REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 131 OF 2000

HON. DAVID MANYARA NJUKI.....PLAINTIFF

-v-

AFRAHA EDUCATIONAL SOCIETY & 3 OTHERS……..DEFENDANTS

FIRST RULING

The plaintiff herein David Manyara filed this suit against Afraha Education Society, Loice Wangari Njuguna, John Kanja and Kimunya Kamana seeking various reliefs.

The plaintiff's counsel then on record filed notice to withdraw the suit on 2nd May 2000. This fact was brought to the attention of this court on 19th May 2000. The then plaintiff's counsel on record then intimated on record that the notice was under Order 24 rule 1 of the Civil Procedure Rules. As at this time the copy of the said notice was missing from the court file but counsel promised to place one on the file. The defence had no objection and the court made orders for the withdrawal to that suit with costs to the defendant and with a further order that the defendant do proceed to process the counter claim for hearing and final disposal.

As at the time this court made the orders for withdrawal it was not aware of the existence of Nairobi HCCC No.654/2000 filed by the same plaintiff against the same defendants. A perusal of that court file shows that counsels for parties appeared before the judge in Nairobi on 2nd May 2000 in respect of the Nairobi suit and my learned sister judge Justice Joyce Aluoch made an order that the Nairobi file be transferred to Eldoret and the same be consolidated with the current file – Eldoret HCCC No 107/99. The Nairobi file has already been transferred here and relocated No 131/2000 of Eldoret High Court.

The plaintiff has come under section 3A of the Civil Procedure Act Order 24 rule 1 and Order 50 rule seeking orders that the plaintiff be permitted to reinstate the withdrawal suit and the orders discontinuing the same be vacated. The sum total of the grounds in support are that the suit was withdrawn because another similar case had been filed in Nairobi; that the Nairobi file has now been transferred to the Eldoret High Court and consolidation has to take place; that the order of consolidation will not be given effect until and unless the suit herein is reinstated.

The defendants opposed that application on the basis that order 24 rule 1 permits the withdrawal of the suit but has no provision for reinstatement; that the plaintiff was within his rights to withdraw his claim, that the defendant has a counter claim to which the plaintiff filed a defence and orders have been issued in respect of the same; that the Nairobi file was filed with the sole purpose of defeating this court's orders made on 6th March 2000; that the Nairobi file was transferred because it was an abuse of the due process of the law; that the suit was withdrawn on 19th May 2000 and not 2nd May 2000. On that basis he urged the court to dismiss the application with costs.

In reply counsel for the plaintiff submitted that the withdrawal became effective when the notice was filed on 2nd May 2000; that when the Nairobi case was filed the plaintiff had an impression that the Eldoret suit had been withdrawn; that since the position of the law is that a party cannot prosecute two similar suits separately, the only course open to the court is for the withdrawn suit to be reinstated; that if the defendant is allowed to prosecute his counter claim he will be denying the plaintiff a chance of putting his case forward.

On the court's assessment of the facts herein it is clear that indeed order 24 rule 1 permits withdrawal of the suit but it does not provide for reinstatement of the suit. The plaintiff/applicant has however cited section 3A which is a saving section and usually invoked when no other provision caters for that particular situation. . The application is therefore proper.

As for its merits the notice of withdrawal was filed on 2nd May 2000 and in law the withdrawal became effective on that date and the endorsement was just made at a later stage on 19th May 2000. As at 2nd May 2000 the orders for consolidation had already been made. The High Court in Nairobi was not aware of the withdrawal and since the endorsement of the withdrawal was made at a later stage it is clear that the consolidation order was early in time and in order for it to be given effect reinstatement has to issue. This court also when it made orders of 19th May 2000 it was not informed of the consolidation order.

As for the counter claim it will not be affected by the reinstatement because since there is a consolidation order the plaint in the Nairobi file will cover the withdrawn plaint should a reinstatement order be not forth coming.

In the court's opinion, the parties position will not be altered in any event as the two suits are similar and so there is no harm in reviving the withdrawn suit for purposes of consolidation.

The application of 5th July 2000 be and is hereby allowed as prayed. However, on costs, since it is the plaintiff who caused the circumstances leading to that withdrawal, he will pay costs of this application to the defendant.

Dated at Eldoret this 22nd day of August 2000.

Read and delivered at Eldoret this 28th day of August 2000.

