



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. CIVIL APPLICATION NO. 117 OF 2018

BENJAMIN KIRWA KEMBOI.....APPLICANT

-VERSUS-

SAMWEL KIRWA BIRGEN.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **25 July 2019**. It was filed pursuant to **Sections 1A, 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rules 1, 11(1) and (2)** of the **Civil Procedure Rules, 2010**. The main prayer is that which is set out in Prayer (b) of the Notice of Motion, namely, that the Court be pleased to stay the taxation of the Respondent's Bill of Costs filed herein, pending the hearing and determination of **Eldoret Chief Magistrate's Environment and Land Case No. 322 of 2018** and **Eldoret Environment and Land Miscellaneous Case No. 30 of 2018**.

[2] The application was predicated on the grounds that the instant matter, as well as **Eldoret Chief Magistrates Environment and Land Case No. 322 of 2018** and **Eldoret E&L Miscellaneous Case No. 30 of 2018**, are all between the same parties and are in respect of the same subject matter; and therefore that taxation of costs ought to await the finalization of the substantive suit, which is **Eldoret Chief Magistrate's Environment and Land Case No. 322 of 2018**. In the Supporting Affidavit, sworn by the Applicant, he explained that this matter was filed in error; and that he took the earliest opportunity to withdraw the same and proceeded to file **Eldoret E&L Miscellaneous Application No. 30 of 2018**. He further deposed that his application for leave to withdraw was allowed; whereupon he filed **Eldoret Chief Magistrates E&L Case No. 322 of 2018**. He therefore prayed the taxation herein be stayed pending the hearing and finalization of **Eldoret Chief Magistrate's E&L No. 322 of 2018**.

[3] The application was opposed by the Respondent vide the Grounds of Opposition dated **19 September 2019**, his contention being:

- [a] That the instant suit is separate and distinct from all and/or any other suit filed by the Applicant;
- [b] That it is clear from the Notice of Withdrawal that the Applicant withdrew the application with costs to the Respondent;
- [c] That the Respondent incurred costs in instructing Counsel and filing a reply to the application for which the Applicant ought to pay costs;
- [d] That the Applicant has filed suits in various courts and is therefore forum-shopping, and should not be entertained.

[4] The application was canvassed by way of written submissions, pursuant to the directions issued herein on **29 July 2019**. **Mr. Birir**, learned Counsel for the Applicant, relied on his written submissions dated **30 October 2019**. He hinged his submissions on **Order 25 Rule 1** and **Order 51 Rule 11(1) and (2)** of the **Civil Procedure Rules**, and the case of **Tatu City Ltd & 3 Others vs. Stephen Jennings & 6 Others** [2016] eKLR, in connection with the applicable procedure for withdrawal of suits. He also cited the cases of **Republic vs. Deputy Registrar, High Court Mombasa Ex Parte Tiomin (K) Ltd** and **Omar & Another vs. Mbuji & Another** for the proposition that costs, where awarded, ought to await the outcome of the suit. He therefore faulted the Applicant for not having caused the file to be placed before the Court for an appropriate order for withdrawal before filing his Bill of Costs for taxation; and for prematurely seeking taxation of his costs.

[5] On the other hand, it was the submission of **Ms. Tum** for the Respondent that this is a matter in which the Respondent had been served, and had, in response, instructed an advocate to come on record and file a reply by way of Grounds of Opposition. She urged the Court to note that the matter had already been fixed for hearing on **13 November 2018** when the Notice of Withdrawal was filed. It was therefore her submission that the Respondent is entitled to costs in the circumstances; and pointed out that, in any case, costs were conceded in the Notice of Withdrawal. It was further the submission of the Respondent that since this suit has no bearing with the pending suits between the same parties, no justifiable cause has been shown as to why costs should await the outcome of the pending matters.

[6] I have carefully considered the subject application, the grounds relied on by the Applicant, as well as the response made thereto by the Respondent. I have also given due consideration to the written submissions filed herein by learned Counsel for the parties, including the authorities relied on by them. It is common ground that soon after filing this suit, by way of the Originating Summons dated **16 October 2018**, the Applicant filed a Notice of Withdrawal of the suit on **7 November 2018**. The said Notice reads thus:

“TAKE NOTICE that M/S J.K. Birir & Co. Advocates has from the date hereof withdrawn the application dated 16th October, 2018 which is listed for hearing on 13th November, 2018 with costs to the Respondent.”

[7] Accordingly, an endorsement thereof was made on the same date of **7 November 2018** by the Deputy Registrar in the proceedings and therefore form part of the court record. The Respondent’s Counsel thereafter filed a Bill of Costs dated **10 December 2018** which was then fixed for taxation before the Deputy Registrar on **31 July 2019**. It was that action that provoked the instant application. As pointed out hereinabove, the instant application is for stay of taxation; and the main ground relied on by the Applicant is the fact that there are other suits pending between the parties in respect of the same subject matter. He therefore urged that taxation be stayed pending the hearing and determination of those other suits, namely **Eldoret Chief Magistrate’s E&L Case No. 322 of 2018** and **Eldoret E&L Case No. 30 of 2018**.

[8] Granted the position taken by the Respondent, the key issue for determination herein is the question whether a good case has been made by the Respondent to warrant stay of taxation. Two questions arise from this basic issue, namely:

[a] whether the Respondent’s Bill of Costs has been prematurely filed for taxation, and

[b] whether the Respondent is under obligation to await the outcome of the other suits filed by the Applicant to have his costs taxed in respect of this matter.

