



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 646 OF 2005 (OS)**

**SAMSON RATEMO OYUGI.....PLAINTIFF**

**VERSUS**

**POSTAL CORPORATION OF KENYA.....DEFENDANT**

**RULING**

On 15<sup>th</sup> November, 2005, the Plaintiff approached the Court by way of an Originating Summons dated 10<sup>th</sup> November, 2005 seeking a determination of two (2) questions, namely:-

- 1. Whether the Applicant is indebted to the Respondent in the sum of Kshs. 500,000/- with interest thereon at the rate of 5% since 2001 to date, or at all.**
- 2. Whether the Applicant, having fully paid the loan (obtained from Postal Corporation of Kenya), is entitled to a Discharge and release of the documents of the title of the said L.R. Number Lenginet Settlement Scheme/230**
- 3. Who should pay the costs of this suit.**

A Replying Affidavit was filed in opposition to that originating summons on 8<sup>th</sup> December, 2005. Directions were taken on 22<sup>nd</sup> February, 2006, on 6<sup>th</sup> November, 2006 and 29<sup>th</sup> January, 2007, respectively the suit was removed from the cause list for reasons given by the court. No further action was taken by the parties and on 21<sup>st</sup> August, 2009, the court on its own motion issued a Notice to Show Cause why the suit should not be dismissed for want of prosecution. The Notice came up before Honourable Kimaru J on 16<sup>th</sup> October, 2009.

On the said 16<sup>th</sup> October, 2009, both the Plaintiff and Defendant were ably represented by their counsels Mr. Kamere and Mr. Muya, respectively. Both counsels in addressing the Court on the Notice before it, addressed the court to the effect that either the Suit had been settled or abandoned by the Plaintiff and that the only issue pending was one of costs. Having heard the parties, Hon. Kimaru J. made an order dismissing the suit for want of prosecution. The Honourable Judge did not make any order as to costs.

By a Notice of Motion dated 26<sup>th</sup> April, 2010, the Defendant has applied under Order L Rule 1. Order XXIV of the Civil Procedure Rules and Sections 3A and 27 of the Civil Procedure Act praying for judgment for the costs of the suit. The grounds are that the suit, was commenced prematurely without the Plaintiff having exercised any due care and diligence as to the whereabouts of the original title, that all along the original title was in the possession of the Plaintiff and that is why the Plaintiff abandoned the suit, that the Defendant had wrongly been dragged to a long rigorous, tedious and expensive court process

and had as a result incurred heavy losses in defending the suit.

The Plaintiff on his part filed grounds of opposition to the effect that the Defendant is not entitled to costs and that the application is otherwise incompetent misconceived and a gross violation of the due process. He also filed a preliminary objection on a point of Law which was also argued as part of the Grounds of Opposition. In it, he took objection to the annexures to the Affidavit in support on the grounds that they had not been marked and that the application was frivolous.

Both Mr. Muga for the Plaintiff and Mr. Kamere for the Defendant addressed me on the application reiterating what I have summarized above.

Order 25 (order 24 of the former Civil Procedure Rules) provides:-

- 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.**  
**(3) The provisions of this rule and rule 1 shall apply to counterclaims.**
- 3. Upon request in writing by any defendant the registrar shall 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.”**

In my view, order 24 (currently O25) of the Civil Procedure Rules applies to instances where a party withdraws or discontinues its suit. Rule 1 thereof does not address the issue of how the issue of costs has to be dealt with where a suit has been withdrawn but if the provision is read together with Section 27 of the Act, Costs would follow the event.

On discontinuance, Rule 2 is very specific that the court will give terms as to costs. However, the matter before me is not on a withdrawal or discontinuance of a suit, it is where the Court on its motion dismissed the Suit for want of prosecution under Order 17 Rule 2(1). That rule does not address the issue of costs.

I am of the view that in such circumstances since the court is the one which takes the initiative to dismiss the suit for inaction on the part of the parties, the court retains the discretion as to whether any costs are to be paid and by who.

In the case before me, the issue of costs was raised before Kimaru J and in his wisdom, the Judge dismissed the suit without making the order as to costs. To my mind, the issue of costs did not escape the mind of the Judge. That issue was raised by both counsels but he was silent on it when dismissing the suit. My view is that the Judge may have consciously failed to make an order as to costs because both parties had failed to take any step in the proceedings for a long time. If the Defendant was minded that the continued stay of the suit in the court was oppressive to it, the Defendant would have either listed the same for trial or simply applied for it to be dismissed.

In view of the foregoing I have come to the conclusion that granting the orders sought would be sitting on appeal on the decision of Kimaru J made on 16/10/09 or reviewing the same without a proper application therefor. Accordingly, I dismiss the Notice of Motion dated 26<sup>th</sup> April, 2010 but due to the history of this

litigation and the complaints the Defendant has raised in the Affidavit in Support of the Motion, I make no order as to costs on the application. It is so ordered.

Dated and delivered at Nairobi this 26<sup>th</sup> day of October, 2011

**JUSTICE A. MABEYA**