



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

**Civil Case 309 of 2003**

**JAMES OTIENO AYUKO.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**NGURU ENTERPRISES.....2<sup>ND</sup> DEFENDANT**

**RULING**

On 25<sup>th</sup> June 1998 the plaintiff filed this suit, seeking inter alia, a permanent injunction to restrain the defendants from selling off the suit property L.R. No. NAIROBI/BLOCK 72/120. The plaintiff also sought a declaration that the contract between it and the 1<sup>st</sup> defendant was voidable, and that he was entitled to rescind it.

On the same date when the suit was filed, the plaintiff filed an application for a temporary injunction, and he managed to persuade the court to grant an ex parte order, in the first instance, on that very day. After that, the application was adjourned on several occasions, but the interim orders remained in place, until 21<sup>st</sup> January 1999 when the Hon. Aluoch J. dismissed the application.

On 18<sup>th</sup> November 2003, the parties recorded a consent order, which enabled the plaintiff to amend the plaint.

For the sake of completeness of the record, it is important to indicate that the 1<sup>st</sup> Defendant did file a Defence on 5<sup>th</sup> October 1998. And on 23<sup>rd</sup> February 2004, the 1<sup>st</sup> Defendant filed a Reply to Amended Plaint.

Ultimately, on 21<sup>st</sup> March 2006, when the suit was scheduled to come up for hearing, the plaintiff decided to withdraw it altogether. The 1<sup>st</sup> Defendant did not oppose the withdrawal of the suit, but demanded costs thereof, from the plaintiff.

However, the plaintiff points out that as he had been granted leave to institute the proceedings herein as a pauper, he could not be ordered to pay costs.

Does Order 32 rule 17 of the Civil Procedure Rules allow costs to be recovered from a pauper, as submitted by the 1<sup>st</sup> defendant?

That rule provides as follows:

**“In the event of a pauper plaintiff or defendant succeeding in any suit which results in a decree or order for payment to him of any sum of money from the other side, whether by way of costs or otherwise, the court may order that the court fees remitted as aforesaid or otherwise under this Order shall be a first charge on any moneys recovered or to be recovered under such decree or order.”**

It is abundantly clear that rule 17 only comes into play when the pauper is successful, and gets a decree or order which enables him to recover money from the other side. Therefore, the said rule would not take effect in a case such as this one, in which there is no order in favour of the pauper plaintiff.

Pursuant to the provisions of Order 32 rule 1 (2) of the Civil Procedure Rules, a pauper is a person who is not possessed of sufficient means to enable him pay the fee prescribed by law, for the plaint in such suit. Before the court can allow any person to sue as a pauper, the court must be satisfied that the person does not have the means with which he could pay court fees.

It is for that reason that pursuant to rule 10, it is provided that where the pauper is successful, the court would calculate the court fees that would have been payable in the event that the plaintiff did not sue as a pauper. The court would then have a first charge on the subject-matter of the suit, for the recovery of the costs from the party who had been ordered by the decree to pay the same.

All these rules were formulated in such a manner as to reflect the understanding that a pauper was a person who did not have the financial ability to pay court fees.

And where a defendant felt that the plaintiff ought not to continue to sue as a pauper, Order 32 rule 9 (b) enables the defendant to apply to court to dispauper the plaintiff. Therefore, until and unless the court dispaupered a plaintiff, he would continue to be treated as a pauper, provided that he had been granted appropriate leave by the court.

However, the all important question is whether by virtue of having been permitted to sue as a pauper, the plaintiff would be immuned to not only court fees, but to costs otherwise payable to the other parties. Order 32 rule 8 provides as follows:

**“where the application is granted, it shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner except that the plaintiff shall not be liable to pay any court fee.”**

It is true that the only fee which is not payable by a pauper is the court fee. No rule exonerates a pauper from paying costs to the other party.

In any event, even if an order was made for the payment of costs by the pauper, if he was unable to comply, he could be just like any other party against whom such an order was made. In other words, when the court grants judgement or an order for payment of costs, there is no guarantee that the person against whom it was made will be in a position to satisfy either the said judgement or order for costs.

To my mind even though the plaintiff may not have been dispaupered, I find no reason, in law, to exempt the plaintiff from order to pay costs.

Therefore, in the exercise of the authority conferred upon me by the provisions of Section 27 of the Civil Procedure Act, I direct that the costs shall follow the event. In other words, as the plaintiff has withdrawn the suit, he is deemed to have been unsuccessful, and he shall therefore pay to the 1<sup>st</sup> defendant, the costs of the suit.

Dated and Delivered at Nairobi this 18<sup>TH</sup> day of MAY 2006.

FRED A. OCHIENG

JUDGE