



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVILSUIT NO. 431 OF 2010**

**PATRICK KIGERA MATHIA & ANR.....PLAINTIFFS**

**VERSUS**

**DR. PETER MUNGAI NGUGI & 2 OTHERS.....DEFENDANTS**

Coram : Mwera J.  
Wangai for plaintiff  
Mrs Otaba for 3<sup>rd</sup> defendant  
Sameer for 1<sup>st</sup> & 2<sup>nd</sup> applicants  
Njoroge court clerk

**RULING**

About to follow is a composite ruling regarding two (2) applications herein. On account of presentation the first one was a notice of motion dated 1.02.11 brought by the 3<sup>rd</sup> defendant under Order 25 rule 4 of Civil Procedure Rules and filed in court on 18.4.11. It had the main prayer:

i) that the suit herein be stayed pending payment of its one third costs in NRI RM CC No. 1931/2010 which the plaintiffs discontinued on 15.9.10.

The grounds therein were that the plaintiffs instituted RMCC No. 1931/10 against the defendants but then wholly discontinued it on 15.9.10. Judgement for costs in the discontinued suit were awarded to the 3<sup>rd</sup> defendant as against the plaintiffs on 24.9.10. The plaintiffs had not paid them and yet they brought the present suit again against the 3<sup>rd</sup> defendant upon the same cause of action as in the discontinued suit - hence the present motion. One Kiragu Kimani, an advocate for the applicant, swore a supporting affidavit in essence expanding on the prayer and the grounds above except to add that costs were awarded to the 3<sup>rd</sup> defendant in a sum of sh. 55 426/= by a certificate dated 18.10.10. The 3<sup>rd</sup> defendant's lawyers demanded payment of those costs on 29.10.10. A reminder was sent on 10.11.10, warning of an application to stay the present suit, unless the said costs were paid. No payment was forthcoming and an application to stay suit was filed but was later struck out. Another demand letter to pay costs dated 24.1.11 was sent but still no payment has been made in respect of the costs of the discontinued suit - RMCC 1931/10. The record does not yield any papers in opposition to this application dated 1.2.11.

The second motion dated 24.6.11 by the 1<sup>st</sup> and 2<sup>nd</sup> defendants was filed on 28.6.11 under Order 25 rule 3

and Order 50 (no rules) of the Civil Procedure Rules. It, too, sought an order:

i) that the proceedings in the present suit be stayed until the plaintiffs paid pay the applicants' costs in RMCC 1931/10.

In the grounds and the supporting affidavit by Mr. S. Inamdar, Advocate, the same reasons were advanced that when the plaintiffs filed RMCC 1931/10 against the defendants appearance was entered, a defence filed but then the suit was discontinued. Costs certified at sh. 41,200/= were awarded, but not paid, yet the plaintiffs brought the present suit pleading same facts for the cause of action. They were caught up by Order 25 rule 4 Civil Procedure Rules 2010 – hence this motion.

Responding to the last motion – dated 24.6.11 in the grounds of opposition, the plaintiffs contended that the 1<sup>st</sup> and 2<sup>nd</sup> applicants have never served a demand for payment of the said costs. The 2 applicants filed a similar application dated 15.6.11 but later withdrew it with costs going to the plaintiffs. Those costs have not been paid yet. The orders under Order 25 rule 4 Civil Procedure Rules were discretionary but not as of right. Adding that the withdrawal of RMCC 1931/10 from the lower court was on account of pecuniary jurisdiction, the court was told that the joint defence there and that to the present suit was similar and no extra effort had been expended by the 1<sup>st</sup> and 2<sup>nd</sup> defendants in accomplishing that. If they succeeded here then they would get their costs once and for all. The motion was thus termed frivolous, scandalous and vexatious.