R. NAMBUYE, J.

SECOND RULING

In respect of the application dated 23rd May 2000 and filed the same date, the application was amended to read that it is brought under Order 44 rule 1 and order 50 rule 1 of the Civil Procedure Rules. It seeks review of this court's orders made on 16th May 2000 and on the 19th day of May 2000 on account of error and mistake apparent on the face of the record; that the said orders be vacated and that costs be provided for. The reasons are that as at the time they were made the suit had been withdrawn; they should have been based on the counter claim and they should have shown that the counter claim survives the withdrawal of the suit; that leave to cite the plaintiff was made under a wrong provision of the law; that the order for police supervision gave the police an opportunity to harass the plaintiff and they urge the court to set side and or vacate them.

The defendant has opposed that application on the grounds that stay orders should not have been made as they are not provided for under order 44; that thee was no error apparent on the face of the record as the orders of 12th May 2000 were granted on an application which by law is supposed to be exparte; that the order to request help from the OCPD was proper as his help was needed in an execution process and such orders are usually made exparte; that upon withdrawal the suit of the plaintiff died but not the counter

claim and in fact having withdrawn his suit the plaintiff has no locus standi prosecuting applications in this file; that order 44 of the Civil Procedure Rules applies where the ingredients are satisfied as the plaintiff has not specified what orders he wants reviewed; it is their stand that the orders were properly granted at the time; similarly the orders made on 19th May 2000 were 2 and the plaintiff has not specified which orders are to be reviewed.

In reply counsel for the plaintiff stated that it has already been ruled by the court that the order for police supervision should not have been made and the same has been set aside or stayed; that he has to show by law that the counter claim lives after the withdrawal of the suit; that they are aggrieved by orders of 16th May 2000 and those of 19th May 2000 and in the court record and there is no need to reproduce them.

On the court's assessment of the facts in this application, it is clear that the parties argued two injunction applications against each other. The court read separate rulings on 6th March 2000 which were in favour of the defendant. The defendant accordingly extracted the orders and moved to execute or effect the same. They were allegedly not obeyed by the plaintiff. This prompted the defendant to file the application dated 12th May 2000 and filed the same day. It had 4 prayers that it be heard exparte in the first instance; that the court do grant leave to institute contempt proceedings and that the OCPD do supervise the enforcement of the orders of 6th March 2000 and that costs be provided for. These orders were granted on 16th May 2000 whereby leave was granted to the defendant to institute contempt proceedings against the plaintiff for disobeying the orders of 6th March 2000 and also the prayer for police supervision and that costs were to be in the cause. It has been argued by counsel for the plaintiff that the application was brought under a wrong provisions of law as a wrong section was cited. This is complaint touching on want of form and this is curable under order 50 rule 12 of the Civil Procedure Rules.

As for the order relating to police supervision this court has already observed during the request for stay of those orders that this substantive prayer should not have been included and the same is reviewed and set aside on the court's own motion. The prayer for leave to institute contempt proceedings has been attacked by the plaintiff’s counsel because it should not have been made as the plaintiff had already withdrawn his suit and the defendant did not show that the counter claim lives after withdrawal of the suit. It is evidently clear that in law a suit is defined in section 2 of the Civil Procedure Code to mean “all civil proceedings commenced in any manner prescribed". It is common knowledge that a counter claim is a suit of its own and no argument is required to prove that. It is clear that when the plaintiff withdrew his suit it did not pull down the defendant’s counter claim and that is why the court made an order that he should process the counter claim for hearing and final determination. It follow that as at the time the orders complained of were made the counter claim was alive.

The other argument was that the orders should not have been made as the suit had been withdrawn. There were orders made on 6th March 2000 in favour of the defendant which did not die with the suit and were capable of being enforced.

As for the orders made on 19th May 2000 they were for changing or substituting the signatories to the bank account of the defendant following the ruling of 6th March 2000 and secondly the had been withdrawn. Again, using my earlier argument in this ruling that withdrawal of the suit did not erase the orders already granted on the record in favour of the defendants and it did not exonerate the plaintiff from obedience to those orders, it follows that they were rightly made.

Lastly the issue of competence of the application has come into question. The defendant argues that the plaintiff has no locus standi to prosecute this application. In the court’s view the plaintiff’s withdrawal of the suit leaving the counter claim did not remove the plaintiff from the proceedings as he has a reply to defence and defence to counter claim filed on 19th May 2000. He is still a party to the proceedings and so the application is in order and he has locus standi.

