



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 134 of 1992

GLADYS MUKWALU MARANGU.....1ST PLAINTIFF

JAPHET MUTEMBEI MARANGU.....2ND PLAINTIFF

V E R S U S

EMILIO MARANGU M'NDIRI.....1ST DEFENDANT

ANJELO MUNENE MARINDI.....2ND DEFENDANT

CIVIL PROCEDURE AND PRACTICE

**q Withdrawal of suit –consequences of -costs upon withdrawal of suit –order XXIV
rule 3.**

**q Costs are at the discretion of court S. 27 Civil Procedure Act (Cap. 21 Laws of
Kenya)**

R U L I N G

The suit herein was instituted by a Plaintiff dated and filed on 23.04.1992. Summons to enter appearance against the Defendants was issued on 4th May 1992.

Together with the suit was filed a Chamber Summons under Order XXXIX seeking prayers for orders of inhibition against registration and injunction against the 2nd Defendant from trespassing, evicting, constructing any structures or in any other manner interfering with title No. MUTHAMBI/UPPER KARIMBA/278 & 279 until the suit is heard and determined and costs for the suit.

On 14.5.1992 the firm of B.G. Kariuki & Company filed a Notice of Appointment of Advocate for the 2nd Defendant, Angelo Munene Kariuki. The said firm also filed grounds of objection on the same day against the Plaintiff's Chamber Summons of 23.04.1992. They also filed a Replying Affidavit sworn by the Second Defendant against the said Chamber Summons for orders of inhibition and injunction.

On 15.05.1992 the Plaintiff's Advocates Mbae Mwarania & Co Advocates filed an Amended Plaintiff.

On 20/05/1992, the prayers for inhibition and injunction were granted. A Memorandum of Appearance was entered for the 2nd Defendant on 4/06/1992 and a defence on his behalf was filed on 23/6/1992. The defence is dated 22.06.1992.

The 1st Defendant Emillio Marangu M'Ndiiri filed his defence on 30/06/1992. The second defendant was served on 25.05.1992 with the restraining orders issued on 20th May 1992.

On 29.07.1992, the Plaintiff issued a Chamber Summons to the 2nd Defendant to show cause why he should not be committed to civil jail to which the 2nd Defendant filed on 12/08/1992 a Replying Affidavit sworn by him on 11.12.1992.

On 12/11/1992 a Consent Order was recorded before Kuloba J allowing the 2nd Defendant to continue occupying and cultivating the area where his house presently stands and which he currently cultivated until the payment or until further orders.

The matter was fixed for hearing on 3rd November 1992, 28th April 1993, 19th July 1994 but no hearing took place on those dates.

Agreed issues dated 28.09.1995 were filed on 29/09/1995. Then there was a lull until 17.7.2002 when a Notice of Change of Advocates was filed by the firm of Mwenda Mwarania Advocate & Co Advocates to act for the Plaintiffs. The matter was then fixed for hearing on 15.6.2006 when Mr. Akwalu learned counsel for the Plaintiffs told the court that he would like to withdraw from acting. Mr. Kariuki learned counsel for the 2nd Defendant then drew the court's attention to the fact that there had been injunctive orders issued on 30.4.1992 and that the matter had taken too long. The Hon Mr. Justice Lenaola observed that the injunctive orders had been in operation at the temporary stage for 14 years which was clearly an abuse of court process, and the plaintiffs were still not desirous of proceeding with the suit. The learned Judge proceeded for those reasons to discharge the orders.

The learned Judge then fixed the case for hearing on 15.11.2006 and directed the Plaintiffs' Advocates to file an application to withdraw from acting before that date; and ordered that if the Plaintiffs were not present on 15.11.2006, the court would be at liberty to dismiss the suit.

Those orders lifting the orders of inhibition and injunction made and issued on 30.04.1992, over title No. Muthambi/Upper Karimba/1278 and Muthambi/Upper Karinga 1229 made on 25.06.2006 and fixing the suit for hearing on 15.11.2006, were issued on 12th July 2006.

When the suit came for hearing before the Hon Mr. Justice Lenaola on 16/11/2006, in the presence of Mr. Akwalu for the Plaintiff and Mr. Gichunge for the Defendants it was ORDERED.

