



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

Civil Case 55 of 2005

CHURCH ROAD DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT

DAVID MUTUKU.....2ND DEFENDANT

SAMUEL NJIHIA.....3RD DEFENDANT

RULING

This is an application for the following orders:

- “1. The Amended Plaint dated 11th May 2006 be struck out with costs on an Advocate-Client basis.**
- 2. An inquiry as to the damages pursuant to the undertaking to pay damages filed on 1st February 2005, by the plaintiff and which the plaintiff ought to pay, sustained by the 1st Defendant and the damages be assessed at the net of the gross rental income of KShs. 8,000,000/= that the Defendant was deprived off for 10 months.**
- 3. The costs of the suit and the damages be paid personally by the plaintiff’s managing director Francis K. Ngatia**
- 4. Any further relief that this Honourable court may deem fit.**
- 5. The costs of the application be the defendants’ in any event.”**

Before the hearing of the application could commence, the plaintiff’s advocate sought the directions of the court, as he believed that the plaintiff’s Notice of Withdrawal of suit would have a direct bearing on the application. The said withdrawal notice had been filed in court on 5th June 2006. Therefore, the plaintiff expressed the view that there was no longer any suit, which could form the basis for the defendants’ application herein. If anything, the plaintiff asked the court to act on the withdrawal notice, and thus have the suit marked as withdrawn, with no order as to costs.

Mr. Gichuhi, advocate for the defendants pointed out that the very fact of the plaintiff seeking to have the suit withdrawn, with no order as to costs, was reason enough to warrant the defendants’ application for an order that the plaintiff pays costs.

To my mind, there is no doubt that if a plaintiff should choose to discontinue his suit, through a withdrawal thereof, he would not have the final say on the issue as to the costs relating thereto.

Pursuant to the provisions of Order 24 rule 3 of the Civil Procedure Rules, any defendant may request the registrar for costs of a suit that had been wholly discontinued. Upon receipt of such request, the registrar is to sign judgement for the costs of such suit. That being the position, the plaintiff herein cannot be right to insist that following its lodging of the Notice of Withdrawal of Suit, the case had been brought to an end.

Therefore, the issuance of the said notice was not an end in itself.

However, that still begs the question as to how the notice would impact on the undertaking which the plaintiff had given in the suit. Would it be true, as asserted by the plaintiff, that upon the filing of the withdrawal notice, the suit ceased to be in existence, and that therefore the defendant would have no forum from which to mount its quest for an inquiry as to damages?

The defendant holds the view that the withdrawal of the suit could not take away the undertaking which had been given within the context of such suit. But the plaintiff insists that there would be no basis for the application as the suit would have been withdrawn.

The plaintiff also submitted that an inquiry as to damages could only be undertaken if the suit had been determined. The plaintiff added that the process of conducting an inquiry as to damages would have to be by way of viva voce evidence, and in a suit that was separate from this case.

In response to those views, the defendant insists that it was perfectly entitled to pursue the issue as to the enforcement of the undertaking within these proceedings. Indeed, the defendant believes that the process of the said enforcement did not require any further evidence. The reason for that contention is that the issuance of the interlocutory injunction had resulted in the receivers being removed from their role of collecting rent, for a period of TEN (10) months. Therefore, given the fact that the monthly rental was KShs. 800,000/=, the defendant submitted that the damages attributable to the interlocutory injunction was KShs. 8,000,000/=.

Before delving further into that aspect of the application, I believe that it is important to note that the application was filed on 22nd May 2006. Thereafter, the plaintiff filed its Notice of Withdrawal of suit, on 5th June 2006. Given the chronological sequence of those two events, I cannot help but wonder if the plaintiff filed the withdrawal notice in an endeavour to sweep the carpet off from under the defendant's feet.

