REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 296 of 2006

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

VERSUS

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

DAVID MUTUKU…….....……..2ND
DEFENDANT

SAMUEL NJIHIA…….....……..3RD
DEFENDANT

R U L I N G

The defendants are seeking the striking out of the plaint herein, with costs on an Advocate/Client basis.

Pending the determination of the application to strike out the Plaint, the defendants request that the court should give them a reprieve on the need to file a Defence to the suit.

In the alternative, the defendants request for an order staying this suit until such time as the plaintiff would have paid such costs as may be taxed in **Milimani HCCC No. 55 of 2005, Church Road Development Co. Ltd Vs. Barclays Bank of Kenya Limited 2 Others.**

The reason given by the defendants for asking that this suit be struck out or at least stayed, is that as at the time it was filed there was another case which had been filed earlier, in respect of the same subject matter, and as between the same parties. Therefore, it is the defendants view that the plaint herein was an abuse of the court process insofar as it was filed whilst the other case was still subsisting. The said other case is **CHURCH ROAD DEVELOPMENT CO. LTD V. BARCLAYS BANK OF KENYA LIMITED & 2 OTHERS, MILIMANI HCCC NO. 55 of 2005, ("the other case").**

As at the date when this application was canvassed before me, on 7th July 2006, it was common ground that there was a ruling which had not yet been delivered. The said ruling had been scheduled to be delivered on 28th July 2005.

In the light of the fact that there was a ruling which was still pending in the other case, the defendant

submitted that the said case was still pending.

Secondly, the defendant submitted that until and unless the court were to adopt, as an order, the plaintiff's Notice of Withdrawal of Suit, such notice did not take effect. Therefore, although there was no dispute about the fact that on 5th June 2006, the plaintiff had filed a Notice of Withdrawal of Suit, the defendant submits that the said notice would only become effective as and when the Deputy Registrar of the court had minuted and signed it, so to make it into an order of this court.

In response to the application, the plaintiff faults the defendants for not being candid. As far as the plaintiff was concerned the issue as to the validity or otherwise of the Notice of Withdrawal was being determined in the other case. Therefore, by invoking the contention that the withdrawal notice had not taken root in the other case, the defendants are said to be seeking the determination of the same issue before two courts.

In the circumstances, the plaintiff invited the court to apply the analogy of the provisions of Section 6 of the Civil Procedure Act, so as to stay the subsequent application. In other words, the defendant's application herein ought to be stayed as it was filed subsequent to the defendants' application in the other case. For that reason, the plaintiff feels that this application should have been stayed. In the alternative, the plaintiff asks that the two applications be consolidated, so that only one ruling was given on the issues concerned.

If the defendant was permitted to canvass this application, the plaintiff feels that they would have been permitted to re-open arguments which had been made in the other case. Those issues include the defendant's quest for stay of proceedings, as well as the quest for costs.

Having had the privilege of also handling the application in the other case I note that the three substantive reliefs sought therein were as follows:

"**1. The Amended Plaint dated 11th May 2006 be struck out with costs on an Advocate- Client basis.**

2. An inquiry as to damages, pursuant to the undertaking to pay damages filed on 1st February 2005 by the plaintiff and which the plaintiff ought to pay for damages sustained by the 1st Defendant, and the damages be assessed at the net of the gross rental income of KShs. 8,000,000.00 that the 1st Defendant was deprived off (Sic!) for 10 months.

3. The costs of the suit and the damages be paid personally by the plaintiff's managing director Francis K. Ngatia."

From my understanding of those prayers, the defendants in the other case were implying that the suit was still very much alive, as at the date when the application dated 22nd May 2006 was filed. It is only on that basis that the defendants could have sought an order to strike out the plaint.

Therefore, on 5th June 2006, the Plaintiff filed a Notice of Withdrawal of Suit, pursuant to Order 24 rule 1 of the Civil Procedure Rules. Following that development, the defendants concentrated their attention on their prayer for an inquiry as to damages, pursuant to the undertaking which the plaintiff had given on 1st February 2005.

