



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 43 OF 2019**

**ESTATE SONRISA LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SAMUEL KAMAU MACHARIA.....DEFENDANT/APPLICANT**

**RULING**

1. The application herein is dated 9<sup>th</sup> November 2020 and is brought under Order 21 Rule 9 and Order 45 Rule 1, 2 & 3 of the Civil Procedure Rules, Section 1(A), 1B, 3A and 27 of the Civil Procedure Act. The defendant/applicant herein seeks the review and setting aside of the ex parte orders made on 28<sup>th</sup> October 2020 and that costs of the suit be awarded to the defendant.
2. The applicant avers that the matter came up for mention on 28<sup>th</sup> October 2020 to confirm court's directions on filing of submissions by the plaintiff with regards to the defendant's application for striking out of the suit. That the advocate on record for the defendant was unable to join the virtual court in time. The reason for the delay in joining the virtual court was that though the advocate joined the virtual link to court, he was admitted into the court late. That by the time the advocate joined the virtual court, the court had already dealt with the matter. That court was done with the day's causelist, Mr. Sang the advocate on record for the defendant informed court about the technical hitch and the Court directed that the orders were already recorded and can only be addressed by way of formal application, hence this application.
3. The application is supported by affidavit of Kipkemoi Sang, the advocate on record for the defendant/applicant. He avers inter alia that on 28<sup>th</sup> October 2020, he was admitted into the virtual court after the matter had been called and dealt with. He claimed that when the matter was called, the advocate on record for the plaintiff withdrew the suit with no order as to costs. He also stated that the plaintiff's counsel misled the court to make no order as to costs, yet there was no consent between the parties for costs not to be awarded. He prayed to court to review those orders and award costs to the defendant.
4. The plaintiff/respondent opposed the application vide a supporting affidavit sworn by one Allan George Kamau, the advocate on record for the plaintiff/respondent. He avers inter alia that the plaintiff withdrew the suit for being time barred. That the withdrawal was occasioned by the delay in filing the suit that was caused by coordinating the facts of the case with other parties. He pleaded with court not to award costs to the defendant/applicant as it would amount to unfair enrichment and a reward to breaching court orders. He further urged that the applicant was an underserving party to be awarded costs and prayed court to dismiss the application with costs.
5. The court directed the application to be disposed of by way of written submissions.
6. The defendant/applicant filed his submissions on 17<sup>th</sup> December 2020 and submitted that, the nonattendance by advocate on 28<sup>th</sup> October 2020 was not intentional but rather out of a technical problem of not being admitted into the virtual court in time. That though the Notice of Withdrawal indicated that the suit had been withdrawn with no orders as to costs, there was no consent between the parties for the same. That the advocate on record for the plaintiff misled court to withdraw the suit with no orders as to costs. He further submitted that the court ought to hear both the plaintiff and defendant before awarding costs, as award of costs is a right anchored in law. That pursuant to the withdrawal the plaintiff was aware of the nullity of the suit on the basis of the suit being time barred but kept on engaging the defendant in litigation.
7. He relied on **Section 27 of the Civil Procedure Act** that state that costs follow the event and the discretion to award or not to award rests with the court and that discretion should be made judiciously. Further to that, he relied on **Cecilia Kaburu Ngayu V Barclays Bank of Kenya Ltd & Anor (2016)EKL**R where court awarded costs to the 2<sup>nd</sup> defendant and held that the core principal of Section 27 was costs must follow the event. He prayed court to allow the application since there is no reason why the defendant cannot be awarded costs, considering that the plaintiff withdrew the suit before its final determination.
8. The plaintiff/respondent filed their submissions on 3<sup>rd</sup> February 2021 and submitted that its trite law that a review application must be accompanied by an order and decree to be reviewed. That the application herein is therefore defective and incompetent. They relied on

several cases including that of **Thomas Owen Ondieki V National Bank of Kenya (2011)EKLR** where it was held that an application for review was dismissed for being incompetent as no decree had been drawn and attached.

