



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 31 (FORMERLY HCC NO 342 OF 1996) OF 2020

HANOS (K) LTDPLAINTIFF/RESPONDENT

VERSUS

MOHANLAL NEMCHAND SHAH.....1ST DEFENDANT/APPLICANT

LAXMIBEN MOHANLAL NEMCHAND SHAH.....2ND DEFENDANT/APPLICANT

DHIREN MOHANLAL SHAH3RD DEFENDANT/APPLICANT

RULING

I. The Preliminaries.

1. What is before this Honorable Court for determination is the Notice of Motion application by the Advocates for the Defendant/Applicant – the law firm of Messrs. Mutuku Mbithi & Butoyi Advocates dated 24th October, 2019 and filed in court the said date. It is brought under the provisions of Order 9 rule 9 of the Civil Procedure Rules 2010.

II. The Defendant/Applicant's case.

2. The Defendant/Applicant through the aforementioned application seeks to be granted the following orders. These are:-

(a) That leave be granted to the Defendant/Applicant to change the firm of Advocates representing him in this matter from the law firm of NDEGWA MUTHAMA KATISYA & ASSOCIATES to the firm of Messrs. MUTUKU, MBITHI & BUTONYI ADVOCATES. (Spend)

(b) That upon such leave being granted, the firm of Messrs. Mutuku, Mbithi & Butonyi Advocates be deemed to be on record on behalf of the Defendant/Applicant on this matter. (Spend)

(c) That the Court Orders for the reconstruction of the Court file herein. (Spend)

(d) That the Honorable Court issues direction as to the Court the suit herein.

(e) That Costs of this application to be provided for.

2. Ideally taking prayers (a), (b) and (c) were already dealt with, therefore this Honorable Court is only left to make a determination of prayers (d) and (e) hereof of the said Notice of Motion application.

The said Notice of Motion application is founded and supported by the 16 Paragraphed Supporting affidavit of DHIREN MOHANLAL SHAH the 3rd Defendant/Applicant and three (3) annexures marked as “DSM 1 to 3” annexed thereof sworn and dated on the 24th October, 2019. There was also a further Affidavit sworn by Mr. Peter Mutuku Mbithi dated 26th May, -2021. He deposed that the Respondent filed the suit in 1996 against the 3rd Defendant and parents now deceased being the 1st and 2nd Defendant. He stated that his parents had since passed on and he was the only surviving Defendant in the matter. He attached copies of the Grant Letters of Administration. He said that he had previously retained the Law Firm of Messrs. Ndegwa Muthama Katisya & Associates since the year 2003.

3. He deposed that the Plaintiff/Respondents immediately filed a further suit against the 3rd Defendant/Applicant herein being HCC Misc.

Appl. No. 667/2009 (Later on it became ELC No. 52/2016) on 18th October, 2018, the later suit was determined in favour of the Plaintiffs/Respondents. He informed court that he had since filed an appeal at the court of Appeal against the said judgment of the superior court being Court of Appeal (Mbsa) Civil case No. 81 of 2020 – **“Dhiren Mohanlal Shah – Vs – Hanos (K) Limited”** He attached a copy of the memorandum of Appeal.

4. He held that considering that the issues at the High Court had been fully canvassed, it would have been fair that the 3rd Defendant/Applicant was allowed to file his Bill of Costs in the withdrawn case as ordered by court. He deposed that his then Advocates never filed a Bill of Costs for taxation hoping to do so at the end upon the finalization of the entire dispute.

5. He deposed that in the given circumstances it had been necessary to appoint another Advocate being Mutuku, Mbithi & Butonyi Advocates in place of Ndegwa Muthama Katisya Associates to represent him for the taxation of the Bill of Costs. In so doing, no party would suffer any prejudice should the prayers sought were granted.