Asked to submit the 3<sup>rd</sup> defendant reiterated the factual basis of its motion dated 1.2.11 as already set out above. It went on to refer to Order 25 rule 4 Civil Procedure Rules, citing the case of **Teasdale Vs HSBC Bank (PLC) & Anr [2010] 4 AU ER. 630**. The elements captured in Order 25 rule 4 Civil Procedure Rules were set out in the light of the history of litigation from RMCC 1931/10 which was discontinued, to the filing of the present suit. It was argued that the plaintiffs were given reasonable time to pay the costs awarded by way of written notice but they did not comply. Citing Halisbury's **Laws of England** (5<sup>th</sup> Edn, Butterworths) and the **Supreme Court Practice Rules** (S & M 1985, Vol 1) the court was urged to grant the order sought.

And in support of their application dated 24.6.11 the 1<sup>st</sup> and 2<sup>nd</sup> applicants similarly went over the facts of the present proceedings, together with what was said for and against their application. Regarding demand for the costs to be paid, the 2 defendants maintained that they had stated so in their supporting affidavit that the plaintiff had been so specifically informed i.e. that unless the costs of the discontinued suit were paid, the 2 defendants would apply to stay this suit. So all along from the lower court judgement about those costs, the plaintiffs have been aware of their liability to pay up. This court should therefore in its discretion grant the sought orders.

In response to the 3<sup>rd</sup> defendant's motion dated 1.2.11, the plaintiffs stated that they were acting in person in RMCC 1931/10 and so M/s Kiama Wangai & Co Advocates in this cause are not agents of the plaintiffs as regards that cause. That firm had no instructions to respond to any matters touching on RMCC 1931/10. There was no evidence that the defendants had sought and failed to get their costs paid by the plaintiffs. And in any event costs of any kind could still be recovered in the current cause.

Turning to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's motion of 24.6.11, it was more or less a repetition of what was stated above in regard to the motion dated 1.2.11. But there appeared to be taken as a point of contention that while the 3<sup>rd</sup> defendant was awarded sh. 55,426/= as costs in the discontinued suit, the 1<sup>st</sup> and 2<sup>nd</sup> defendants got sh. 41,200/=. However the difference is not for this court to determine here.

To begin with Order 25 rule 4 Civil Procedure Rules, central to these proceedings, it mandates:

**“4. If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”**

The following elements may be extracted from rule 4:

- i) a suit is instituted and later discontinued by the claimant;
- ii) costs are awarded and certified in respect of that discontinued suit to the respondent(s);
- iii) those costs are known/demanded and not paid by the claimant;
- iv) the claimant, nonetheless files another suit upon the same or substantially the same cause of action;
- v) the court may order a stay of such subsequent suit until such costs have been paid.

In this cause the plaintiffs filed RMCC 1931/10 which they later discontinued as against the defendant/applicants here. Costs were awarded to the 3<sup>rd</sup> defendant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. It is not claimed that the plaintiffs were not aware of those costs at all. The 3<sup>rd</sup> defendant served a demand but the 1<sup>st</sup> and 2<sup>nd</sup> defendants do not appear to have done likewise. But the plaintiffs do not claim that they never knew or all the time were not aware of the fact that the costs had been awarded to the defendants and they fell to be paid. The plaintiffs do not claim that they are ignorant of the law ( Order 25 rule 4 Civil Procedure Rules) that to bring the subsequent suit (the present one), the court whether on its own motion or as is usual, the respondents/defendants in the discontinued suit, would move the court, to ask that those costs be paid first or the subsequent suit could be stayed. But still before payment of those costs the plaintiffs brought the present suit on the same or substantially same cause of action.

In the circumstances of this matter and so that the defendants are not moved from one suit to another with costs building up due to no acts of their own, e.g. to discontinue the earlier case(s), it is directed that the plaintiffs do first pay the costs due the 3<sup>rd</sup> defendant and the 1<sup>st</sup> and 2<sup>nd</sup> defendants in the suit RMCC 1931/10, it discontinued before proceeding in the present cause. That should be done in the next 30 days or if no payment is ever made, the present suit to remain stayed until after such payment.

Costs of the 2 applications to go to the applicants. Orders are granted.

Delivered on 3.10.11.

**J. W. MWERA**  
**JUDGE**