



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 28 of 2001

THOMAS ABUGA N. MORIASI

ISABELLAH M. ABUTA PLAINTIFFS

VERSUS

K. T. D.A

KEBIRIGO LEAF BASE DEFENDANTS

RULING

The Defendants filed an application by way of notice of motion brought under Order XX1V rule 3 and sections 3 and 3A of the Civil Procedure Act. They prayed for orders that:

- (a) Judgment on costs be entered against **the plaintiffs**
- (b) **Leave be granted to the defendants' /applicants' Advocates to file a bill of costs on the part of the claim against the plaintiffs/respondents.**

The application was made on the grounds that a decree had already been issued for the suit to be withdrawn and that the suit had been wholly discontinued. The application was supported by an affidavit sworn by Rebecca Mbithi, the Legal Service Manager of the first defendant. She deposed that the plaintiffs had wholly discontinued their case against the defendants but the costs of the suit had not been paid to the defendants.

Mrs Odoyo for the defendants told the court that a notice of withdrawal of the suit duly signed by plaintiffs was filed on 16th June 2004. The plaintiffs stated in the said notice that the first plaintiff had been elected as a director of the defendants and pursuing this suit was going to cause prejudice and/or embarrassment to him. She urged the court to order that the costs of the withdrawn suit be paid to the defendants.

Mr. Ochwangi for the defendants opposed the said application. According to an affidavit sworn by the first plaintiff, subsequent to the filing of this suit but before the same was heard, the first plaintiff was elected as a Director of Kebirigo Tea Factory Company Ltd, of whom the defendants are its authorized agents.

On 22nd November, 2005 the Board of directors of Kebirigo Tea Factory resolved that the plaintiffs do

withdraw their suit with no order as to costs. An uncertified copy of the minutes of the Board of Directors' meeting of the aforesaid date was annexed to 1st plaintiff's affidavit. Minute 50/11/2005 No.2 stated as follows:

“The Board after consultation resolved to have K.T.D.A. repudiate the cases and close the files of Thomas Abuga Director without pursuing any costs since he had withdrawn all the cases he had against the company.”

Counsel admitted that the plaintiffs, having withdrawn their suit against the defendants, a final decree was issued on 15th September 2005. In his view therefore, the defendants' application had no merit.

According to the provisions of **Order XXIV rule 3** of the **Civil Procedure Rules**, once a suit has been wholly discontinued, any defendant may apply for costs of the suit. At the time when the notice of withdrawal of the suit was filed by the plaintiffs no consent was obtained from the defendants that they were willing to forego the cost of the suit.

The uncertified copy of the minutes of the defendants Board of Director meeting held on 22nd November 2005 is not authentic. The minutes were not signed by the secretary and the chairman and neither were they dated. If at all such a meeting did take place, the plaintiffs are at liberty to pursue the issue administratively. Such a document cannot operate retrospectively to deny the defendants the costs which they are lawfully entitled to. I allow the defendants' application as prayed.

DATED, SIGNED and DELIVERED at KISII this 13th day of May, 2008.

D. MUSINGA

JUDGE

Delivered in the open court in the presence of:

Mr. Otiso for the plaintiffs

Mr. Nyachiro for the defendants

D. MUSINGA

JUDGE