



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Suit 1009 of 2004

- 1. STEPHEN KARANJA WAWERU)**
- 2. BENARD M. IRIA)**
- 3. FRANCIS KAMAU)..PLAINTIFFS/RESPONDENTS**
- 4. ESTHER MURUGI KAHANGI)**
- 5. FRANCIS KARIKA)**

VERSUS

THOMAS BARASADEFENDANT/APPLICANT

RULING

The defendant's application by Chamber Summons dated 30th August, 2005 was brought under s. 3A of the Civil Procedure Act (Cap. 21), and Order XXIV, rule 3 of the Civil procedure Rules. There was one substantive prayer,

“That the first, second, third, fourth and fifth plaintiffs pay costs to be taxed for withdrawing prayers (a), (aa), (b) and (bb) of the amended plaint on 7th October, 2004 and also for withdrawing Chamber application dated 27th September 2004 against the defendant/applicant”

The grounds for this application are set out as follows:-

- i. the 1st, 2nd, 3rd, 4th, 5th plaintiffs/respondents withdrew the applications against the defendant/applicant without an order as to costs;
- ii. the said defendant/applicant had incurred costs in defending himself from unfounded applications for restraining orders;
- iii. the claims are no longer before this or any other court of law.**

In his supporting affidavit of 29th August, 2005 Thomas Barasa depones that on 8th October, 2004 the 1st, 2nd, 3rd, 4th and 5th respondents had filed an amended plaint, claiming against the deponent restraining orders to stop the deponent from construction of his property which is the subject of this suit – on the claim that the deponent did not have approved building plans. The plaintiffs' claims were listed as prayers (a), (aa), (b) and (bb). Such claims had been denied in the defendant's statement of defence dated 29th September, 2004 and in subsequent affidavits – one of these dated 29th September, 2004 and the other dated 21st February, 2005. The deponent was

surprised when the plaintiffs withdrew their Chamber application dated 27th September, 2004; and this happened after the defendant, in a replying affidavit, raised the issue of incompetence of the application. The plaintiffs had, on 18th July, 2005, withdrawn their prayers (a), (aa), (b) and (bb) without considering the expenses the deponent had incurred to-date.

Gitau Kariuki the plaintiffs' advocate swore a replying affidavit on the 11th October, 2005 in which he avers as follows. Truly, the plaintiffs had withdrawn their application dated 27th September, 2004 brought against the defendant. The deponent concedes that in respect of that aping the said building plans, the first defendant was in breach of that duty".

At the time of the filing of the original plaint the plaintiffs had also filed an application by Chamber Summons. The application inter alia sought leave for the 1st plaintiff to sue for and on behalf of four plaintiffs. The application also sought a temporary "3. within L.R. No. Ruiru/Kiu/Block 3/68. In his ruling given on 17th June, 2005 Ransley, J held:

"In my view the applicant is entitled to an order in terms of prayer (bb) of the amended plaint".

It is clear, therefore – and as acknowledged by the applicant herein – that it is not possible in the instant application to claim against the respondent, costs in respect of prayer (bb) of the amended plaint. That prayer was never withdrawn; and on that prayer the Court, on 17th June, 2005 found in favour of the plaintiffs/respondents.

Affected in the plaintiffs' withdrawal notice of 7th October, 2004 were paragraphs (a), (aa), (b) and (bbb) of the amended plaint. Since the withdrawal of those paragraphs was unilateral, and the applicant's costs were not considered, it follows that in principle, the costs entailed will be due to the applicant.

However, the plaintiffs while conceding the validity of the said principle, contend that on the specific facts of this matter, the costs are not due to the defendant/applicant: because when the original plaint was amended to introduce paragraphs (aa), (bb) and (bbb), the statement of defence had not been similarly amended in response – and therefore the amendment resulted in no extra costs to the defendant/applicant.

This raises questions of law. What exactly is it that leads to a party's costs, in relation to motions in Court initiated by the other party? The party moving the Court, by his motions, occasions the need for a response from the other party. Response, in this respect, is not necessarily a literal response by filing documents; response may mean just the preparation to respond. And therefore when a party (X) claims to have been put to expense by the other party (Y), it is not essential that X must produce prepared instruments, documents or papers to show that, indeed, he had been put to expense by Y. If such material exists it may be invoked to demonstrate the level of expense, and this will go to costs; but this does not negate the fact that costs may have been incurred merely by the informal arrangements to meet the claims raised by Y.

Therefore, in my opinion, the mere fact that when the plaintiffs introduced paragraphs (aa), (bb), (bbb) in their amended plaint the defendant did not also amend his defence, does not mean that the defendant incurred no costs. It should, indeed, be presumed that the defendant had incurred some minimum cost, in preparing to meet the plaintiffs' motions as expressed in their newly – introduced claims. Consequently I am not in agreement with counsel for the plaintiffs, that the defendant could not properly make a claim for costs, in respect of the additions which were made to the original plaint.

As already noted, the plaintiffs' withdrawal notice of 7th October, 2004 had the effect of withdrawing also paragraphs (aa) and (bbb) of the amended plaint. For this unilateral withdrawal of main pleadings, quite clearly, the plaintiffs are liable to bear the defendant's costs.

While the ruling of Ransley, J. on 17th June, 2005 had the effect that the plaintiffs were the overall

winners in the suit, they were winners by a summary procedure, in the process of which the defendant, in the respects already outlined, also won certain costs.

Therefore, on the facts of this case, its costs are not to be assigned on the principle that costs follow the event.

I will, therefore, order as follows:-

- 1. The plaintiffs are to bear the defendant's costs, in respect of the withdrawal by the plaintiffs of their prayers (a), (aa), (b) and (bbb) of the amended plaint.**
- 2. The plaintiffs shall bear the defendant's costs in respect of the withdrawal of the Chamber Summons dated 27th September, 2004 www.kenyalaw.org Stephen Karanja Waweru & 4 others v Thomas Barasa [2006] eKLR 10**
- 3. The taxing officer shall take into account the foregoing orders on costs.**

DATED and DELIVERED at Nairobi this 10th day of February, 2006

J. B. OJWANG

JUDGE

Coram: Ojwang J.

Court Clerk: Mwangi

For the Plaintiffs/Respondents: Mr. Gitau,

instructed by M/s. Gitau Kariuki & Co. Advocates

For the 2nd Defendant/Applicant: Mr. Wachakana,

instructed by M/s Wachakana & Co. Advocates