



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
ENVIRONMENTAL & LAND CASE 561 OF 2010

TATU CITY LIMITED
KOFINAF COMPANY LIMITED.....PLAINTIFFS

VERSUS

ROSEMARY W. NJAU
JOSEPHINE MWAGIRU
ANN N. WALKER

STEPHEN MBUGUA MWAGIRU.....DEFENDANTS

RULING

By a notice of motion dated 1st July, 2011, **STEPHEN MBUGUA MWAGIRU (4th Defendant)**, sought the following orders *inter alia*:

“1. That this honourable court be pleased to strike out the notice of discontinuance of the suit herein dated 27th day of June, 2011.”

This application is brought under the inherent powers to make orders as may be deemed fit to prevent the abuse of the court process and in the interest of justice. The plaintiffs filed a notice of preliminary objection against that notice of motion. When this matter came up for hearing, Mr Havi, learned counsel for the plaintiffs, was of the view that the preliminary point of law would dispose of the notice of motion dated 1st July, 2011.

A brief background of this matter based on the undisputed facts is that on 18th November, 2010, the plaintiffs filed the suit herein through an originating summons against the 1st, 2nd and 3rd defendants seeking *inter alia* an order to remove caveats that were lodged by the said defendants on the suit properties.

On 5th May, 2011, the 4th defendant filed an application seeking to be enjoined in the suit as a defendant. This application was allowed by consent of all parties which was recorded in court on 30th May, 2011. The 4th defendant filed an application seeking to strike out the entire suit or a stay of proceedings pending the determination of *winding up cause numbers 29 and 30 of 2010*. On 27th June,

2011, the plaintiffs filed a notice of discontinuance of the suit against the 4th defendant. That notice to discontinue the suit was filed by the plaintiff in court without reference to the 4th defendant. It is what has precipitated this notice of motion.

According to the plaintiffs, the 4th defendant has no *locus standi* to take out the notice of motion nor is there jurisdiction to consider the motion in view of the withdrawal of the suit against the 4th defendant. Secondly, the notice of motion is an abuse of the court process in view of the rulings delivered in this matter on 19th January and 19th April, 2011. Mr Havi made extensive oral and written submissions to support the preliminary objection. On the other hand, Dr Kuria, learned counsel for the 4th defendant, opposed the preliminary objection and raised the following issues which were reiterated by counsel for the 1st, 2nd and 3rd defendants.

Firstly, by the 4th defendant filing a replying affidavit to the originating summons, he raised issues which amount to his counter claim. Thus the plaintiffs could not unilaterally purport to withdraw the suit against the 4th defendant. Secondly, the 4th defendant was allowed to join this suit as a party to the proceedings by consent of all the parties. The plaintiff purported to withdraw the suit without consulting the 4th defendant. The 4th defendant was entitled to make representation, the suit was purportedly withdrawn against the principles of natural justice that no party shall be condemned unheard.

Moreover, the notice of withdrawal was not adopted as an order of the court by the Deputy Registrar and according to many decisions that were cited, the notice of withdrawal does not take effect until it is adopted by way of an order of court.

At this point, before engaging in a lengthy and detailed repetition of the submissions by all parties, it is my humble opinion that there are matters of both facts and law in this matter that are not agreed upon.

- It is evident that the parties are at variance on whether or when (if at all), the notice of withdrawal of the suit took effect.
- Whether the plaintiff could withdraw the suit against the 4th defendant after a consent order was recorded with the plaintiff's approval for the 4th

defendant to be made a party to the suit, just for the plaintiff to decide to discontinue the suit alone.

- The plaintiffs have to offer an explanation why they changed their minds and did not consult the 4th defendant when the suit was discontinued.
- Whether a plaintiff has unfettered discretion to withdraw a suit against a defendant after a defence has been filed without notice to the defendant.
- Whether the 4th defendant's replying affidavit constitutes a counterclaim is also a disputed matter of both fact and the law.

For the aforesaid reasons, the preliminary objection is misconceived and I have no hesitation to order it dismissed with costs to the respondent. This is the tragedy of wasting the courts' time with preliminary objections; judicial time that could have been used to determine the substantive motion. As I end this ruling I wish to echo the words of Sir Charles Newbold P in the case of **MUKISHA BISCUIT COMPANY VS WEST END DISTRIBUTORS EALR [1969] EA page 71:**

“The first matter relates to the increasing practice of raising point, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the

facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.”

This practice still continues forty three [43] years after that landmark decision was rendered!!

Parties have to appear before the **Environmental and Land Division** to fix a date for the notice of motion dated 1st July, 2011.

Ruling read and signed this 30th day of March, 2012.

MARTHA KOOME

JUDGE OF APPEAL

Note:

This application was heard and concluded on 1st December, 2011, when I was a Judge of the High Court. The matter was pending for ruling when I was appointed as a Judge of the Court of Appeal. I proceeded to write and append my signature thereto in my new capacity.