6. Upon being granted leave, the Defendant/Applicant prepared a further affidavit, and on 2nd June, 2021, he complied by filing a 10 Paragraphed affidavit dated 26th May, 2021, sworn by one PETER MUTUKU MBITHI. He deposed that he was an Advocate of High Court of Kenya practicing from the firm of Messrs. Mutuku, Mbithi & Butonyi Advocates and having the conduct of this proceedings hence competent to swear the said affidavit.

7. He deposed that at the appeal, he was represented by the Law Firm of Mututku Mbithi & Butoyi Advocate. He held that on the said Appeal, the Plaintiff/Respondent swore an affidavit in which it deposed that it had filed a Notice to discontinue the suit herein in January, 2015 – he attached a copy of the said Notice.

8. He was of the view that the Plaintiff/Respondent had alleged having discontinued the suit herein, it would have been fair and in the interest of justice that the court gave directions as to discontinued case and the Applicant herein be allowed to file a Bill of Costs therein.

He stated that he had chosen to appoint the firm of Messrs. Mutuku Mbithi & Butoyi Advocate to represent him in place of Messrs. Ndegwa Muthama Katisya Associates, Advocates. From the further Affidavit, the only additional point of importance was that no directions as to costs on the alleged discontinued suit were ever given and therefore the issue of Party and Party Bill of Costs was premature at this stage.

He further deposed that the Honorable Court had jurisdiction to give directions on all issues related to the case at hand. He urged to be granted the orders as prayed.

II. THE PLAINTIFFS/RESPONDENTS CASE

9. The said Notice of Motion application was vehemently opposed by the Plaintiffs/Respondents. On 28th November, 2019 the law firm of Messrs. Anjarwalla & Khanna Advocates filed a grounds of opposition dated on the same date. Under the provisions of Order 57 Rule 14 (d) (e) of the Civil Procedure Rules. They argued that the said application was wholly misconceived, an abuse of the process of court the Prayers No. 4 and 5 of the said application could no longer be sought or implemented as they arose from an order issued on 3rd December, 2009 which had lapsed in the year 2006 and time barred by limitation. They argued that this court had no jurisdiction to grant any directions or orders onto such prayers.

10. On 29th January, 2020, the Advocates for the Plaintiff/ Respondent filed a Notice of Preliminary objection dated 29th January 2020 on the following grounds:-

(a) That the Notice of Motion application dated 24.10.2019 and filed on the same date was still pending hearing and determination of prayers 4 & 5 thereof.

(b) That the said application was opposed by the 1st Plaintiff/ Respondent through the statement of grounds of opposition dated 28th November, 2019 and filed on the same date.

(c) That the consent order issued on 3rd December 2009 for costs to be taxed was time barred and was not enforceable in law.

(d) That there had been no subsequent order of costs issued herein.

(e) That this Hon. Court has no jurisdiction to proceed to tax the said party and party Bill of Costs and hence prayed for the same to be set aside.

(f) That the Bill of Costs was in event defective as the 1st, 2nd Defendants were deceased sought to claim costs against the 2nd Plaintiff who was also deceased.

III. THE SUBMISSIONS

11. On 1st March, 2021 when all the parties were present in court, directions were taken to the effect that the Notice of Motion application dated 24th October, 2019, the grounds of opposition dated 2nd November, 2019 and the preliminary objection by the Plaintiff/Respondent dated 29th January, 2020 be disposed off by way of written submissions. Both the Learned Counsels Senior Counsel Mr. Ushwin Khanna for the Plaintiffs/Respondents and Mr. Peter Mutuku Mbithi were accorded a brief moment each to orally highlight on submissions.

