



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 283 of 2006**

**CASEMENT INDUSTRIES LIMITED .....PLAINTIFF**

**VERSUS**

**THE ATTORNEY-GENERAL.....1ST DEFENDANT**

**NATIONAL INDUSTRIAL CREDIT BANK LTD..... 2<sup>ND</sup> DEFENDANT**

**KENYA COMMERCIAL BANK LTD..... 3<sup>RD</sup> DEFENDANT**

**AZIZ MOHAMMED PIRAK BARUCH..... 4<sup>TH</sup> DEFENDANT**

**CHARLES BOSIRE..... 5<sup>TH</sup> DEFENDANT**

**ESTHER MUBOKA BOSIRE..... .6<sup>TH</sup> DEFENDANT**

**VINCENT JOSEPH KAMBO.....7<sup>TH</sup> DEFENDANT**

**TERESA KAMBO GIKONYO.....8<sup>TH</sup> DEFENDANT**

**RULING**

By notice of motion dated 18.12.07 stated to be brought under Order XXIV rule 2 (2) and Order L rule 1 of the Civil Procedure Rules plus sections 80 and 3A of the Civil Procedure Act, Cap.21, the plaintiff applied for orders setting aside court orders made on 28.11.07 withdrawing the plaintiff's suit with costs to the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. The plaintiff also applied for reinstatement of the suit for hearing on merit and that costs of the application be in the cause.

The grounds upon which the application is based are essentially that the suit was withdrawn by the then plaintiff company's advocate without the plaintiff's instructions to do so and against the plaintiff's instructions that the matter be fully heard on merit to its logical conclusion.

The application is supported by the affidavit of Antony Kamau, a director of the plaintiff company sworn on 18.12.07. The affidavit annexes a letter dated 17.12.07 addressed by G.M. Muhoro Advocates to the plaintiff herein confirming that the said advocates withdrew the suit without the plaintiff's instructions.

At the hearing of the application before me, the plaintiff/applicant was represented by learned counsel, Mr M.M. Nzavi; the 3<sup>rd</sup> defendant was represented by learned counsel, Mr W.M. Kamau; the 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents were represented by learned counsel, Mr P.N. Kerongo; while there was no appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants/respondents.

Plaintiff's/applicant's counsel asked this court to exercise its discretion in favour of the application on the basic grounds that the dispute involves two prime properties in Lavington, Nairobi; that no prejudice would be occasioned to any defendant if the orders sought are granted as each will be accorded a hearing on merit; that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants/respondents have not filed any papers in opposition to the application; and that the plaintiff/applicant is ready and willing to meet the costs of the current application.

On the other hand, counsel for the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants/respondents opposed the application.

Counsel for 3<sup>rd</sup> defendant/respondent relied on the replying affidavit of Chris Theuri, relationship manager of the 3<sup>rd</sup> defendant sworn on 17.01.08. The main points made by counsel for 3<sup>rd</sup> defendant were that the conduct of the plaintiff company prior to the withdrawal of the suit shows that the plaintiff had no interest in pursuing the suit. The said counsel pointed out that the plaintiff had previously filed chamber summons application dated 22.03.06 under certificate of urgency seeking restraining orders against the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants but that by the time the suit was withdrawn on 28.11.07, the chamber summons dated 22.03.06 had not been heard; that the said chamber summons was for hearing on 28.11.06 (*sic*) but that on the said date it was withdrawn together with the suit; and that the withdrawal was with the consent of the defendants. Counsel for 3<sup>rd</sup> defendant said that the order of withdrawal is binding and urged that the present notice of motion application dated 18.12.07 be disallowed.

For his part, counsel for 5<sup>th</sup> and 6<sup>th</sup> defendants submitted that the notice of motion application dated 18.12.07 is incompetent because it introduces the 7<sup>th</sup> and 8<sup>th</sup> defendants for the first time, which in his view cannot be done under Order XXIV. In the said counsel's view, G.M. Muhoro was duly on record to deal with the matter for the plaintiff and that if the plaintiff has a claim against his former advocate, his remedy lies elsewhere, not in setting aside of the consent orders. In the view of counsel for 5<sup>th</sup> and 6<sup>th</sup> defendants, the court has discretion in this matter under Order XXIV. Counsel for 5<sup>th</sup> and 6<sup>th</sup> defendants urged this court to dismiss the present application with costs to the 5<sup>th</sup> and 6<sup>th</sup> defendants.

In reply, plaintiff's/applicant's counsel said it was not correct to say that the 7<sup>th</sup> and 8<sup>th</sup> defendants were brought into these proceedings for the first time through the present application. He drew attention to chamber summons dated 01.11.07 which sought to amend the plaint to introduce the 7<sup>th</sup> and 8<sup>th</sup> defendants. Plaintiff's counsel submitted that the advocate then on record for the plaintiff acted beyond his mandate. Plaintiff's counsel also submitted that the replying affidavit of Kenneth Kinuthia Kariuki sworn on 26.04.06 on behalf of the 2<sup>nd</sup> defendant is not in answer to the current application. Plaintiff's/applicant's counsel reiterated that his application be granted.

I have given due consideration to the application now before court and the opposition thereto.

The court record shows that on 28.11.07, Mr Muhoro applied before Rawal, J to withdraw the suit herein and told the Judge that he (Muhoro) had instructions to withdraw the suit. The Judge recorded as follows:

**‘As the other counsel do not have objections except the costs, the suit is marked as withdrawn. Costs to to 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.’**

The record adds that there was no appearance for the 1<sup>st</sup> and 4<sup>th</sup> defendants at that session.

The present application is brought, *inter alia*, under section 80 of the Civil Procedure Act. That section permits a person considering himself aggrieved by an order of the court to apply for review. The section

adds:

**‘... and the court may it thinks fit.’**

Clearly, the court has discretion to grant or decline to grant the review sought.

On the question whether the present application introduced the 7<sup>th</sup> and 8<sup>th</sup> defendants for the first time, the record shows that on 02.11.07 the plaintiff filed an amended chamber summons dated 01.11.07 seeking to introduce the 7<sup>th</sup> and 8<sup>th</sup> defendants.

The application now before court raises complex issues revolving around principal-agent or client-advocate relationship and as to when an advocate as agent of his/her client/principal may or may not bind the principal. In the present case, there is a consent order of withdrawal of the suit recorded by the court. The then advocate for the plaintiff told the court in the presence and hearing of advocates for the 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants that he (the then plaintiff’s advocate) had instructions to withdraw the suit. The said advocate was still on record for the plaintiff. The court as well as the other parties represented at the session relied on the said advocate’s ostensible authority and entered a consent which was made an order of the court. Subsequently, the then plaintiff’s advocate wrote to the plaintiff to say he did not in fact have instructions or authority from the plaintiff to withdraw the suit. If the other parties or third parties acted on the withdrawal to their detriment, should they be subjected to the agony of being entangled in the withdrawn suit through its reinstatement? I hold that the circumstances of the matter at hand dictate that the withdrawn suit ought to be allowed to rest where it was laid through the consent order of 28.11.07. I agree with the submission of counsel for the 5<sup>th</sup> and 6<sup>th</sup> defendants that if the plaintiff company has a claim against its former advocate, the said plaintiff’s remedy lies elsewhere but not in the setting aside of the consent order of 28.11.07 or reinstatement of the withdrawn suit.

The notice of motion application dated 18.12.07 is hereby dismissed.

Having regard to the circumstances of the case, I direct that the parties bear their own respective costs of the present application.

Orders accordingly.

Delivered at Nairobi this 31<sup>st</sup> day of July, 2008.

**B.P. KUBO**

**JUDGE**