In that regard, it is important to bear in mind the terms of the undertaking itself, which reads as follows:

“ **UNDERTAKING TO PAY DAMAGES**

We, CHURCH ROAD DEVELOPMENT CO. LTD of Post Office Box Number 62213 Nairobi DO HEREBY UNDERTAKE to pay damages that may be occasioned by the issue of injunctions to restrain the defendants whether by themselves or the agents, or Advocates or Auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say from acting or purporting to act as receivers and/or managers of the plaintiff and its L.R. No. 1870/10/14, interfering with the plaintiff's enjoyment, occupation, use, management or otherwise howsoever interfering with the ownership of title, possession of to and/or interest in ALL THAT piece of land known as L.R. No.1870/10/14 pending the hearing and determination of this suit.”

In my understanding of that undertaking, the plaintiff was saying that pending the hearing and determination of the suit, if an injunction was issued to restrain the defendants, and if the said injunction did occasion any damages to the defendants, the plaintiff undertook to pay such damages.

If the defendant was able to demonstrate that it did suffer some damages due to the injunction orders which remained in force for a period of ten months, the plaintiff would, by virtue of the undertaking it gave, be liable to pay compensation to the defendant for such damages.

In my considered view, it would be wholly inequitable for a person who had given such an undertaking to remove themselves from the obligations arising from their said undertaking, at their own will. If that were made possible, the undertakings as to damages would have no tangible meaning. Therefore, in my considered view, the only way to ensure that undertakings as to damages were meaningful, is by insisting that they remained effective for all time, subject only to the defendant satisfying the court that he suffered some damage that was attributable to the interim injunction. In other words, I believe that the discontinuance of a suit in which the undertaking as to damages was given, should not bring the undertaking to an end.

The learned authors of HALSBURY'S LAWS OF ENGLAND, 4th Edition, Vol. 24 described an undertaking as to damages as being an undertaking:

“to abide by any order as to damages which the court may make in case it should afterwards be of opinion that the defendant has, by reason of the order, sustained any damages which such party ought to pay.” (see paragraph 982 of Halsbury's above-cited)

They go on, at paragraph 983 of that text, to cite the following as being the effect of the undertaking:

“The plaintiff's undertaking as to damages on an order for an injunction remains in force notwithstanding the dismissal or discontinuance of the action, and if the plaintiff ultimately fails on the merits the defendant is entitled to an inquiry as to the damages sustained by reason of the interlocutory injunction, unless there are special circumstances. The undertaking applies, even if the plaintiff has not been guilty of misrepresentation, suppression or other default in obtaining the injunction, and is equally enforceable whether the mistake in granting the injunction was on a point of law or on the facts.”

I have no doubt that the above-cited text correctly stated the legal position on undertakings as to damages.

In the case of **NEWCOMEN Vs COULSON (1878) 7 CHD 764** the court held as follows:

“I cannot accede to Mr. Higgins argument, that a Plaintiff can deprive a Defendant of his right to damages under the Plaintiff's undertaking by discontinuing his action. it would be a most dangerous doctrine to hold that he can thus evade his liability.

..... There must be a reference as to damages in the ordinary way.”

In the light of those persuasive authorities, I am convinced beyond any doubt that the plaintiff's liability under its undertaking as to damages did not cease upon the lodging of its Notice of Withdrawal of Suit.

However, even though the defendants have asserted the said loss was in the sum of KShs. 8,000,000/=, I am not convinced that the issue is that simple. I say so, regardless of the contention that the damage was equivalent to the sum which the 2nd and 3rd defendants were unable to collect, as rents, for ten months when the injunction was in force. First, the defendants did not satisfy the court that the monthly rents of KShs. 800,000/= were being collected as a matter of course. In reality, there could always be the possibility of tenants defaulting in the payment of rents, at some time or other.

Furthermore, the receivers were now back in place. Therefore, the defendants have not completely lost out; perhaps they have only suffered a ten-month delay in collecting the rents. As I understand it, the 1st defendant still holds security for the money it is owed by the plaintiff.

Before the court can ascertain the damages occasioned to the defendants due to the interlocutory injunction, it would be necessary for there to be conducted an inquiry as to damages. Therefore, I do direct that the defendants do set down the case for a session when they will adduce proof of the damages they suffered during the period when the interlocutory injunction was in force.

For now, I award to the defendants the costs of the application dated 22nd May 2006.

Dated and Delivered at Nairobi, this 28th day of July 2006.

FRED A. OCHIENG

JUDGE