



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE NO. 281 OF 2002

CATHOLIC DIOCESE OF NAKURU REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

NYANDARUA PROGRESSIVE AGENCIES.....1ST DEFENDANT

CHARLES MOMO.....2ND DEFENDANT

RULING

(Application dated 10th June 2020.)

1. Parties to the suit as at the commencement by a plaint, amended several times and resting with the **Further Further Amended Plaint dated 10th November 2015**, and filed on the 27th January 2016 are

- a) **Catholic Diocese of Nakuru as the plaintiff.**
- b) **Nyandarua Progressive Agencies Ltd – 1st Defendant**
- c) **Charles Momo – 2nd Defendant.**

2. On the 2nd June 2005, the 2nd Defendant withdrew his statement of defence by a Notice of Withdrawal filed on the 7th June 2005. Upon the above notice, judgment was entered against the said 2nd Defendant on the 16th January 2016 on application by the plaintiff (see paragraph 8 and 9 of the judgement delivered on the 27th May 2020).

3. The 2nd Defendant testified as the 1st Defendant's witness. He did not apply to remove his name from the pleadings after withdrawing his defence, nor did he contest the interlocutory judgment entered against him on the 16th January 2016.

The plaintiff's claim against the 2nd Defendant therefore remained on record upto the date of judgment, upon a formal proof of its claim against the 2nd Defendant.

4. In its judgment dated the 27th May 2020, at paragraph 48 the court rendered that the 2nd Defendant did call any evidence to support its counterclaim as it had already withdrawn its statement of defence, and by extension, the counterclaim.

5. At paragraph 56 of the judgment, the court made a finding that the plaintiff had proved its case upon a balance of probability against the 1st and 2nd defendants as prayed in the plaint, and ordered costs to be paid to the plaintiff by both the 1st and 2nd Defendants.

6. The order on costs against the 2nd Defendant precipitated the application before me.

7. **The application dated 10th June 2020** is brought by the 2nd Defendant, under the **Provisions of Order 45 Rule 1 of the Civil Procedure Rules**, seeking Orders:

1) Spent

2) That the judgment of this court delivered electronically on the 27th May 2020 be reviewed to the extent that it ordered the 2nd Defendant to pay costs of the suit.

3) That the order that the applicant pays costs of the suit be set aside and it be substitute with an order that costs be paid by the 1st Defendant only.

4) That costs of this application be provided for.

Upon grounds stated the face of the application, and affidavit of the 2nd Defendant sworn on the 8th June 2020.

8. I have considered the application, the affidavits in support and in opposition, as well as the filed submissions by each party.

9. ISSUES FOR DETERMINATION:

1) Whether the 2nd Defendant by withdrawing his defence remained a party to the suit.

2) Whether the court ought to review its order on costs against the 2nd Defendant to the Plaintiff.

3) Costs on the application.

10. It is common ground that the notice of withdrawal of the 2nd Defendant's defence was endorsed by the court. An attempt by the 2nd Defendant upon application, to have the defence reinstated was denied by the court in a ruling dated the 19th October 2014 (Emukule J).

11. A defendant who withdraws his defence, but does not apply for his name to be removed from the proceedings remains a party thereto, with the effect that he ceases to object to, or deny the plaintiff's claims against him.

Ordinarily, in a not liquidated claim, an interlocutory judgment would be entered against the party, and upon formal proof/hearing of the suit, the court would make a finding as to whether or not the plaintiff will have proved its claim against the defendant.

12. The court records shows that an interlocutory judgment was entered against the 2nd defendant, upon the withdrawal of his defence on the 16th January 2016. This interlocutory judgment was not set aside or at all. Throughout the hearing of the suit, and the 2nd defendant testifying in support of the plaintiff, against the 1st defendant, he carried an interlocutory judgment on his head.

13. Did this withdrawal of defence terminate the case against the defence?

The claim by the plaintiff against such party remains undefended, have the interlocutory judgment. The case does not terminate upon such withdrawal – Order 10 Rule 7 Civil Procedure Rules. Upon full hearing, the court would then make a decision as to which of the parties would bear costs of the suit.

14. I agree with the applicant's submissions that the 2nd Defendant was not actively participating in the suit after withdrawing his defence, but that did not remove him from being a party to the suit. There is no submission by the 2nd Defendant upon withdrawal of his defence that he was removed, or he removed himself from the suit as the 2nd defendant, by any court order.

