



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIV. APPLICATION NO. 236 OF 2018

ACQUALINE DISTRIBUTORS LIMITED.....APPLICANT

VERSUS

COASTAL BOTTLERS LIMITED.....RESPONDENT

RULING

1. By a Motion on Notice dated 11th September, 2018, the applicants applied for the transfer of **Msa CMCC No. 418 of 2010 Acqualine Distributors Ltd vs. Coastal Bottlers Ltd** from the Chief Magistrate's Court at Mombasa to this court for hearing and determination.
2. Of course, the applicant did set out in the body of the Motion and the supporting affidavit, the grounds upon which the application was being made. The application was filed on the same day and was duly served.
3. On being served, the respondent filed a replying affidavit in opposition thereof. The same was sworn by **Noel I. Adagi** on 14th November, 2018. Together with that replying affidavit, the respondent filed written submissions on 16th November, 2018 and had them served upon the advocates for the applicants on the same day.
4. Consequently, the advocates for the applicants filed and served a Notice of Withdrawal of the said application on 23rd November, 2018. However, the advocates for the respondents received the said Notice of Withdrawal under protest.
5. The matter was listed before me for hearing on 11th September, 2018. **Mr. Amadi**, Learned Counsel for the applicant submitted that there was nothing before the court for hearing as the matter had been brought to an end on 23rd November, 2018 when the said Notice of Withdrawal was filed. He was of the view that what remained, if any, was taxation if the respondent was desirous of pursuing the same.
6. On his part, **Mr. Kinuthia** Learned Counsel for the respondent submitted that, since the respondent had filed its pleadings in opposition to the application before the Notice of Withdrawal had been filed and served, the respondent was entitled to an order for costs.
7. I have considered the record and the submissions of learned counsel. The issue before court is, whether there is an application before it capable of being entertained, and if not what orders, if any should be made.
8. Obviously, proceedings before court belong to the parties. The claimant owns a proceeding from its inception up to conclusion. The court has no interest or ownership whatsoever thereon. All that the court does is to superintend on its execution in accordance with the law and the applicable rules of procedure.
9. It is for this reason that the rules of procedure, to wit, **Order 25 (1) of the Civil Procedure Rules** allows a claimant to withdraw any proceeding at any stage of the proceedings. The relevant rule provides:-

“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”.

10. Of course this provision applies to applications as it applies to suits. This is so because ‘a suit’ is defined in **section 2 of the Civil Procedure Act, Cap 21 Laws of Kenya** thus:-

“‘suit’ means all civil proceedings commenced in any manner prescribed”.

The Motion before me is a proceeding commenced in a manner prescribed under the rules. In this regard, it is amenable to the provisions of **Order 25 (1)** set out above.

11. The foregoing being the case, the applicant was entitled to withdraw the application as it did. However, since the respondent had already filed its documents in opposition thereto, it was akin to a suit having been set down for hearing. In this regard, **Rule 3 of Order 25** came into operation. That rule provides:-

“3. 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”.

12. In this regard, it is crystal clear that the Motion having been wholly withdrawn, all that is left is for the respondent to apply in writing for the costs to be assessed by the Deputy Registrar. In my view, it is always advisable to apply that the court or the Deputy Registrar does endorse the order to the effect that a suit has either been wholly discontinued or any part thereof has been withdrawn and an appropriate order for costs is made.

13. Accordingly, I order that the Motion is hereby marked as wholly withdrawn with costs to the respondent to be taxed if not agreed.

It is so ordered.

DATED and **DELIVERED** at Mombasa this 13th day of September, 2019.

A. MABEYA

JUDGE