

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 459 OF 1998

TRANS-NATIONAL BANK LIMITED.....PLAINTIFF

VERSUS

JAMES NYABUTI ANGWENYI.....DEFENDANT

RULING

The Plaintiff, Trans-National Bank Limited, by a Notice of Motion made under the provisions of **Section 3A of the Civil Procedure Act** and all other enabling provisions of the law has made an application seeking to be granted the orders of this Court to the effect that further proceedings in this suit including the taxation of the Defendant's Advocate's bill of costs dated the 30th July 2003 be stayed pending the hearing of the application. The Plaintiff has further prayed that it be granted leave to withdraw the Notice of discontinuance of the suit filed on the 19th of May 2003 and in its place be substituted with order of this Court marking the suit as settled and a further order that each party bears its own costs.

The grounds in support of the Application have been stated on the body of the application and supported by the annexed affidavit of Andrew Mukite Musangi. The Application is opposed. The Defendant has filed a replying affidavit sworn by Wilfred Nyaundi Konosi in opposition to the application. During the hearing of the Application, Mr Musangi Learned Counsel for the Applicant and Mr Ayuka Learned Counsel for the Respondent argued their respective opposing submissions in favour of their clients.

I have read the entire pleading filed in this case. I have also considered the submissions made by Counsel for the Applicant and Counsel for the Respondent. The background to this suit is that the Defendant was granted a loan facility by the Plaintiff to enable him purchase a motor vehicle. This was in the year 1992. The Defendant subsequently defaulted in repaying the said loan amount advanced plus the accrued interest. He was sued by the Plaintiff for the outstanding amount plus the accrued interest.

Subsequently after the said suit was filed, the Defendant by a letter dated the 4th of December 1998 sought a waiver of the accrued interest from the Plaintiff. The Defendant's plea was granted by the Plaintiff. The accrued interest was waived. The Plaintiff instructed their advocates on record to have the suit marked as settled. Instead of the Advocates for the Plaintiff making an appropriate application before Court to have the suit marked as settled, the said Advocates filed a Notice of discontinuance of suit on the 19th of May 2003 under the provisions of **Order XXIV Rule 1 of the Civil Procedure Rules**. The Defendant's Advocates naturally filed their bill of costs in view of the Plaintiff's action in withdrawing the suit against the Defendant.

The Plaintiff has now made an application that the said Notice of discontinuance of the suit was filed in error. The Plaintiff has submitted that what it ought to have filed was an application marking the suit as settled in view of the agreement reached with the Defendant. The Defendant, through their Advocates on record, however is not of the same view. It is the Defendant's contention that the Notice of withdrawal of the suit was filed to forestall the application filed by the Defendant to have the Plaintiff's suit dismissed for want of prosecution.

I have considered these rival arguments. It is my considered opinion that the intention of the parties has to be ascertained from the pleadings filed in Court. It is not in dispute that the Defendant was advanced a loan by the Plaintiff. It is further not in dispute that the Plaintiff filed suit after the Defendant

had defaulted in paying the loan amount advanced plus the accrued interest. After the said suit was filed, the Defendant sought an indulgence from the Plaintiff to have the accrued interest waived. The Defendant's plea was considered and granted by the Plaintiff. The suit filed by the Plaintiff against the Defendant was thus compromised as the suit basically sought the recovery of the accrued interest.

The parties to the suit having agreed to compromise the suit at the instance of the Defendant, it is not open to the Defendant to now demand that he be paid the costs of the suit. The intention of the parties was to compromise the suit with each party bearing its own costs. In the circumstances of this case, the Notice of discontinuance of the suit was therefore filed in error. The said Notice of discontinuance of the suit is set aside and substituted by an order of this Court marking this case as settled. Since it was the intention of the parties that each party was to bear its own costs, there shall be no orders as to costs both in the application and in the main suit that has now been marked as settled.

DATED at NAKURU this 20th day of September, 2004.

L. KIMARU

AG. JUDGE