



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA

AT KITALE.

CIVIL CASE NO. 12 OF 2004.

DAVID SANG KIPSOI)
ROBERT S. KIPSOI).....APPLICANT/PLAINTIFF

VERSUS

JOHN K. KOSGEL.....RESPONDENT/DEFENDANT.

R U L I N G.

1. By a ruling delivered on 2nd December, 2008, judgment was entered against the plaintiff in favour of the defendant on the counterclaim. On 20th January, 2011, the applicant/plaintiff filed a notice of motion seeking a review, variation or setting aside of the orders of 2nd December, 2008. When that application came up for hearing, **Mr. Wanyonyi**, learned counsel for the plaintiff/applicant sought an adjournment of the matter so that he could have amended the application. The adjournment was granted and the application dated 20th January, 2011 was fixed for hearing on 21st February, 2011. On that date, **Mr. Wanyonyi** informed court that he had filed an application on the same day seeking to amend the application dated 20th January, 2011.

2. For that reason the matter was adjourned to enable counsel to the respondent to respond to the new application for amendment. The matter was fixed for hearing on 8th April, 2011 when **Mr. Wanyonyi** yet again indicated that he had filed yet another notice of motion dated 23rd March, 2011 and that he had withdrawn the notice of motion dated 20th January, 2011 by filing a notice of withdrawal dated 25th March, 2011. **Mr. Kiarie**, learned counsel for the defendant/respondent vehemently opposed the notice of withdrawal of the application dated 20th January, 2011 which had been fixed for hearing and to which he had responded to. He cited the provisions of Order 25 rule 2 of the Civil Procedure Rules which provides that:-

“Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.”

3. Counsel for the respondent further argued that it is unprocedural for the applicant to file a notice of withdrawal without seeking the consent of the other party, he therefore urged this court to strike out the notice and to give directions on costs. According to **Mr. Kiarie**, the application dated 23rd March, 2011, is an abuse of court process because the applicant ought to have withdrawn the earlier application properly by seeking the consent of the respondent or the leave of the court, before filing yet another one. He urged the court to strike the subsequent application until the applicant complies with the provisions of order 25 (2) of the Civil Procedure Rules.

4. It is common ground that the applicant filed a multiplicity of applications. The notice of motion dated 20th January, 2011,

another notice of motion dated 21st February, 2011, then he purported to withdraw the notice of motion dated 20th January, 2011 without following the laid down procedure by just dropping a notice of withdrawal which was not endorsed by the court and then he proceeded to file yet another notice of motion dated 23rd March, 2011. Obviously, this is an abuse of court process. The applicant should have informed the court and sought leave to withdraw or sought the concurrence of the other side as provided for under order 25 of the Civil Procedure Rules. A reference to a suit under the provisions of section 2 of the civil procedure Act also refers to civil proceedings commenced in any manner.

5. In the circumstances, I order the notice of withdrawal which was irregularly filed be and is hereby struck out. The applicant should comply with the provisions of Order 25 (2) of the Civil Procedure Rules if he intends to withdraw the notice of motion dated 20th January 2011. It follows also that the application dated 23rd March, 2011 is an abuse of the court process as it is a duplication of the notice of motion dated 20th January 2011. It also faces the same fate of being struck out with costs to the respondent.

Ruling read and signed this 20th day of May, 2011.

M. KOOME.

JUDGE.