates for the Defendant raised a preliminary issue under consideration. His argument was that there was a judgment of the court and decree that the suit had been withdrawn, and the Advocates had not obtained leave of the court to come on record as required under Order 9 Rule 9 of the Civil Procedure Rules. The Defendant's Advocate urged the court to expunge the application dated 13th March 2013 as it had been filed by an Advocate not properly on record.

The Plaintiff's Advocate argued that they filed a Notice of Appointment on 1st March 2013, after the Plaintiff had filed a Notice to Act in person on 5th February 2013, and there was thus no need for a Notice of Change of Advocate to be filed. Further, that the suit was withdrawn in a consent entered in court on 24th January 2013, and there was no judgment entered by the court. He submitted that he was therefore on record procedurally. This court reserved ruling on the preliminary issue.

I have carefully considered the arguments made by the parties. The main issues to be decided are whether there is a judgment herein entered into by the court, and if so, whether the Plaintiff's Advocate has complied with Order 9 Rule 9 of the Civil Procedure Rules. A judgment is defined by the **Black's Law Dictionary, Ninth Edition** at page 918 as "a court's final determination of the rights and obligations of the parties in a case". Section 25 of the Civil Procedure Act which provides for judgments and decrees states as follows:

25. The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow:

Provided that it shall not be necessary for the court to hear the case before pronouncing judgment

(i) where the plaint is drawn claiming a liquidated demand, and either—

(a) the defendant has not entered such appearance as may be prescribed; or

(b) the defendant, having entered such appearance, has failed to file a defence within the time prescribed; or

(ii) in such cases as may be prescribed under section 81 (2)(f).

The cases referred to under section 81(2)(f) are those where a summary procedure is used to recover debts, liquidated demands or immoveable property.

In **Ngome v Plantex Company Limited (1984) KLR 792**, the Court of Appeal held that a judgment is a judicial determination or decision of a court on the main question or questions in a proceeding. These authorities show that there must be a consideration of, and determination on the issues before the court, before judgment is entered for or against a party with regard to the said issues or questions. It is my considered opinion that a withdrawal of a suit does not entail a determination of any questions or issues before the court. In a withdrawal the parties retract or terminate proceedings or suit before they can be heard and determined on merit. This is also clearly the intention envisaged in withdrawal of suits under Order 25 Rules 1 and 2 of the Civil Procedure Rules which provide as follows:

“1. 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. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(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.”

It is evident from these provisions that parties are free to proceed with subsequent actions on the same cause of action after withdrawal of a suit, and this court finds that for these reasons a withdrawal of a suit cannot be a determination of a suit on its merits and/or judgment.

In light of this finding this Court also finds that Order 9 Rule 9 of the Civil Procedure Rules is inapplicable in the circumstances of this case, as no judgment has been passed. Order 9 Rule 9 provides as follows:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and

the proposed incoming advocate or party intending to act in person as the case may be”

I have perused the court record and find that on 5th February 2013 the Plaintiff did file a Notice to Act in Person dated 17th December 2012. The Plaintiff’s Advocates thereafter filed a Notice of Appointment on

13th March 2013 of the same date. I therefore find and order that the Plaintiff's Advocates are properly on record as they have complied with the applicable rule in the circumstances of this case namely Order 9 Rule 7 of the Civil Procedure Rules. This rule provides as follows:

“ Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.”

I further order that the Plaintiff's Notice of Motion dated 13th March 2013 is properly on record and do proceed to full hearing. There shall be no orders as to costs.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____23rd____ day of ____July____, 2013.

P. NYAMWEYA

JUDGE