A. THE SUBMISSIONS BY THE DEFENDANT/APPLICANT

12. On 16th July, 2021, the Advocates for the Defendants/ Applicants the law firm of Messrs. Mutuku, Mbithi & Butonyi Advocates prepared and filed their written submission dated 12th July, 2021. The Learned Counsel, Mr. Mbithi admitted and confirmed that all the other prayers had been spend and the only ones that remained were prayer 4 and 5 of the Notice of Motion which were now contested. The directions sought in prayer 4 of the Notice of Motion application related to the Notice of Discontinuance filed by the Plaintiff/Respondent on 20th January 2015 without leave of court or consent of the Defendant/Applicants

13. The Learned Counsel submitted that the Plaintiff argued in Paragraph 10 of their Submissions that no action would be brought for claim of equitable relief in this case after six (6) years. They held that the Plaintiff/Respondents claimed that it filed its Notice of Discontinuance of the suit in January, 2015. The Defendant/Applicant filed the current appeal seeking among others for directions in November, 2019 within the 4 years of filing of the notice.

14. He argued therefore the application was filed within the four (4) years of expiry of the six (6) years of the prescription claimed by the Plaintiff/Respondent. It was within the time allowed by law to claim costs and other equitable relief.

The directions sought was from the provisions of order 25 Rule 2 of the Civil Procedure Rules 2010. Where the case had been withdrawn when it had been fixed or set down for hearing.

15. They held that there was no leave of court sought to discontinue the suit which at the time had been pending in court for more than nineteen (19) years. There was no consent of the Defendants/Applicants for the suit to be withdrawn. They held that the Plaintiff/Respondents retained the right to discontinue its suit at any time.

16. The Defendant/Applicant could not be seen to stand on the way of the Plaintiff/Respondent to withdraw its suit. However they stressed that such discontinuance ought to be with the consent of the Defendant/Applicant or with leave of court and without the consent of the Defendant/Applicant was therefore irregular and no effect in terms of the provisions of Order 25 Rule 2 of the Civil Procedure Rules 200.

17. The contended that the filing of such Notice of Discontinuance of the suit smacks of attempt to circumvent consequences of filing three different suits on the same cause of action at the same time, avoided the likely outcome of the Application to dismiss the suit and was an outright abuse of the due process

18. To buttress on this point, they relied on the decision of ***“Beijing Industrial Designing & Researching Institute –Versus – Lagoon Development Limited [2015] eKLR*** where the Court of Appeal held that such right to withdraw a case cannot be ***“interpreted to mean as the Respondent implied, that the Plaintiff has a right to discontinue his suit in sundry and all cases, even without leave where the law requires such leave. To do so hold would be to reduce the requirement for leave to a mere formality, which we do not think is what was intended by the decisions of the Supreme Court or Order 25”***

Further, they submitted that holding that the Plaintiff must obtain leave of court to discontinue the suit or to withdraw the claim or any part thereof which is granted upon such terms as are just. In this scenario too the Plaintiff’s right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of court. That such leave is granted in terms suggest that it is not a mere formality.

19. They urged that the honorable Court retained the necessary jurisdiction to grant leave to the Plaintiff/Respondent to either discontinue his suit or not in terms of Order 25 Rule 2 of the Civil Procedure Rules 2010 or not and to issue appropriate directions. If the Plaintiffs/Respondents had wanted to discontinue its suit which had been pending in court since the year 1996, it should have been pursuant to the rules of Procedure and in a way that afforded the 3rd Defendant/Applicant the right to costs.

They concurred that the grounds of opposition and the preliminary objection raised by the Plaintiff/Applicant were discretionarily and should be dismissed with costs to the Defendant/Applicant and proceed to issue directions as the court would fine it proper

In the final analysis, he urged this Honorable Court to order that the applications should be allowed.