As the parties should already be aware, in my ruling dated 28th July 2006, which was in the other case, I did come to the conclusion that:

"**the plaintiff's undertaking as to damages on an order for an injunction remains in force notwithstanding the dismissal or discontinuance of the action."**

By arriving at that decision I did not, nor was I called upon to determine the question as to whether or

not the other suit had already been discontinued. Therefore, I hold the considered view that the issues raised in this application are not similar to those raised in the other suit. In any event, the issue as to whether or not the filing of the Notice of the Withdrawal of suit served to discontinue the suit automatically, was neither canvassed nor determined in the other suit. To my mind, the plaintiff appeared to assume, in the other suit, that immediately upon filing the Notice of Withdrawal of Suit, it served to discontinue the said suit. In response thereto, the defendants did, in the said other suit, submit that even if the suit might have been discontinued, that could not be a bar to the enforcement of the undertaking that had been given by the plaintiff.

In the current application, Mr. Francis K. Ngatia has deponed, inter alia, that the suit herein was instituted "**on June 6, 2006 a day after Milimani HCCC No.55 of 2005 was withdrawn."**

That deposition implies that as at the time the plaint herein was filed, the other suit was no longer in existence, for this is what the plaintiff asserted at paragraph 28 of the plaint herein;

"**In 2005, the plaintiff instituted against the defendant herein, Milimani Court Civil Case No. 55 of 2005 but the same has been withdrawn."**

It is with that contention that the defendants now take issue, because it is their view that the mere act of filing the Notice of Withdrawal of the Suit did not, by itself, serve to withdraw the case. The defendants say that until and unless the notice was "**adopted by the court",** the suit would still be in existence.

However, the plaintiff believes that the notice, once filed, did not need any court sanction in order to become effective. In support of that proposition, the Plaintiff relied on the decision of the HON. PICKERING J., in the case of **M.P. SMITH & 2 OTHERS V ENGELA WESSELS [1927 – 1928] Vol. 11 Law Reports of Kenya 51.**

As I understand the said decision, it was in relation to the question as to whether or not the plaintiff could file a notice of discontinuance of the suit. That issue arose from the fact if the plaintiff was deemed to have taken "any other proceeding" in the case, he would not have been entitled to file the notice of discontinuance. After giving consideration to the matter, the learned judge held that the plaintiff had not taken any step in the proceedings before filing the notice of discontinuance. Accordingly, the judge was satisfied that the plaintiff was entitled to discontinue the suit by filing the notice of discontinuance, as he did.

In my considered opinion the decision in that case has no bearing on the matter now before me, for the defendants herein do not allege that the plaintiff had no capacity to file the Notice of Withdrawal of Suit.

Meanwhile, the defendants had cited the decision of the HON. ETYANG J., in the case of **THELUJI DRY CLEANERS LTD V MUCHIRI & 3 OTHERS [2002] 2 KLR 746,** to back their contention that a Notice of Withdrawal did not take effect from the date of its filing but from the date it is adopted as an order of the court, when it is endorsed by the Deputy Registrar.

There is no doubt at all that that is the point which was emphasized by the learned judge. And Dr. Kamau Kuria, advocate for the plaintiff does not dispute that fact. His submission, however, is that the decision was not binding on this court because of the circumstances prevailing in that case. He said that the learned judge had failed to cite any authorities to back his findings. He also submitted that the judge was angry, for the reason that he felt that the magistrate's court was undermining the authority of the High Court.

There can be no doubt, from a perusal of some of the findings of the learned judge, that he was angry. And I believe that nobody can fault him for expressing himself as forcefully as he did, in the circumstances.

In his considered view, the learned Chief Magistrate had "**blatantly undermined**" his authority,

through conduct which was described as being inexcusable, utterly dishonest, and immoral.

Whereas those feelings could have possibly influenced the judge to use strong language, the plaintiff has not satisfied me that the feelings had so clouded the mind of the judge that he had reached an erroneous judicial verdict. To my mind, a judge is not obliged to cite legal authorities in each and every decision which he makes, before the said decision can be deemed to be correct.

