



**Arboretum Plaza Limited v Middle East Bank Kenya Ltd & 4 others (Civil Case E055 of 2023) [2024] KEHC 4135 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4135 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E055 OF 2023**

**A MABEYA, J**

**APRIL 19, 2024**

**BETWEEN**

**ARBORETUM PLAZA LIMITED ..... PLAINTIFF**

**AND**

**MIDDLE EAST BANK KENYA LTD ..... 1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENTS ..... 2<sup>ND</sup> DEFENDANT**

**AKBER ABDULLAH KASSAM ESMAIL ..... 3<sup>RD</sup> DEFENDANT**

**DHIRENDRA RANA ..... 4<sup>TH</sup> DEFENDANT**

**ELIZABETH ONGARE ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a plaint dated 29/11/2023, the plaintiff sued the defendants seeking various declarations including general damages. Simultaneous with the plaint, the plaintiff lodged a Motion on Notice of even date. In the Motion it sought injunctive orders against the defendants.
2. The suit was filed in the Civil Division of this Court as HCCC no E 205/2023. On 1/12/2023, Meoli J transferred the suit to this Court. The same was registered as HCCC no E 055 of 2023.
3. On 15/12/2023, Mr. Maiga Learned Counsel for the plaintiff appeared before me and urged the Court to adopt a Notice of withdrawal of suit dated 1/12/2024. The Court obliged and marked the suit as withdrawn. However, immediately thereafter he informed the Court that the withdrawal was in no 205/2023. The Court therefore set aside the order of withdrawal and directed for pre-trials before the Deputy Registrar on 6/2/2024.



4. However, on 6/2/2024 when the matter came up before the deputy registrar, the defendants who had gotten wind of its existence did appear. Mr. Ismail a Learned Counsel for the 1<sup>st</sup> defendant informed the deputy registrar that there were applications which had been filed to dismiss the suit and the same should be mentioned before me.
5. On 14/3/2024, the matter was listed before me and both Advocates for the plaintiff and the Defendants appeared. The Court gave directions for the hearing of a Motion dated 31/1/2024.
6. Immediately thereafter, Mr. Gathu for the plaintiff pointed out to Court that there was already filed in Court a Notice of withdrawal of suit dated 16/2/2024. That he had never served any pleading or summons upon the defendants. That the defendants had only downloaded the pleadings from the CTS.
7. Mr. Esmail retorted that the Notice of withdrawal did not comply with Order 25(1) of the Civil Procedure Rules as it was a conditional withdrawal. That it had sought to withdraw the suit with no order as to costs. That since Rule 3 of Order 25 require that costs be given to the opposite party, it was a matter for taxation.
8. Mr. Kiragu Kimani (Sc) for the 5<sup>th</sup> defendant associated himself with Mr. Esmail's submissions. He submitted that he had come into cognizance of the suit and appeared. The other Advocates appearing for the 2<sup>nd</sup> to 4<sup>th</sup> defendants, Mr. Kivindyo and Mr. Onyambu supported Mr. Esmail and Mr. Kiragu Kimani(SC).
9. The issue for determination is whether the Notice of withdrawal filed by the plaintiff is effective. The notice is dated 16/2/2024. It sought that the suit be marked as withdrawn with no order as to costs. The defendants oppose the notice because of the inclusion of the words "with no order as to costs".
10. Order 25 of the Civil Procedure Rules provides: -

“1 .At anytime before the setting down of the suit for hearing the plaintiff may be notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and .....
11. Under the foregoing provision, it is within a party's discretion to withdraw or discontinue his/her claim before trial. As to costs, that is in the discretion of the Court and has to be dealt with under Rule 3 of Order 25 as submitted by Mr. Esmail.
12. In the present case, there is ample evidence that none of the defendants was served with any pleading. Summons were never issued. I need not have to state here that, a suit effectively commences against a defendant once a summons is issued and served upon him commanding him to attend and answer the claim.
13. The question is, can any order issue or relief be granted against a party who has not been formally invited to join a proceeding by way of service. From the record, at no one time did the plaintiff appear in Court and seek any adverse order against the defendants. Further, no adverse order was made against any of them. What is clear is that, the defendants got wind of the suit and invited themselves to the proceedings and purported to file applications with a view to claim costs.
14. I think that won't do. By the time the defendants invited themselves to the proceedings, the plaintiff had given a clear notice of its intention to withdraw the suit. The defendants saw the pleadings in the CTS and filed applications and thereby incurred costs. Volenti non fit injuria. They invited the costs upon themselves and they cannot seek to bar the plaintiff from withdrawing or discontinuing this suit.



15. In my view, in the circumstances of this case, no order for costs commends itself to me. Accordingly, the suit is marked as wholly withdrawn with no order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