B. THE SUBMISSION BY THE PLAINTIFF/RESPONDENT

20. On 30th June, 2021, the Advocates for the Plaintiff/ Respondent the law firm of Messrs. Anjarwalla & Khanna Advocates filed their written submissions dated 24th June, 2021. From the said written submission, Mr. Khanna Senior Learned Counsel stated that the only prayers remaining to be determined were prayers numbers 4 and 5 of the Notice of Motion application dated 24th October, 2019 by the 3rd Defendant/Applicant. He submitted that in respect of Prayer 4 of the said application, the 3rd Defendant/Applicant herein was seeking a prayer that the Honorable Court issued directions as to the suit herein. He stated that the Plaintiff/Respondent had opposed prayers numbers 4 and 5 of the said application through its Statement of the Grounds of Opposition dated 28th November, 2019 and through its Preliminary Objection dated and filed on the 16th March, 2021. They referred to the Further Affidavit sworn by Peter Mutuku on 26th May, 2021 and filed in Court on 2nd June, 2021 and submitted that the facts deponed to therein were of no relevance to the issue for determination. The Learned Counsel submitted that the Plaintiff/Respondent had discontinued its suit against the Defendants herein under a Notice of Discontinuance dated 15th January, 2019 and filed in Court on 20th January, 2015. Their contention was that the said Notice was duly served on the firm of Messrs. Ndegwa Katisya Sitonik Associates Advocates on the 21st January, 2015 at 10.40 am and service was acknowledged to that effect.

21. They explained that the said law firm were acting for the Defendants herein until the 2nd December, 2019 when leave was granted by

the Honourable Court to change the firm of Advocates representing the 3rd Defendant/Applicant from the firm of Messrs. Ndegwa Katisya Sitonik Associates Advocates to the law firm of Messrs. Mutuku, Mbithi & Butonyi Advocates. The Learned Counsel averred that prior to the suit being discontinued, the matter had neither been heard nor determined and no Judgement had been entered.

The Learned Counsel further argued that the period of limitation had now expired and they relied on the provisions of Section 4 (1) (e) of the Limitation Act of Actions Act, Cap. 22.

22. It was their contention that with regard to the provisions of the above cited provision of the law, any further step or directions taken in this matter was time barred by limitation.

Consequently, the Learned Counsel submitted that this Honorable Court had no jurisdiction to give any directions sought in Prayer 4 of the Defendant/Applicant's Notice of Motion application.

The upshot of it all, the 1st Plaintiff/Respondent urged the Honorable Court to allow the Preliminary Objection and dismiss prayers 4 of the Notice of Motion application dated 24th October, 2019 with costs to the 1st Plaintiff/Respondent.

IV ANALYSIS & DETERMINATION

23. I have read and put into account all the pleadings – the written submission by the 3rd Defendant/Applicant, the authorities, the grounds of opposition, dated 28th November, 2019 and the Preliminary objection dated and filed on 29th January, 2020 raised by the Plaintiffs/Respondents pertaining to the Notice of Motion application dated 25th October, 2019 by the 3rd Defendant/Applicant and considered the appropriate provisions of the law. In order to arrive at a fair, just and informed decision as urged by both the parties herein the court has relied on the following framed issues. These are:-

a. Whether the Plaintiff is entitled to withdraw its case at any time of the proceeding under the provisions of Order 25 Rules 2 (1) and (2) of the Civil Procedure Rules, 2010.

b. Whether the 3rd Defendant/Applicant is entitled to be granted the orders sought under Prayers 4 and 5 of the Notice of Motion Application dated 29th October, 2009 after the discontinuance of the entire suit against the Defendants by the upon the withdrawal of the entire suit by the Plaintiffs/Respondents through a Notice of Discontinuance of Suit dated 15th January, 2015 and filed in court on 20th January, 2015.

c. Who will bear the costs of the Notice of Motion application dated 25th October, 2019.

ISSUE No.

a). Whether the Plaintiff is entitled to withdraw its case at any time of the proceeding under the provisions of Order 25

Rules 2 (1) and (2) of the Civil procedure Rules, 2010.

