



**Duale & another v Equatorial Commercial Bank Limited & 2 others (Civil Suit 376 of 2018)
[2024] KEHC 11082 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11082 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 376 OF 2018
FG MUGAMBI, J
SEPTEMBER 20, 2024**

BETWEEN

SAIDO SUGULE DUALE 1ST PLAINTIFF

NIMA ABDI ADAN 2ND PLAINTIFF

AND

EQUATORIAL COMMERCIAL BANK LIMITED 1ST DEFENDANT

BEAR AFRIC KENYA LIMITED 2ND DEFENDANT

BIRE HUSSEIN MIRE 3RD DEFENDANT

RULING

Introduction And Background

1. For determination is the plaintiffs' Notice of Motion dated 5/5/2023 seeking to review, discharge or set aside consent orders issued on 3/4/2023. The application is supported by the affidavit sworn by Saido Sugule Duale, the 1st plaintiff, on the same date and written submissions dated 27/9/2023.
2. The plaintiffs contend that on 21/10/2020, Ms. Nasimiyu holding brief for Mr. Osundwa allegedly for the plaintiffs and Mr. Kenneth Wilson counsel for the defendants appeared before Hon. Lady Justice Wilfrida Okwany and recorded a consent. The plaintiffs further contend that the said firm of Osundwa & Company Advocates had no instructions to compromise the suit. That in any case, the firm was on record for the 3rd defendants.
3. The plaintiffs contend that the consent, which was recorded in their absence that day, was contrary to their clients' instructions for withdrawal of the suit with no orders as to costs. The orders were therefore adverse to the interest of the plaintiffs and were procured on misrepresentation and misapprehensions.



4. The plaintiffs further contend that it is on the premise of the impugned consent order that the defendants had instructed auctioneers to execute and recover the sums of Kshs. 760,400/= owed to them on the strength that they were awarded costs pursuant to the consent order.
5. The application is opposed by the 1st defendant through grounds of opposition dated 18/5/2023 and written submissions dated 9/10/2023. The grounds of opposition are that while the plaintiffs admit that the suit was withdrawn, their only concern is that costs were awarded to the defendants. The defendant denied the existence of any consent order of 3/4/2023 to warrant the grant of the orders sought.

Analysis and Determination

6. I have carefully considered the pleadings, submissions, the evidence and authorities cited by the respective parties. The issue for determination is whether the plaintiff's application is merited.
7. At the outset, it is important to highlight that while the plaintiffs seek to set aside the purported consent orders of 3/4/2023, no such consent order exists in the court record to justify the relief they are seeking. The plaintiffs have also referred to the court's orders of 21/10/2020. Upon reviewing those orders, it is evident that the court had previously acknowledged the withdrawal of the suit via a notice of withdrawal dated and filed on 6/2/2019. The court formally marked the case as withdrawn, with costs awarded to the defendants.
8. I further note that the court erroneously recorded the firm of Osundwa & Company Advocates as representing the plaintiff, when in fact, the firm was on record for the 3rd defendant. Consequently, the plaintiffs' averment that they were not present on that date is convincing.
9. Be that as it may, the record reflects that the plaintiffs had filed a notice of withdrawal of the suit through their Advocates on record, Hassan, Bulle & Company Advocates, on 6/2/2019. The matter had been consolidated with ELC Suit No. 722 of 2016 which was also withdrawn through a notice of withdrawal dated 24/10/2018. As such, the plaintiffs cannot be heard to say that they did not authorize the withdrawal of the suit.
10. Order 25 of the [Civil Procedure Rules](#) provides that:
 - “ 1. At any time before the setting down of the suit for hearing the plaintiff may by 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 such discontinuance or withdrawal shall not be a defence to any subsequent action.
 - 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 to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”
11. In this case, the plaintiffs withdrew the suit before it had been set down for hearing hence there was no need for the defendants' consent or leave of court. (See [Pil Kenya Ltd v Joseph Oppong](#), [2001] eKLR). The notice of withdrawal took effect upon its filing and service upon the defendants. See Bahati [Shee Mwafundi v Elijah Wambua](#), [2015] eKLR.



12. Having said that, it would appear that what the plaintiffs are actually dissatisfied about is the award of costs to the defendants by the court. It is admitted by the 1st defendant that indeed the notice of withdrawal filed by the plaintiffs was with no orders as to costs. The court however allowed costs at the instance of the 1st defendants advocates and the same was not based on any alleged consent. I note that the plaintiff does not seek a review of that decision on costs. I shall therefore not venture into that.

Disposition

13. Accordingly, the plaintiffs' application dated 5/5/2023 is without merit. It is hereby dismissed with costs to the 1st defendant.

DATED, SIGNED AND DELIVERED IN NAIROBI HIS 20TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE

