



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

ELC NO. 419 OF 2003

RACHAEL NJOKI WAINAINA.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

RULING

The plaintiff/ applicant brought this suit against the defendant by way of Originating Summons under Order XXXVI Rule 3D of the Civil Procedure Rules for determination of several questions thereunder. Subsequently however, the Originating Summons was dismissed and the court ordered that the costs be paid by the plaintiff and her colleagues. The costs were taxed at Kshs. 13,770,105/= all inclusive. There is now before me an application by way of Chamber Summons under Order XX Rules 6, 19(2), 20 and 22 of the Civil Procured Rules and Section 3A of the Civil Procedure Act for the following orders,

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2. That this Honourable Court be pleased to order a stay of the decree and all consequential orders pending the hearing and determination of this application.

3. That this Honourable Court be pleased to issue an order that the decree issued on 23rd May, 2005 be amended and or varied as against the 1st plaintiff/applicant.

4. That the costs of this application be in the cause.

The grounds upon which the said application is based are:

a) The 1st plaintiff/applicant is merely the first plaintiff in the suit.

b) That when the suit was dismissed with costs for want of prosecution on 15th April, 2005 it is all the plaintiffs who have to pay the defendant's costs and not the 1st plaintiff alone.

c) That the defendant has commenced execution proceedings for costs against the 1st plaintiff alone

when there are so many plaintiffs who had sued in their own capacity.

d) That the 1st plaintiff is ready and willing to deposit in court her share of the costs due to the defendant.

e) That the suit was not a representative suit.

f) That the interests of justice will be served once the decree is amended to reflect the correct amount of money the 1st plaintiff is required to pay the defendant.

There is in addition, an affidavit sworn by the 1st plaintiff/applicant Rachael Wainaina. The application is opposed and the learned counsel for the defendant has filed grounds of opposition thereto stating:

1. That the application is incurably incompetent.

2. That the application lacks merits and is an abuse of the process of court.

3. That the application is not filed timeously.

4. That this Honourable Court is *functus officio* and cannot entertain the current application.

Both learned counsel for the parties have filed submissions which I have read. The order for costs followed the dismissal of the Originating Summons by Kubo J on 15th April, 2005. There were some intervening proceedings thereafter including taxation of the bill of costs which may have delayed the filing of this application. Whatever the case, the order for costs appears in the last paragraph of the ruling which reads as follows,

“The upshot is that the plaintiff and her colleagues are hereby ordered to bear the costs of this suit. If they would like to sue the lawyers who acted for them, that is up to them. Orders accordingly”.

Order XX Rule 6(1) reads as follows,

“6(1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.”

I have looked at the Originating Summons which was filed by the plaintiff herein. The plaintiff describes herself as Racheal Njuki Wainaina (Suing on her behalf and on behalf of all members of Embakasi Fedha Self Help group). This title was never amended to describe the plaintiff as the 1st plaintiff. In effect therefore, she must have been carrying the mantle of the rest of the members and it is a misdirection for her to be described as the 1st plaintiff/applicant in the certificate of urgency and the Chamber summons filed on her behalf. Indeed all along she has used the plural word of plaintiffs in the Originating Summons and in the affidavit in support thereof she stated in paragraph 1 thereof as follows,

“That I am a Kenyan adult of sound mind, born in 1920 and un- employed, founder member of Embakasi Fedha Self Help Group and have authority from other members to swear this affidavit”.

It is her who provided the plot numbers set out in paragraphs 1,2 and 3 of the Originating Summons. Whether or not she had absolute and express authority to institute the suit is for her to say. It is clear however, that the suit she brought in that capacity was struck out for want of prosecution. Costs follow the event and the suit having been dismissed the plaintiff is bound to bear the costs. That is, to pay the costs to the defendant.

There was no appeal that she filed following the said judgment neither was there any application to review the same. In the absence of any such steps taken, there is no recourse as sought by her in the present application. Additionally, by its ruling on 15th April, 2005 the court become *functus officio* and cannot revisit the said ruling.

As the plaintiff did not deem it necessary to reveal the names of the other members, no order can be issued that may condemn anyone without a hearing. She elected to move the court and must live with the consequences. With respect therefore, I am unable to amend or vary the decree of this court because it flows from the ruling from which it was extracted. It follows therefore that, this application fails and is therefore dismissed with costs to the defendant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 14th day of June, 2011

A. MBOGHOLI MSAGHA

JUDGE