



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO.109 OF 2010

PROJECT KENYA INTERNATIONAL.....PLAINTIFF

VERSUS

PETER WANJOHI KAMAU..... DEFENDANT

R U L I N G

On the 17th of September 2010, by way of plaint dated 15/9/2010, the **plaintiff** commenced a suit against the defendant for a *declaration that the defendant holds the suit properties in trust for the plaintiff and therefore the latter should transfer the suit properties to the former forthwith* .He also prayed that *In the alternative and without prejudice to the claim, the defendant to return his money or monies used in purchase of the properties* .Lastly he prayed for costs of the suit and interest at court rate and any other or further relief the Honourable Court could deem fit to grant.

Summons to enter appearance were issued on 20/9/2010 in compliance with order V rule 1 of the Civil Procedure Rules as it then was.

Though there is no affidavit of service of the summons to enter appearance the memo of appearance was filed on the 8th of October 2010 and therefore this court presumes that the summons accompanied by plaint were served on the defendant. The defendant filed his defence and a counter claim for general damages for defamation and character assassination inter alia on the 19th of October 2010 .

However, unknown to the defendants, by the time of filing appearance and defence the plaintiff had discontinued the whole suit against the defendant.

On the 9th of November 2010, the defendant filed a bill of costs dated 4th of November 2010 claiming Kshs.279,182/= as costs of the suit.

When the matter came up for taxation of the defendants Bill of Costs Mr. Mugambi raised a preliminary objection on a point of law that the Taxing Master did not have jurisdiction to entertain the same since the suit had been withdrawn before the defendant filed memorandum of appearance and defence.

The Honourable Magistrate considered the preliminary objection and the submissions of both counsel and properly directed himself that the issue for consideration was whether the defendant is entitled to costs in the suit that is withdrawn after service of summons.

On this issue, the Honorable Magistrate found that the defendant who has been served with the summons to enter appearance and defence and files the memo of appearance and defence after the suit has been withdrawn is entitled to costs upon request in writing and this would be followed by an endorsement in writing by the Deputy Registrar. Since this procedure was not followed, the Honorable Court found that the process of taxation of the Defendant's Bill of costs was premature. Eventually the Bill of costs was struck out on the 17/3/2011.

On the 17th of May 2011, by application dated 5th May 2011 the defendant applied for an order that this court do grant the defendant the costs of the withdrawn suit together with interest thereof.

The application is supported by the affidavit of Peter Wanjohi Kamau the defendant herein who states that he was served with summons to enter appearance on the 27/9/2010. On the 28th September 2010 he instructed his advocate on record who charged him a fee of Kshs.285,000/= all inclusive. That he made a down payment of Kshs.150,000/= on the 1st October 2010 and was issued with a receipt No.4504. His advocate filed appearance and served it upon M's Ng'ang'a Munene & Co. Advocates on 8th October 2010 and later filed defence and counterclaim and served it upon Ng'ang'a Munene Advocate on 19th October 2010. On the 1st November 2010 the defendant was personally served with notice of withdrawal of the entire suit dated 29th September 2010 and filed in court on 30th September 2010 and upon receiving the said notice he forwarded it to his advocate for further action. His advocate filed a Bill of Costs but the taxing master struck it out on grounds that there was no order by the judge awarding costs. The defendant applicant is categorical that had the withdrawal notice been served on him promptly and or within 7 days of filing, he would not have incurred costs in defending the suit and therefore he is entitled to his full party and party costs against the plaintiff/respondent.

In reply the plaintiff/respondent, through Teri Crane filed a replying affidavit whose import is that the application does not disclose any material on the basis of which this honorable court can exercise its discretion under the law to grant the orders for costs and interest sought by the defendant. He further states that the Notice of withdrawal was filed on 30/9/2010 and endorsed on the same date. The plaintiff is convinced that since the memo of appearance and defence were filed after the withdrawal of the suit, the only reason for filing the same was to obtain costs.

He finally states that it would be unconscionable to saddle the plaintiff with costs for a suit that it had withdrawn.

During the interparte hearing Mr. Kiama for the applicant submitted that the summons to enter appearance was served to the plaintiff together with plaint. In response to the summons to enter appearance, the defendant filed memo of appearance and defence. The **gravamen** of the defendants/applicants case is that he is entitled to costs as he was not served with the notice of withdrawal.

Mr. Mugambi on his part argued that the memo of appearance and defence were filed on 8/10/2010 and 19/10/2010 respectively after withdrawal of suit and the endorsement of the court made on 30/9/2010.

Mr. Mugambi was not clear in his submissions as to whether the notice of withdrawal of suit was served. I have not seen an affidavit of service of the notice of withdrawal of suit or an endorsement by the defendant on the notice. He submits that the defendant was aware that the suit was withdrawn as the endorsement is on record. Listening to Mr Mugambis submissions it can be presumed that he either expected the defendant to peruse the court file before filing any document or the registry to stop the defendant from filing any document after withdrawal of suit and yet he had the legal obligation of serving the notice of withdrawal of suit on the defendants.

