



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL SUIT107 OF 2006**

**REBECCA WAIRIMU NDURA**

**(The administrator of the estate of**

**JAMES NDURA GACHIA) :::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**V E R S U S**

**HOUSING FINANCE CO. LTD. :::::::::::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

This application has been brought pursuant to the provisions of Order 24 rule 4 of the Civil Procedure Rules. It seeks to stay these proceedings until the plaintiff pays to the defendant, the costs of an earlier suit.

That earlier suit, **REBECCA WAIRIMU NDURA** (suing as Administrator of the estate of **JAMES NDURA GACHIA (DECEASED) Vs. HOUSING FINANCE CO. LTD.**), was dismissed with costs, on 6<sup>th</sup> December 2006.

It is the contention of the defendant that the plaintiff ought not to be allowed to prosecute this suit until she pays the costs of the earlier suit. The said costs were assessed, by consent of the parties, to be in the sum of KShs.65,000/=.

Following the consensual assessment of costs, on 28<sup>th</sup> February 2007, the court file in the earlier case went missing. The defendant herein says that it has been unable to execute the order on costs, because the court file has not been traced.

Meanwhile, the plaintiff is said to have brought this case, in which the prayers sought are said to be the same as those in the earlier suit. As the parties to the 2 suits are also said to be the same, the defendant asks the court to stay the proceedings in this case until after the plaintiff pays the costs of the earlier suit.

But the plaintiff contends that the earlier suit was filed by her, as an individual, whilst in this current case she had filed suit as the administrator of the estate of the late James Ndura Gachia.

In her considered view, if the administrator was stopped from prosecuting the case, she would be unable to gather the estate together.

The plaintiff says that the defendant need only apply for the reconstruction of the court file in the earlier case, before taking steps to thereafter carry out execution against the plaintiff in that suit.

However, the defendant herein does not see the difference in the capacities in which the plaintiff herein and the plaintiff in the earlier suit had instituted proceedings against the defendant.

A copy of the plaint in the earlier suit was annexed to the affidavit in support of the application before me. Both in the case title and in the description of the plaintiff in that case, she was said to be;

**“The administrator” or**

**“the administratix”** to the estate of the late James Ndura Gachia.

Clearly therefore, the capacity in which the plaintiff herein has sued, is the same as the capacity in which she had sued the defendant in the earlier suit.

In both suits, the property **L. R. NO. BUTSOTSO/SHIKOTI/3471** is at the centre of the dispute. That property had been offered to the defendant as security for a loan of KShs.855,000/=, which the defendant had lent to James Ndura Gachia.

In both the suits, the plaintiff seeks an order that accounts be taken, because she believes that the defendant had received much more than it was entitled to.

Effectively, therefore, the cause of action is substantially the same in both suits.

Order 24 rule 4 of the Civil Procedure Rules, provides as follows;

***“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.”***

That rule appears to be targeting situations in which the plaintiff chooses to bring a case to an end, through discontinuance or withdrawal.

I would not say that when a case is brought to an end in a manner in which the plaintiff did not exercise his own free will to terminate it, the same considerations would apply.

In the matter before me it is the defendant who had raised a preliminary objection to the earlier suit. The court upheld the said preliminary objection, and dismissed the suit with costs. Therefore, it cannot be said that the plaintiff had discontinued the said earlier suit.

And the defendant has not satisfied me that even if the earlier suit had not been discontinued by the plaintiff, the provisions of Order 24 rule 4 of the Civil Procedure Rules would apply. I therefore do not find any good reason to apply the rule to this case.

I also share the view of the plaintiff, that the defendant may easily apply for the reconstruction of the court file in the earlier case, and thereafter take out execution proceedings. Perhaps the fact that the plaintiff herein will be available, as she takes steps to prosecute this suit, should be a good enough incentive to execute the order for costs in the earlier suit.

The application dated 11<sup>th</sup> February 2008 is dismissed with costs.

***Dated, Signed and Delivered, at Kakamega, this 5<sup>th</sup> day of February 2009***

**FRED A. OCHIENG**

**JUDGE**