



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CIVIL CASE 73 OF 1998**

**JUMA ..... PLAINTIFF**

**VERSUS**

**KHAUNYA & 2 OTHERS ..... DEFENDANT**

**RULING**

The subject matter of this ruling is the chamber summons dated 10th July 2003 which is brought under the provisions of order I rules 10,13, and 22 and order XXIV rule 2 of the Civil Procedure Rules. In this summons the plaintiff seeks for the following orders:

- (a) To have the consent order recorded on 6th March 2002 in which the plaintiff was granted leave to withdraw this suit set aside and the suit against the 1<sup>st</sup> defendant reinstated.
- (b) An order for stay of proceedings and all consequential orders pending the hearing and finalisation of this application.
- (c) An order striking out the 2nd defendant's name for misjoinder.
- (d) Costs of this application

The summons is supported by an affidavit of Anthony Kayaya Juma sworn on 10.7.2003.

The summons was opposed by the 1st respondent who filed grounds of opposition and a replying affidavit sworn by Mr Shem Sanya Balongo dated 23rd February 2004.

It is the contention of the respondent that this suit was withdrawn by consent in the presence of the plaintiff and the application does not meet the requirements for setting aside consent judgment or orders.

The respondent also attacked the competency of the plaintiff's application stating that the same is incompetent because it does not conform with the provisions of order L rule 1 of the civil procedure rules. The applicant should have come by way of a motion instead of a summons.

It is further submitted by the respondent that this application has no merit because the same is not envisaged under order XXIV of the Civil Procedure Rules. It is expected that a party who has withdrawn a suit should file a fresh suit instead of filing an application for reinstatement.

It would appear from the proceedings of 6th March 2002 that this suit proceeded for hearing before the Hon Lady Justice Ang'awa where the plaintiff testified and in the midstream the plaintiff's advocate, Mr Kiveu applied for a short adjournment to take further instructions from his client, the plaintiff, which request was granted by the Court. When the matter resumed for hearing the plaintiff's learned advocate verbally applied for leave to withdraw the whole suit. He was granted leave pursuant to order XXIV rule 2(2) of the Civil Procedure Rules when the defendant did not object. The plaintiff was however ordered to pay costs which was later assessed at Ksh123,549/=.

The plaintiff later sacked his advocate and appointed the firm of Wabwile Waswa & Co Advocates to appear for him. He now accuses his former advocates for withdrawing the suit without consulting and has beseeched this Court not to let him suffer for the mistake of his erstwhile advocate. I find this argument not impressive in view of the fact that it is apparent that he was consulted by his former advocate before the suit was withdrawn. I refer to the case of *Kenya Commercial Bank Ltd vs Specialised Engineering Co Ltd* [1982] KLR P 485

Where it was held *inter alia*:

(a) That a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

(b) An advocate has general authority to compromise on behalf of his client, as long as he is acting bonafide and not contrary to express negative direction. In the absence of express direction, the order shall be binding.

I am bound by this decision and I will adopt these statements of law. Consequently I am of the view that the suit was properly withdrawn. Now what remains for my decision is on whether the application has merit. I think I will deal with the first prayer of the application which of course will determine the necessity of considering the other two prayers. The applicant seeks to have the order withdrawing the suit set aside and for an order reinstating the former suit. I have already pointed out that the suit was withdrawn pursuant to the provisions of order XXIV rule 2 (2) of the Civil Procedure Rules though the plaintiff did not cite the above provisions when making the application. It is in my humble view that a suit which has been withdrawn pursuant to order XXIV of the Civil Procedure Rules cannot be reinstated. A party has the option of instituting a fresh action. This finding is on the basis of the provisions of order XXIV rule 4 of the Civil Procedure rules which provides:

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit upon the same, or substantially the same cause of action, the Court may order a stay of such subsequent suit until such costs shall have been paid.”

The law under this order does not envisage a litigant to seek for an order of reinstatement. The applicant says that he wants to avoid payment of costs and that is why he has taken this strange route. I can only say that there is no short-cut. The law is clear with no ambiguity.

In the final analysis I find this summons lacking in merit. The same is dismissed with costs to the respondent. In view of my decision, there is no need to consider the merits of the other prayers which essentially depend on the outcome of the first prayer.

**Dated and Delivered at Busia this 7th day of May 2004.**

**J.K.SERGON**

**JUDGE**