9. On the issue of awarding costs, the respondent submitted that, they were unable to file the suit in time due to the difficulties in coordinating facts from different parties. That once the respondent realized the mistake, they immediately withdrew the suit and should not be punished by court by awarding costs to the defendant/applicant.

10. The respondent interpreted **Section 27 of the Civil Procedure Act** to mean that, awarding costs is at the discretion of court. The respondent prayed to court to decline an award of costs to the applicant as the same would be highly prejudicial to the respondent who has lost it all.

11. I have considered the application and submissions made by both parties.

12. On 28<sup>th</sup> October 2020, when the matter came mention to confirm filing of submissions, Ms. Mbiriwe was holding brief for the Mr. Kamau for the plaintiff while there was no appearance by the advocate on record for the defendant. Ms. Mbiriwe, informed court that the plaintiff had filed a Notice of Withdrawal of the suit with no orders as to costs. She also confirmed that she had served the defendant. The court then proceeded to mark the matter as withdrawn with no orders as to costs. The defendant herein seeks to review those orders vide this application and prays to court to award costs to the defendant.

13. The respondent avers that the application is incompetent, because the applicant has not attached the orders being reviewed. However, from my reading of **Order 45 Rule 1 of the Civil Procedure Rules** it is not a mandatory requirement for an applicant seeking review of an order to attach the order or decree. In my view the application before me is competent for determination.

**14. Order 45, Rule 1 of the Civil Procedure Rules** provides the reasons that would warrant court to review orders previously made if the applicant can prove:-

**a. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or**

**b. on account of some mistake or error apparent on the face of the record,**

**c. or for any other sufficient reason,**

**a. and has made the application without unreasonable delay.**

15. The application herein was made 14 days after the orders were made, and therefore in my view there was no delay in seeking review. The reason fronted by the applicant is that on the material day, advocate on record for the defendant was unable to join virtual court due to technical delay. When he was able to join, the court had already called out the matter and given the orders, hence the need for this application. The reason given for the non-attendance is sufficient that warrant court to consider reviewing its orders made in 28<sup>th</sup> October 2020 with regards to costs.

16. The applicant anchors, his application on **Section 27 of the Civil Procedure Act which provides that:-**

**1. 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 in 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 to try the suit 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.**

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

17. The court has the discretion to award the costs to a successful party in a suit. Herein, there is no successful party, instead we have a plaintiff who withdrew his suit before the case was heard and determined. The suit herein was instituted vide a plaint filed on 15<sup>th</sup> March 2019 by the plaintiff and the defendant filed a defence on 8<sup>th</sup> April 2019. The defendant then made an application seeking to have the suit dismissed for being time barred on 26<sup>th</sup> September 2020. Before the application was determined, the plaintiff herein withdrew the suit vide a Notice of Withdrawal filed on 27<sup>th</sup> October 2020. No doubt, the defendant has incurred costs in defending the suit until the suit was withdrawn and consequently deserves to be compensated for such.

18. The discretion of court to award costs is wider to cover instances where the suit has been withdrawn before it is heard and determined. Litigation is a legal business that takes time, money and human resource to make it happen. When the plaintiff dragged the defendant to court, they must be ready to meet the costs incurred by the defendant. The plaintiff's suit has inconvenienced the defendant and, he should be compensated for the resources he incurred in defending the suit that has since been withdrawn.

19. I find no good reason to depart from the law as set out in **Section 27 of the Civil Procedure Act**. I find the Notice of Motion dated 9<sup>th</sup> October 2020 has merit and is hereby allowed. I make the following orders:-

**a. The costs in the withdrawn suit shall be paid by the plaintiff to the defendant.**

**b. Such costs shall be agreed between the parties, or taxed by the Taxing Officer of the Court.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16<sup>TH</sup> DAY OF JUNE 2021**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Ms Mbwire holding brief for A.G.N Kamau for Plaintiff**

**Ms Achieng holding brief for Orengi for Defendant/Applicant**

**C.K. YANO**

**JUDGE**