[9] The Applicant made reference to **the Tatu City Case** (supra) to shore up his submission that the Notice of Withdrawal is itself not a proceeding; and that the Respondent was under obligation to cause the Notice of Withdrawal to be adopted by the Court and a formal order made for the payment of costs. The guidance furnished by **Black’s Law Dictionary**, Tenth Edition, as to the definition of a proceeding is as hereunder:

“(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of the larger action; (4) the business conducted by a court or other official body, a hearing.”

[10] Clearly therefore, a Notice of Withdrawal does qualify as a proceeding, so long as it is backed by an endorsement on the court record. In this instance, the filing of the Notice of Withdrawal dated **7 November 2018** was followed by a prompt endorsement on the court record, by the Deputy Registrar. I am far from persuaded that more was required, on the part of the Respondent, to supply efficacy to the endorsement and qualify it as a proceeding. I say so because **Order 49 Rules 2 and 7** of the **Civil Procedure Rules** empower the Deputy Registrar to deal with matters falling under **Order 25, Civil Procedure Rules**. Hence, I take the view that, for purposes of **Order 25 Rule 1**, the Deputy Registrar’s endorsement of a Notice of Withdrawal would be sufficient; and that no other or further order by the Court would be necessary to bring a suit to a finality.

[11] It is noteworthy however that, in this case, the Notice of Withdrawal was filed by the Applicant after the Respondent had entered appearance and filed his Grounds of Opposition; and that the matter had already been fixed for hearing on **13 November 2018**. The court record also shows that the hearing date was taken on **23 October 2018** before the Notice of Withdrawal was filed. Accordingly, the applicable provision is not **Order 25 Rule 1** as posited by the Applicant, but **Rule 2 of Order 25**. Under that provision, whose marginal note reads “discontinuance” as opposed to withdrawal, a suit can be discontinued either by consent or with leave of the Court. The implication is that the window for withdrawal of the entire suit at will by a plaintiff ceases upon the filing of pleadings by the defendant. Hence, **Rule 2(2) of Order 25** provides that:

“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.”

[12] Accordingly, it is imperative that the discontinuance be sanctioned by the Court and an order made as to costs before taxation can ensue. Moreover, **Order 25 Rule 3** of the **Civil Procedure Rules** provides that:

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”

[13] For the foregoing reasons, it is my finding that indeed the Respondent’s Bill of Costs was prematurely filed and fixed for taxation. There is nothing on the record to show that the Defendant requested for or obtained Judgment for the costs of the withdrawn suit as by law required.

[14] As to whether the Respondent is under obligation to await the outcome of the other suits filed by the Applicant to have his costs taxed in respect of this matter, Counsel for the Applicant relied on **Order 51 Rule 11(2)** of the **Civil Procedure Rules**, which provides that:

“Unless the court otherwise orders for special reasons to be recorded, costs awarded upon an originating summons, applications or other process shall be taxed only at the conclusion of the suit.”

[15] I am therefore in full agreement with the conclusion reached in Republic vs. Deputy Registrar, High Court Mombasa Ex Parte Tiomin (K) Ltd, wherein **Hon. Onyancha, J.** held:

“My interpretation of the above provisions is that in respect of the processes therein stated, which include originating summons, motions, chamber summons or other similar process, costs awarded thereof shall be taxed only at the conclusion of the suit. The exception to this is found within the first sentence of sub-rule 2 in the words – “unless the Court otherwise orders...” Furthermore, where the Court will in its discretion order for such costs to be taxed before the conclusion of the suit, it will have to do so for special reasons and the special reasons have to be recorded...I make a finding that the Taxing Officer, herein the Deputy Registrar, has powers generally to tax Bills of Costs but not the Bill of Costs which was before him on 30.10.2001 which as I have found hereinabove and in accordance with Order 50 rule 13 [now Order 51 Rule [2] was clearly not allowed to be taxed by him unless there was an express order of this Court specifically authorizing him to tax it before the conclusion of the suit as expressly provided in the said Order...”

[16] Needless to say that an Originating Summons is a suit for purposes of the **Civil Procedure Act** and the Rules thereunder (see **Section 2** of the **Civil Procedure Act**). Hence, the question to pose is whether this suit was pending by the time the Respondent’s Bill of Costs was filed; and my straightforward answer to that question is no. This suit, save for compliance by the Respondent with **Rule 3** of **Order 25** as to costs, is finalized for all intents and purposes. The Applicant has moved on and filed a similar application before the **Eldoret Environment and Land Court in Eldoret E&L Miscellaneous Case No. 30 of 2018** and obtained the orders he was seeking herein, pursuant to which he filed a substantive suit in **Eldoret Chief Magistrate’s E&L Case No. 322 of 2018**. Hence, there is no justification for restraining the Respondent from realizing the fruits of litigation rightfully due to him herein.

[17] There is another reason why stay would be untenable in the circumstances of this matter. **Order 25 Rule 4** of the **Civil Procedure Rules**, is explicit that:

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.” (Emphasis supplied)

[18] The implication is clear, that upon discontinuance of a suit, a party who files a subsequent suit in respect of the same or substantially the same cause of action, as did the Applicant herein, ought not to be permitted to proceed with the subsequent suit unless and until he has paid costs for the discontinued suit. Thus, in the eyes of the law, it is the Respondent and not the Applicant who is entitled to stay of proceedings.

[19] In the light of the foregoing, the orders that commend themselves to me in respect of the application dated **25 July 2019** are as hereunder:

[a] That the said application be and is hereby dismissed with costs;

[b] That subject to compliance with the applicable provisions of **Order 25** of the **Civil Procedure Rules**, the Respondent is at liberty to proceed with taxation of his Bill of Costs herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY 2020

OLGA SEWE

JUDGE