



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 375 OF 2008

LORNA AMIMO.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LTD & ANR.....DEFENDANT

Coram : Mwera J.
Kwengu for Plaintiffs
Mrs. Mbabu for 1st Defendant
Njenga for 2nd Defendant
Njoroge court clerk

RULING

By the motion dated 13.6.11, brought under sections 27, 1A 1B of Civil Procedure Act and Order 50 rule 1 of Civil procedure Rules, the 1st defendant laid the prayer:

i) that it be awarded costs of the suit against the plaintiff and the 2nd defendant jointly and severally.

The grounds stated that the plaintiff and the 2nd defendant agreed (to settle the case) out of court and recorded a consent on 16.6.11. The plaintiff executed a discharge voucher compromising the suit with no further claims against the 2nd or 1st defendants. No provision was made for the 1st defendant's costs to which it is lawfully entitled.

The supporting affidavit by P. Mbabu, counsel for the applicant went over the history of the suit herein which ended with the compromise alluded to. The 1st defendant denied the plaintiff's claim of sh. 5.01 m. The settlement between the plaintiff and the 2nd defendant was for sh. 4m. It was averred that the plaintiff's whereabouts were not known – hence the present application.

A replying affidavit by Paul Gichuhi, the 2nd defendant's employee, stated that the plaintiff sued the 1st defendant in 2008. Then it joined the 2nd defendant. The two settled the matter and a discharge voucher was executed:

“7. That upon executing the discharge voucher, the suit herein was deemed as compromised and both the 1st and 2nd defendants discharged from any liability at all.”

That the above was communicated to the 1st defendant without protest. The court recorded all that on 16.5.11. So that discharged the 2nd defendant from any liability.

Asked to submit the 1st defendant/applicant reiterated the contents of the motion adding that:

“ It is clear the discharge voucher compromised the plaintiff’s suit and/or claim against both defendants. It is also clear that the 1st defendant was not part of the negotiations.”

That costs follow the event. When the 1st defendant filed its defence it was clearly pleaded that liability fell on the 2nd defendant – not itself. It must get costs.

In the replying affidavit by the plaintiff the court was told that it sued the 1st defendant because it had taken a group accident insurance cover for her late husband, covered by the 2nd defendant who was under statutory management. As the suit was pending, the 2nd defendant sprung back to life and it settled the plaintiff’s claim. So it should pay the 1st defendant’s costs. The plaintiff considers that she still has a good claim against the 1st defendant – the balance of her claim of sh. 5.01m, because she only got sh. 4m from the 2nd defendant.

And in submissions the plaintiff urged the court to note that the 1st defendant’s prayer was hinged on the discharge voucher signed between her and the 2nd defendant. It was no party to. The 2nd defendant settled the matter as the 1st defendant’s insurers and so should pay it the costs.

And on the part of the 2nd defendant, it maintained that it was the plaintiff who dragged the 1st defendant to court and not itself. She should pay the costs.

In this court’s view, the plaintiff sued the 1st defendant as one who had executed group accident insurance for the deceased herein, and the insurance cover was given by the 2nd defendant. The 2nd defendant was under statutory management when the suit was brought. But when it got back into business, it was not said before or after joining as a party, it opted to settle the claim and that is the basis of paying sh. 4m to the plaintiff. As per the discharge voucher the plaintiff did:

“ hereby accept from INVESCO Assurance Company Limited the sum of Ksh. 4,000,000/= in full and final satisfaction of the subject claim under the discharge voucher and the subject suit.”

Accepting that sum in full and final satisfaction of the claim, meant that the benefit sought, costs, interest etc had been satisfied and settled because by that:

“ the pending suit and all issues arising therein will be deemed as fully compromised and no further claim will be made against INVESCO Assurance Company or Kenya Pipeline Company

Ltd” (underlining added).

When the plaintiff amended its plaint she pleaded, *inter alia*:

“ REASONS WHEREFORE the plaintiffs (sic) prays (sic) judgement against the defendants jointly and severally” (underlining added)

for sh.5.01 m costs, interest etc.

Now that she got satisfaction from the 2nd defendant whom she discharged by compromise between them, it is only fair that the plaintiff do pay costs in this cause to the 1st defendant. She took it to court, she got paid by its co-defendant, she should pay the 1st defendant its costs. The 1st defendant spent money, time and energy to defend itself. It deserves the costs.

Prayer granted with costs.

Delivered on 13.10.11.

J. W. MWERA

JUDGE