



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 809 OF 2001**

**JIMMY RAYANI ..... PLAINTIFF**

**VERSUS**

**ZOEB TAYEBJEE ..... 1ST DEFENDANT**

**THE STANDARD LIMITED .....2ND DEFENDANT**

**RULING**

The subject matter of this Ruling is the question as to who is responsible for paying the 1st defendant's costs arising from the 2nd defendant's notice of motion dated 14.09.04 and filed on 16.09.04 seeking dismissal of the plaintiff's suit against the 2nd defendant and subsequent withdrawal of the plaintiff's suit against the 2nd defendant. The notice of motion came up for hearing before me on 14.03.05 whereat the plaintiff was represented by learned counsel, Mr. J. Orange while the 1st defendant was represented by learned counsel, Mr. F.K. Athuok and the 2nd defendant represented by learned counsel, Miss A.K. Ondari – Aloo.

Plaintiff's counsel informed the court that the plaintiff and 2nd defendant had entered a consent for the plaintiff to withdraw the suit against the 2nd defendant without any order as to costs and urged that the 2nd defendant should bear the 1st defendant's costs of the present application.

Counsel for the 1st defendant informed the court that the 2nd defendant's notice of motion of 14.09.04 was served on the 1st defendant on 22.09.04 and that the 1st defendant filed a replying affidavit on 23.11.04. The 1st defendant's counsel urged that the 2nd defendant pays the 1st defendant's costs of the notice of motion on the basis that the 1st defendant is not a party to the consent between the plaintiff and the 2nd defendant filed on 11.03.05.

On the other hand the 2nd defendant, through his counsel, pointed out that in its notice of motion it had prayed for dismissal of the plaintiff's suit against it for want of prosecution and that the plaintiff should bear the costs of the suit. Thereafter the plaintiff and 2nd defendant entered into consent under which the plaintiff withdrew his suit against the 2nd defendant with no order as to costs. It was the 2nd defendant's counsel's contention that consequent upon the agreement between the plaintiff and 2nd defendant that the suit be withdrawn against the 2nd defendant with no order as to costs and following withdrawal of the suit against the 2nd defendant on those terms, there is now no suit remaining against the 2nd defendant but the suit remains only against the 1st defendant and that the plaintiff and 1st defendant should sort out the issue of costs between themselves.

In reply, counsel for the plaintiff urged that if the court finds the plaintiff liable for the 1st defendant's costs, such costs should be confined to court fees incurred by the 1st defendant in filing a replying affidavit since the 2nd defendant's notice of motion was not argued.

I have duly considered the rival submissions of the parties. The pleadings show that the 2nd defendant filed his notice of motion dated 14.09.04 on 16.09.04 seeking to have the plaintiff's suit filed, inter alia, against itself dismissed as against it for want of prosecution and that costs of the notice of motion be borne by the plaintiff. It would appear that thereafter the plaintiff entered into negotiations with the 2nd defendant, leading to the filing on 11.03.05 of a consent letter dated 04.03.05 whereby the plaintiff sought to withdraw the suit as against the 2nd defendant and asked that there be no order as to costs.

The 1st defendant informed this court, through his counsel, that when he was served with the 2nd defendant's notice of motion, he filed a replying affidavit thereto on 23.11.04.

Firstly, I wish to observe that the replying affidavit alluded to by the 1st defendant is not in the court file. This is not the first time I have come across instances of documents said to have been filed missing from the relevant case file. One such other instance is recorded in my ruling in High Court Civil Case No.981 of 2003, Lalchand Shah & Rambha -vs- Kenindia Assurance Co. Ltd where, after recording the lamentation of another Judge (Nyamu, J) about the phenomenon of documents missing from court files, I commented as follows:

**“Let me point out in the above connection that although counsel for the defendant/respondent herein informed this court during submissions on the present application on 01.02.05 that he was relying on grounds of opposition he filed on 14.07.04, those grounds were not in the file and I had to give oral instructions that they be traced in the court registry, failing which copies to be called for from counsel for defendant. Fortunately the grounds were thereafter traced in this court registry but I must make the point that documents lodged with the court registry in respect of any case ought to be promptly placed in the relevant file, not to be left hanging somewhere else in the registry.”**

I do not know whether, in the case now before me, the 1st defendant's replying affidavit said to have been filed on 23.11.04 is hanging around somewhere in the civil registry or not but I must emphasize the need for the civil registry to improve on its filing system.

Secondly, I shall proceed in this Ruling on the basis that the 1st defendant did indeed file a replying affidavit on 23.11.04 following service upon him of the 2nd defendant's notice of motion of 14.09.04.

The 2nd defendant's notice of motion must have been the cause for the 1st defendant to file his aforesaid replying affidavit. I hold that the 2nd defendant, having initiated the said interlocutory proceeding, i.e. the notice of motion of 14.09.04, and having subsequently withdrawn it against the plaintiff following some understanding between itself and the plaintiff, which deal the 1st defendant was not a party to, the 2nd defendant must bear the 1st defendant's costs arising from his filing of the said replying affidavit. My above holding that the 2nd defendant is liable for the 1st defendant's costs arising from his filing of his aforesaid replying affidavit is the condition upon which the plaintiff's suit is hereby marked as withdrawn against the 2nd defendant with no order as to costs as between the plaintiff and the 2nd defendant.

Orders accordingly.

**Delivered at Nairobi this 16th day of May, 2005.**

**B.P KUBO**

**JUDGE**