Mr. Mugambi also argues that the supporting affidavit does not disclose whether it is sworn on information or belief and that Paragraph 12 does not separate matters sworn on information and belief.

I have considered the submissions of both the applicant and respondent and do agree with the

submissions of Mr. Mugambi that this court has a discretion to award costs and the discretion should be exercised judiciously and not capriciously. **Order 25 rule 3 of the Civil Procedure Rules** provides that upon discontinuation of a suit and upon request in writing by any defendant the Registrar has the power to 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. The import of the above is that where the suit has been wholly withdrawn the defendant can request for costs for the whole suit, however where the suit is partly discontinued, the defendant can during the hearing of the suit apply for costs of the discontinued part.

However, the defendant has not approached the court under Order 25 (3) but has approached the court under **section 27 of the Civil Procedure Act**.

Section 27 of the Civil Procedure Act provides as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

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 reason otherwise order.

2. The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

This section gives the court unfettered discretion to award costs plus interest.

The case before this court can be distinguished from the authority of **KOHLI -VS- POPATLAL (1964) EA Page 219** relied upon by the respondent as the facts in both cases are different. In the suit before this court there was no misnomer whilst in the authority cited there was a misnomer as the plaintiff had sued a deceased person but served the defendants who entered appearance and defence without stating that they were not the defendant. The magistrate in the latter case gave the respondent leave to discontinue suit but made no order as to costs because in his opinion the second appellant should not have accepted service or should have set of their defence that they were not the defendant. The magistrate exercised his discretion considering the fact that the person who was sued was not alive and therefore the appellants should not have accepted service or should have set of in their defence that they were not the defendant.

On appeal from the supreme court to the court of appeal at Nairobi it was held by **Grabbe** and **Crawshaw J.J.A, Newbold** dissenting that the failure to disclose the death of the defendant described in the plaint was not sufficient reason for the magistrate to deprive the second appellants of their costs. The distinguishing facts in the two cases is that in the suit in dispute the defendant was served with the plaint, summons to enter appearance and finally filed appearance and defence but was not aware of the withdrawal of the suit due to failure of the plaintiff to serve the Notice of withdrawal.

I do find that the defendant/applicant took some steps after receiving the summons to enter appearance and therefore he is entitled to costs of the discontinued suit. He had accepted service and perused the documents and due to the failure by the plaintiff to notify the defendant of the withdrawal he erroneously filed appearance and defence.

Though the plaintiff argued that order XXIV rule 1 of the Civil Procedure Rules as it then was before being repealed by the new Civil Procedure Rules 2010 did not provide for service of the notice of withdrawal to the defendant this court is called upon to apply to overriding objective of law, to do justice

to the parties to ensure that ends of justice meet. The overriding principle of law and the authority of the court has now been permanently inscribed in our Supreme Law through the provision of Article 159 of the Constitution which provides;

“(2) (d) Justice shall be administered without undue regard to procedural technicalities;”

“(2)(e) the purpose and principles this Constitution shall be protected and promoted”

I do find that service of the notice of withdrawal of suit though not provided for by the repealed Rules of Civil Procedure was a requirement under natural law ,

The submission by Mr. Mugambi that the supporting affidavit does not disclose matters sworn on information and belief and therefore the same should be struck out does not hold any water as the defendant has generally stated that what is deposed to is true to the best of his knowledge, belief and information. Moreover the plaintiff should have applied to cross-examine the defendant on his supporting affidavit. The case of ***Prenchard Rakhil Ltd and Another -VS- Quarry Services Ltd and Others*** is not relevant in this matter as the facts In the supporting affidavit are facts that are on record, In the pleadings and proceedings and therefore entertaining Mr. Mugambi's argument would amount to administering justice with undue regard to technicalities.

The upshot of the foregoing is that the defendant is awarded costs for the discontinued suit to be assessed by the Deputy Registrar in accordance with the Advocates Remuneration Order. However, the court declines to award interest on costs on grounds that the suit was withdrawn before the filing of memo of appearance and defence, moreover interest on costs can only be given if specifically pleaded and prayed for in the defence and counter claim and the court finds it reasonable to award the same. The facts of this suit do not allow me to exercise my discretion in awarding interest on costs as the suit was terminated before the defendants pleadings were filed and therefore it would be unreasonable to award interest. Furthermore even if the court was to look at the defence and counter claim there is no request for interest on costs. I do further order that costs of this application be borne by the respondent. The taxing officer to take into consideration that the suit was withdrawn before the appearance and defence were filed when assessing the costs to be paid. Orders accordingly

Dated, signed and delivered at Nyeri this 28th day of August 2013.

A. OMBWAYO

JUDGE