To that extend, I find and hold that the 2nd Defendant remained a party to the suit, and therefore subject to the orders of the court on costs, which orders are discretionary, depending on the circumstances thereof. Section 27 of the Civil Procedure Act.

15. REVIEW ORDERS?

Order 45 of the Civil Procedure Rules underpins the matter of review of court judgments and Orders.

Of relevance is the Orders of Costs against the applicant, the 2nd Defendant.

Section 27 of the Civil Procedure Act empowers a court to award and Order Costs by and against parties to a suit. The court is granted discretion to determine what costs and which party bears the same. It is trite that a succeeding party is entitled to receive costs from the losing party.

16. It is also trite, and a basic rule of litigation that only parties to litigation can be made liable for costs, but in very exceptional circumstances a court may order costs against a stranger to a suit, but point must be raised before the court – **Sir John Woodroffe & Anamer Ali, in the commentary of the code of Civil Procedure 4th Edition at page 556.**

The proviso to Section 27 of the Civil Procedure 4th Edition at page 556.

The **Proviso to Section 27 of the Civil Procedure Act** comes to play, when the court may reverse the rule that costs shall follow the event, but upon good reasons.

So that so long as the party against which an order of costs is made, is a party to the suit, the court has discretion to order costs against it to the succeeding party.

17. Under **Issue NO.1** above, I have made a finding that the discontinuation of the defence by the 2nd Defendant did not terminate the plaintiff's suit against it. To that extent, without unnecessary repetition, the 2nd Defendant remained a party to the suit, and therefore the court was in order, in my view, to make an order of costs against the said 2nd defendant to the plaintiff, who were the successful parties.

18. Under **Order 45 Civil Procedure Rule**, it is explicit that the court may review its orders/judgment if the following grounds exists;

a) Discovery of new and important matter which after exercise of due diligence, was not within the knowledge of the applicant at the time of the decree was passed or order made, or

b) There was a mistake or error on the face of the record, or

c) There were other sufficient reasons, and

d) The application must have been made without undue delay.

19. In the case **Abasi Belinda Vs. Fredrick Kagwamu & another (1963) E.A 557**, the court held that

“a point which may be a good ground of appeal may not be a good ground for an application for review though it may be a good ground of appeal” –

See also the **Court of Appeal decision in Pancras T. Swai Vs. Kenya Breweries Ltd (2014)** – where court dismissed the application for review because it was not shown that the applicant had made discovery of new and important matter, nor an error on the face of the record.

Likewise in **Francis Njoroge Vs. Stephen Maina Kamore (2018) eKLR** the application was dismissed for lack of discovery of new or important matter.

20. The applicant hereto has failed to demonstrate to the court what new matter, or error is apparent in the judgment of the court.

In arriving at the impugned order on costs against the 2nd defendant, the court made a conscious decision on the matters at controversy and exercised its discretion which is the basis of the present application.

If indeed the decision on costs was wrong, that could be a good ground for appeal, not for review.

Further, an issue that is hotly contested as is in this application cannot be adequately determined and reviewed by the same court which had adjudicated upon it – **National Bank of Kenya Ltd – Vs. Ndungu Njau (Civil Appeal No. 211 of 1996 (unreported))**.

21. Upon thorough interrogation of the reasons for the application, it is apparent that the applicant's grievous is what it deems to be an erroneous view, or of law by the court which cannot be a ground for review but one for appeal, as further stated in **Chittaley & Rao in the Code of Civil Procedure, (4th Edition) Vol.3) Page 3227**.

Besides the alleged error of evidence and law by the applicant, no other reason was advanced, so as to fit in the other arm under **Order 45**, other sufficient reasons.

22. For the above reasons, I find that the application dated 10th June 2020 has not passed the test for grant of an Order of review.

It is therefore dismissed with costs to the plaintiffs.

Orders accordingly.

DELIVERED, SIGNED AND DATED ELECTRONICALLY AT KERUGOYA THIS 15TH DAY OF OCTOBER 2020.

J.N. MULWA

HIGH COURT JUDGE.

ADVOCATES:

1) Githui & Co. Advocates

Gatehouse]-

NAKURU.

2) Rodi Orege & Co. Advocates

Mache Plaza

NAKURU.