For the reasons given, a part form the prayer for police supervision which has been reviewed and set aside, the other orders of 16th May 2000 and 19th May 2000 are confirmed and so the application is refused in respect to those other orders.

The applicant/plaintiff has not succeeded substantially and so the defendant/respondent will have costs of the application.

Read and delivered at Eldoret this 28th day of August 2000.

R. NAMBUYE J.

THIRD RULING

This court made orders on 6th March 2000 in favour of the defendant. They allege to have moved to execute those orders but were not allegedly obeyed. They have therefore come to this court under section 5 of the Judicature Act and order 39 rule 4 of the Civil Procedure Rules seeking an order that the honourable court be pleased to commit the respondent to prison for contempt of court orders for 6 months or such a period that will meet the interest of justice for contempt of orders of this court given on 6th March 2000 and that costs be provided for. The orders alleged to have been contravened is to the event that an injunction was issued to restrain to plaintiff/respondent and or his servants and or agents and or employees from entering and or trespassing into and or remaining therein or running the management of Afraha High School and subukia Afraha Academy or harassing the defendants/applicants or the management committee of the first defendant.

The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in court and the key ones are that the defendants filed an application seeking to restrain the plaintiff from interfering with the management of the first defendant and they were successful and this court issued orders to that effect which were served on the plaintiff and there is a return of service to that effect; that he (plaintiff) refused to heed the court orders which leave was granted on 16th May 2000; that the exhibits show that he (plaintiff) has flouted the court orders and so he should be committed to civil jail; that the application has not been opposed and so the orders should be granted as prayed.

The plaintiff/respondent has not filed any papers in opposition to that application but wishes to state that the return of service relied on does not specify which order was served and what the order required the defendant to do. They contend that the order was not served and he was not aware of the alleged order or what it required him to do. The letter annexed is from Laboka who is not the plaintiff and he (plaintiff) cannot go to jail on behalf of that other person.

In reply counsel for the defendants reiterated that the return of service indicates that he was served with the court order of 6th March 2000 and the order was clear on what it was supposed to achieve; that Laboka is the secretary to one Board of Governors this court ruled that it does not exist; that the application has not opposed the application and so the orders should be granted as prayed; the orders sought are necessary so that the court can maintain its dignity.

On the court's assessment of the facts in this application it is clear that indeed this court made orders on 6th March 2000 which orders have not been appealed against and have not been upset. It is alleged they were breached thereby grieving the defendants who rightly sought leave of court to institute contempt proceedings which leave been upheld by this court in another ruling and it is in place. In pursuance to that leave the current application was filed. Indeed the plaintiff has not filed any papers in opposition and in law he can only address the court on points of law and he did address the court on a point of law which is to the effect that the order was served not and the plaintiff has no notice of it.

As submitted by the plaintiff's counsel the offence of contempt of court is a serious one and it borders on criminality. Whether the application seeking committal is opposed or not the court seized of the matter has to ensure that the correct steps were followed to bring to the attention of the person sought to be committed of the order alleged to be breached. Herein we have the extracted order which is clear and states clearly what the plaintiff was not supposed to do. There is a return of service filed. Paragraph 4 of the said return of service reads "that the said Manyara who became known to me at the time of service

accepted service but declined to sign the copy returned herewith."

The construction of that paragraph shows that the process server did not know the said David Manyara. He did not disclose who led him to the residence of the said David Manyara and pointed out the residence to him and also pointed out the said David Manyara to him. This is necessary to ensure that the person served is the correct one.

Another requirement is that the person in whose favour the orders are made has to serve a notice of penal consequences to accompany the order. There is none annexed and so none was served.

In the premises the orders sought cannot issue. The defendant/applicant will have to start afresh and follow the following guidelines.-

1. Re-extract the order

2. Draw a notice of penal consequences.

3. The process server has to ensure there is personal service.

4. The process server has to state how he traced the person served and how he knew that the person served is the person against whom the orders are made.

For the reasons given the application dated 30th May 2000 be and is hereby dismissed with no order as to costs as to costs as the plaintiff/respondent did not file any papers in opposition to the application.

Read and delivered at Eldoret this 28th day of August 2000.

R NAMBUYE, J