24. Under this sub heading the Honorable Court holds that as a matter of right, the Plaintiff/Respondent retained the right to discontinue its suit at any time. The Defendant/Applicant could not be seen to stand on the way of the Plaintiff/Respondent to withdraw its suit. Besides, it should be noted that this court would even “Suo Moto” in the interest of justice make an order for discontinuance of a suit in favour of any party whatsoever. In this case, the Plaintiffs/Respondents discontinued their case through a Notice of Discontinuance dated 15th January, 2015 and filed in court on 20th January, 2015 which is Six (6) years ago, was very much in order.

Under the provisions of Order 25 Rule 2 (1) and (2) of the Civil Procedure Rules, 2010 provides:-

Discontinuance 2 (1): “Where a suit has been set down for hearing it may be discontinued. Or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

2 (2) “Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just” .

We fully concur with the Learned Counsel for the Defendant/Applicant that for this to be effected there should have been either the consent of the parties or leave of court. Certainly, the leave of court was not a formality. Undoubtedly, it was a legal requirement. Nonetheless, at the same time it will be noted that the power here are purely discretionary of the court. From the facts nothing substantial really happened in this matter after being in court from 1996 that would warrant the Defendant/Applicant to make any claim on costs. The Defendant/Applicant has not been inconvenienced nor prejudicial in any way from this case. For this reason and in the given circumstances this court “Suo moto” proceeds to grant leave for the suit to be discontinued and the matter now stand regularized so to speak.

ISSUE No. b).

Whether the 3rd Defendant/Applicant is entitled to be granted the orders sought under Prayers 4 and 5 of the Notice of Motion Application dated 29th October, 2009 after the discontinuance of the entire suit against the Defendants by the upon the

withdrawal of the entire suit by the Plaintiffs/Respondents through a Notice of Discontinuance of Suit dated 15th January, 2015 and filed in court on 20th January, 2015.

25. In order to handle this sub - heading with the required finesse, I feel there is need to extrapolate on the facts of the case though briefly. This has been a rather protracted litigation of close to twenty (20) years being before this court between the Plaintiffs/Respondents and the Defendants/Applicants herein. The case was initiated by the Plaintiffs/Respondents at High Court on 16th June, 2003. Through an Originating summons, the Plaintiffs/Respondents moved court seeking various prayers among them that they were entitled to adverse possession of the suit property known as Land Reference numbers Sub – division numbers 2108 and 2124, Bamburi which were both owned by the Defendant/Applicant. It will be noted that, by that time, there was still another suit initiated by the Plaintiffs/Respondents being HCCC No. 342 of 1996 between the same parties and the same properties.

26. The Plaintiff's case was that by a lease dated 1st August, 1986, the Defendant, his father Mohanlal Nemchand Shah and his late mother Laximiben Mohanlal Nemchand Shah leased the suit to the Plaintiff/Respondent for a period of three (3) years from the period of August, 1986 and that the said lease expired on 31st July, 1989. That since the effluxion of the lease, it had not been renewed or extended and the Plaintiff/Respondent continued in possession of the suit premises openly and without interruption for a period of over nineteen (19) years as at the date of filing of the said suit in 2009. Upon taking possession, the Plaintiff/Respondent had undertaken extensive development on the premises.

27. From the records, it is indicated that on 14th October, 2009, being six (6) years down the line, when the case was slated for hearing the Plaintiffs/Respondents applied to withdraw the entire Originating Summons case and Justice Anzangalala allowed the application for the withdrawal of the case under Order 25 (1) of the Civil Procedure Rules as the case had not been set down for hearing, with an order that the Plaintiffs/Respondents do pay the Defendants/Applicants their costs of the suit to be taxed and certified by the Taxing Officer of high court. Court accordingly. Immediately thereafter, the Plaintiffs/Respondents filed another suit being HCC (Misc.) (Mbsa) Appl. No. 667 of 2009 and which was later on registered as ELC No. 52 of 2016 between the same parties, the same properties and same cause of action and seeking the same prayers. On 18th October, 2018 having been heard, the suit by the Plaintiffs/Applicants was determined to their favour. The Defendant/Applicant filed an appeal being Court of appeal (Mbsa) Civil Appeal numbers 59 of 2019 which is still pending hearing and determination before the Court of Appeal Mombasa. Thus, the main bone of contention is twofold:- a). on the issue of the order by the high court on the payment of the costs of this suit and b). whether the Environment and Land Court would be the proper court to direct the costs to be taxed and certified by the Taxing officer on orders granted by High Court and vis – a vis the Consent order of 3rd December, 2009.

