



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Succession Cause 711 of 2003

IN THE MATTER OF THE ESTATE OF JAMES THUO ALIAS THUO KAMAU (DECEASED)

RULING

A notice of preliminary objection dated 6th July 2006 was filed by M/S Khaminwa & Khaminwa advocates to the summons of the Objector LUCY MUKUHI THUO dated 20th June 2006. The grounds of preliminary objection were that –

1. The objector has not complied with the court order issued on the 19th day of June 2006, where the objector was ordered to file a supplementary affidavit.
2. The summons brought before the court is an abuse of the court process and an attempt to circumvent the court order issued on the 19th day of June, 2006.

At the hearing of the preliminary objection on 10/7/2006, Mr. Kuloba for the petitioner submitted that the objector had not complied with the court's order issued on 19/6/2006 in which she was to file a supplementary affidavit. The objector had initially applied to amend the affidavit, but the court ruled that an affidavit could not be amended. objector was also ordered to pay court adjournment fees.

Instead of complying with the orders of the court, on 22/6/2006 the objector served M/S Khaminwa & Khaminwa advocates with a notice of withdrawal of the summons dated 6/6/2006. Ms. Khaminwa & Khaminwa advocates were also served with a hearing notice of the suit as well as another summons (dated 20/6/2006) filed under certificate of urgency.

It was the contention of Mr. Kuloba that the actions of the objectors were in clear disregard for the court's order, which was binding as it had not been amended or appealed from. The withdrawal of the application was in disregard to the orders of the court. He sought to rely on the case of KAHUMBU – VS- NATIONAL BANK OF KENYA LTD. (2003) 2 EALR 475. He also submitted that what the objectors did was a disguised way of amending the affidavit.

He lastly, submitted that as the application that was filed was an attempt to circumvent the court's orders, it would open a Pandora's box by disregarding courts orders, if it was allowed to stand. Therefore the application should be dismissed with costs.

Ms. Ndirangu for the objector opposed the preliminary objection. She conceded that on 19/6/2006 they were given leave to file a further affidavit. However, after consulting the law they found that a supplementary affidavit would not cure the defect in their affidavit. Therefore they applied to withdraw the subject application (dated 6/6/2006) and affidavit.

She contended that it was not true that they were trying to amend the affidavit, as (after the withdrawal) there was no affidavit to the previous application. Secondly, they served the notice to withdraw the previous application and they received no challenge to that notice to withdraw the application. She contended that the only remedy available to the other party would be costs. She further contended that, once the previous application was withdrawn, the court's order on the filing of a supplementary affidavit had lapsed. Therefore the applicant/objector had not disregarded the court order.

She lastly contended that the case decision cited was a High Court decision, which was only persuasive. It was also distinguishable, since it dealt with discovery of documents. She urged me to dismiss the preliminary objection.

From the arguments made before me, both parties are in agreement that, indeed, the court made orders to be complied with by the objector, in the application dated 6/6/2006. From the record, those orders were made by myself on 19/6/2006. The orders that I made were in the following terms –

“Applicant granted leave to file a supplementary affidavit within 7 days from today. Applicant to pay today's costs to the petitioner as well as Court Adjournment Fees Stood over generally. Respondent granted leave to file a further replying affidavit within 7 days from service.”

The applicant/objector did not file a further affidavit in terms of the leave granted by the court. However, on 20/6/2006, the objector through his counsel S.W. Ndirangu & Company advocates filed a notice to withdraw the summons dated 6/6/2006 and also filed another summons dated the same day (20/6/2006) under certificate of urgency. Mrs. Ndirangu appeared before me on that same day and sought to withdraw the earlier application dated 6/6/2006. On that 20/6/2006, I found that court adjournment fees (CAF) had not been paid. Therefore I declined to hear the counsel.

On the next day, 21/6/2006, Ms. Ndirangu was before me again. She asked me to certify the application dated 20/6/2006 as urgent and informed me that court adjournment fees had now been paid. I certified the application dated 20/6/2006 as urgent and fixed the inter-partes hearing for 3/7/2006. On that date this preliminary objection herein was argued.

I have considered the submissions by both counsel for the parties in this preliminary objection. Ms. Ndirangu has argued that the case cited of KAHUMBU –VS- NATIONAL BANK OF KENYA LTD (2003) 2 EALR 475 is not binding on me. That is true as it was as High Court decision. However in my view, that case states the correct legal position that a court order is valid and binding unless and until it is appealed against, amended or set aside

I now turn to our present case. The issue for decision in this preliminary objection in my view, turns on whether the application dated 6/6/2006 was withdrawn. If it was not withdrawn then the orders therein still stand. I observe that the court adjournment fees ordered (Kshs.400/=) appears to have been paid vide court receipt dated 21/6/2006. Now was the application dated 6/6/2006 withdrawn?

The discountenance of suits or motions is governed by the provisions of Order XXIV of the Civil Procedure Rules. Rules 1 and of Order XXIV provided as follows –

“1. 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.

2. (1) where a suit had been set down for hearing it may be discontinued or any party of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(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”

Under the definitions in section 2 of the Civil Procedure Act (Cap 21), suit is defined to mean all civil proceedings commenced in any manner prescribed. In my view, a summons in a succession cause under the Law of Succession Act (Cap 160), as in our present case can also be withdrawn in like manner.

According to the court record, on 8/6/2006 the application by the objector dated 6/6/2006 was fixed for hearing inter-partes on 19/6/2006 by Hon. Justice Rawal. When the application came up for hearing on 19/6/2006, Ms. Ndirangu was present for the objector, while Mr. Kuloba was present for the petitioner. It was on that day that Ms. Ndirangu informed the court that there was an error on the affidavit which needed to be attended to.

In effect therefore this was an application that had already been set down for hearing. In terms of Order XXIV rule 2. It can only be withdrawn or discontinued either by the written consent of both parties, or with the leave of the court.

Indeed, there was a notice of withdrawal/discontinuance of the objector's application. That notice was dated 20/6/2006 and was filed on the same date. The application to be withdrawn was the application dated 6/6/2006. There is no written consent by all the parties filed that the said application be withdrawn. Also, the court did not grant leave for the withdrawal of the said application. Therefore, in my view, the application of the objector dated 6/6/2006 is still on record and alive. The court orders made in that application are also alive. They have to be complied with.

This therefore means that the application of the objector dated 20/6/2006 appears to be premature and is incompetent in view of the fact that the application dated 6/6/2006 is alive and there are court orders therein which have not been complied with, and which have neither been appealed from nor amended. The objector's counsel seems to have been acting on the false impression that the application dated 6/6/2006 has been withdrawn. That is not so. Though the court order for filing a supplementary affidavit by the objector is permissive, I cannot allow applications to be filed on top of others just for the sake of it. It is a misuse of the court process. The application dated 20/6/2006 is premature and cannot therefore be sustained, and I have to strike it out. The objector can properly withdraw the application dated 6/6/2006 before filing another application.

For the above reasons I uphold the preliminary objection and strike out the application of the objector dated 20/6/2006 as being incompetent. I grant costs of the preliminary objection to the petitioner.

Dated and delivered at Nairobi this 18th day of September 2006.

George Dulu

Ag. Judge

In the presence of –