"1. That the plaintiff suit be and is hereby withdrawn,

2. That the parties to agree on costs and in default of agreement, the counsel to submit on the same".

The parties did not agree on the costs, hence the 2nd Defendant's submissions on costs dated 11.06.2008 and filed on 13.06/2008. Those are the facts or history of this matter. I set out my opinion in the paragraphs following of this Ruling.

The law governing the withdrawal of suits is set out in Order XXIV (2) & (3) Civil Procedure rules which rule says:-

1. (1) not in issue.

2. (1) Not in issue

(2) Where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit and otherwise, as are just."

(3) Upon request in writing by any Defendant the Registrar shall sign judgment for the costs of a suit

which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

In this matter, as a term or condition of the withdrawal of suit, the court ordered that the parties argue on costs, or in default the counsel (for the parties) submit on the same (i.e. issue of costs).

The second Defendant’s counsel submissions were dated and filed on 13.06.2008. He submits that the 2nd Defendant is entitled to the costs of the suit. The second Defendant has been participating in the suit for the last 17 years, having been dragged to the court by the Plaintiffs on an alleged cause of action which was subsequently withdrawn.

In the English case of DONALD CAMPBELL VS. POLLAK [1927] A.C. 232 at p.813 Lord Atkin said-

“It is well established that when a decision of such matter as the right of a successful litigant to recover his costs is left to the discretion of judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts.....If however there be, in fact some grounds to support the exercise by the trial judge of the discretion he purports to exercise the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide.....”

In the case of DEVRAM NANJI DATTANI VS HARIDAS KALIDAS DAWDA [1949] EACA 35 at 36 Sir John Gray C.J. (Zanzibar) said-

“From the decision which were cited to us during the hearing of the appeal.....it appears to me to be clear that a successful defendant; who after all is brought into court against his will, can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the action, has led to litigation, which but for his own conduct might have been averted.”

In this case as shown from the chronology of events it cannot be said that the 2nd Defendant has conducted himself in any manner whatsoever to deprive himself of the costs of this suit. There is no evidence of conduct on the part of the Second Defendant which led to the litigation which could have been averted but for such conduct either prior to or during the course of the action.

Having led the Second Defendant through the garden path for close to 17 years and over, and on the eve of the hearing after that period decided to withdraw the suit, the Plaintiffs are in my judgment, liable to the second Defendant and who in turn is entitled to costs not merely under Order XXIV, rule 2 (2) & 3 of the Civil Procedure Rules but also under the provisions of Section 27 of the Civil Procedure Act (Cap 21 Laws of Kenya). The said section provides as follows:-

27. (1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid, and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

Having withdrawn the case without any explanation at all, and therefore there being no reason for excusing the Plaintiffs from payments of costs, the costs must follow the event as prescribed in the proviso to section 27(1) of the Civil Procedure Act.

Counsel for the 2nd Defendant have also sought in their submissions and for the same reasons that the Court do exercise its discretion under Section 27(2) of the Civil Procedure Act and award interest on costs.

I think that under the circumstances of this case and on the same grounds that unless the Defendant has misconducted himself and which misconduct has led to the litigation which would otherwise have been avoided this suit has laden upon the 2nd Defendant for 17 years and over and all due to the Plaintiffs' failure to either prosecute the same or withdraw it at the early stages.

The court is in a bit of difficulty in determining in the absence of any global sum or figure on costs having been established, and therefore from what day the interest should commence to run. Under Section 26(1) of the Civil Procedure Act, interest other than on a money decree, (where interest may be payable before as well as after filing suit) interest on costs such as where a suit is withdrawn without any explanation should run from the date when summons to enter appearance or process was served upon the defendants that is from the commencement of incurrence of such costs as well as after such costs are ascertained or quantified until payment in full. Such interest should be charged at 14% till payment in full on the global sum either agreed upon or taxed and certified by the Taxing Officer.

In summary the 2nd Defendant shall have costs for the action and interest thereon at 14% shall be paid on all such costs. There shall be orders accordingly.

Dated delivered and signed at Meru this 25th day of July 2008

M. J. ANYARA EMUKULE

JUDGE.