28. In arriving at a fair and just decision, I wish to state the following. Firstly, as pointed out above, the main substratum of this dispute is whether the Defendant/Applicant is entitled to the prayers No. 4 and 5 of the application and/or whether the consent order entered on 3rd December, 2009 by the parties herein was barred by Limitation of Actions under Section 4 (1) (e) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya. Secondly, let us have an assessment of the concept of Costs. Under the provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 provides that:-

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction shall be no bar to the exercise of those powers; Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order”

29. Thirdly, All said and done, based on the provisions of the Sections 1, 1A 3 and 3A of the Civil Procedure Rules 2010, Sections 3 and 13 (1) & (2) of the Environment & Land Act, No. 19 of 2012, Section 150 of the Land Act, of 2012, 101 of the Land Registration Act, of 2012 and Article 159 (1) and (2) & 162 (2) (b) of the Constitution of Kenya, what are termed as overriding objectives. These provisions of law do donate to court a greater latitude when dealing with land matters to overcome any undue technicalities which would hinder the attainment and application of the said overriding objectives and its principles to ensure and facilitate fast expeditious, proportionate and accessible resolution of dispute before it.

V. DETERMINATION

30. Finally, the upshot of this is that the application by the Defendant/Applicant dated 24th October, 2019 which had already been partially determined particularly on Prayers 1, 2, and 3. Thus, the only pending aspect of the application is on the issues of this Honorable Court providing directions on how the suit will proceed as stated under the prayers numbers 4 and 5 of the said notice of motion application taking that all the other prayers were already spend. In the given circumstances,

I therefore proceed to make the following directions/orders:-

a) THAT this Honorable Court do hereby invoke its inherent powers based on the provisions of the Sections 1, 1A 3 and 3A of the Civil Procedure Rules 2010, Sections 3 and 13 (1) & (2) of the Environment & Land Act, No. 19 of 2012, Section 150 of the Land Act, of 2012, 101 of the Land Registration Act, of 2012 and Article 159 (1) and (2) & 162 (2) (b) of the Constitution of Kenya.

b) THAT pursuant to the afore said inherent powers, the Plaintiff herein – Hanos (Kenya Limited) be and is hereby granted leave and hence allowed to discontinue its suit – ELC No. 31 of 2020 (Formerly HCCC Number 342 of 1996) pursuant to its filed Notice of Discontinuance dated 15th January, 2015 and filed in Court on 20th January, 2015 and the provisions of Order 25 Rules 2 (1) and (2) of the Civil Procedure Rules, 2020 with no orders to Costs.

c) THAT the afore stated Notice of Discontinuance by the Plaintiff be and is hereby adopted as an Order of this Court,

d) THAT pursuant to the afore stated orders, this suit be and is hereby therefore marked as finalized and marked as settled henceforth.

e) THAT the 3rd Defendant to be at liberty to continue pursuing the filed appeal pending before the Court of Appeal being Appeal Number.....against the Judgment of this Court - ELC No. 52 of 2016 (formerly HC. Misc. Application No. 667 of 2009) to its logical conclusion.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY THIS 2ND DAY OF FEBRUARY 2022.

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

IN THE PRESENCE OF:-

M/S. YUMNA – THE COURT ASSISTANT

MR. KHANNA ADVOCATE FOR THE PLAINTIFFS/RESPONDENTS.

MR. WAFULA ADVOCATE HOLDING BRIEF FOR MR. MUTUKU FOR THE 3RD DEFENDANT/APPLICANT.