In the **THELUJI DRY CLEANERS** case the learned judge held as follows, at page 772;

"**The Legal position is that the Notice of Withdrawal of HCCC No. 159 of 2002 did not take effect from the date of its filing but from the date it was adopted as an order of the court on the 30th September 2002 when it was endorsed by the Deputy Registrar."**

At no time did the learned judge say that it was open to the defendant or to the court to object to the Notice of Withdrawal. However, as is apparent from the actions which the Deputy Registrar took, on 30th September 2002, there was an endorsement of the notice. The said endorsement serves to adopt the notice into an order of the court, so said the HON. ETYANG J. But what does Order 24 rule 11 of the Civil Procedure Rules say? It provides as follows:

"**At any time before the setting down of the suit for hearing the plaintiff may by notice in writing wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action."**

A plain reading of the rule discloses that the plaintiff is duly recognised as having authority to withdraw his suit. He can do so by a notice in writing, provided that the suit had not been set down for hearing.

That stage of proceedings varies from that in which the suit had been set down for hearing, whereupon the provisions of Order 24 rule 2 of the Civil Procedure Rules comes into play.

The defendants submitted that the decision in the case of **FITZWANGA V ENVIRONMENT DISASTER RESEARCH FOUNDATION [2002] 1 KLR 283** could be useful in unravelling the matter before me. However, it is important to note, from the outset, that the facts in that case related to consent orders, as opposed to discontinuance notices.

At page 290 of the Law Report, the HON. ONYANCHA J. expressed himself thus;

"**I wish to point out that my examination of the file records, as earlier pointed out, confirms that the "consent orders" were received in court. They were stamped and filed in this file. <u>BUT</u> they were not recorded in the file by the Deputy Registrar. I hold the opinion that no such consents by the parties or their counsel in a suit, become part of the court proceedings or judicial proceedings until they are so recorded and duly signed by the Deputy Registrar. The act of recording the consent and signing it, is not merely administrative in my view. It is judicial and holds judicial or legal consequences."**

I do wholly agree with those views. And I believe that the need for the recording and signature of the Deputy Registrar is the only act which legitimately transforms the terms of the consent letter or the orally pronounced terms, into an order of the court.

That position can be compared to one in which a plaint is filed by a plaintiff. Once the plaint is presented at the court registry, the requisite fees is assessed. After the fee is paid, the plaint is stamped, a file opened and an appropriate minute is made in the court register. In all these steps, it is significant to note that the plaint is not deemed to be filed immediately upon its being presented at the registry.

In similar vein, it would be inappropriate to consider the notice of withdrawal of a suit to take effect immediately upon its presentation to the court.

Even though the plaintiff would not need the approval of either the defendant or the court to withdraw his suit, pursuant to the provisions of Order 24 rule 1, until the said notice is endorsed by the Deputy Registrar, so as to render it a part of the court record, the suit would not have been withdrawn. Therefore, as the Deputy Registrar had not yet endorsed the court records in acknowledgement of receipt of the notice of withdrawal, the suit in the other suit was still alive as at the time when this suit was field.

However, as the plaintiff had set in motion the process of discontinuing the other suit, and appears to have honestly held the belief that the said other suit had been discontinued automatically upon his filing the discontinuance notice, I hold the view that he did not deliberately set out to abuse the process of the court.

Notwithstanding the apparent good faith on the part of the plaintiff, the fact is that the costs in the other suit have not been paid. In the circumstances I think that it would be in the best interests of justice to stay proceedings in this suit, until such time as the plaintiff will have paid the costs in the other suit. Accordingly, in the exercise of the authority bestowed upon this court by Order 24 rule 4 of the Civil Procedure Rules, this suit shall be stayed until the costs in HCCC No. 55 of 2005 are paid.

Finally, the costs of the application dated 20th June 2006 are awarded to the defendants.

Dated and Delivered at Nairobi, this 1st day August 2006.

FRED A. OCHIENG

JUDGE