



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 52 OF 2019

PETER OTIENO KARANI.....APPLICANT

VERSUS

MARK CHITELESI.....RESPONDENT

RULING

1. The applicant has moved the court by a Motion dated 30th April 2019, seeking, in the main:-

(a) That the notice dated 19th February 2019 filed in Kakamega CMCCC No. 347 of 2015 be withdrawn; and

(b) That Kakamega CMCCC No. 347 of 2015 be transferred to Butali Principal Magistrate's Court for consolidation with Butali PMCCC No. 29 of 2018.

2. The grounds upon which the application is premised are that the two suits are between the same parties and are on the same subject matter. The applicant avers that he had instructed the firm of Messrs. CO Samba & Company, Advocates to file and prosecute the Kakamega matter, but the advocates dilly-dallied, forcing him to commence the Butali matter. He avers that he filed a notice to withdraw the Kakamega suit to facilitate disposal of the Butali suit, but he has now realised that he filed the same in ignorance. He would now like to have the Kakamega suit transferred to the Butali court for consolidation of the two suits and final disposal. He avers that he seeks the prayers to obviate duplicity and abuse of court process. He pleads good faith and that the Butali court had jurisdiction.

3. To buttress his case he has attached two documents to his supporting affidavit. There is a copy of the plaint filed in the Butali suit, and copy of the notice of withdrawal of suit filed in the Kakamega suit. There is also copy of a letter from the Advocates Complaints Commission in respect of a complaint that he had raised against his advocates with respect to delays in the prosecution of his Kakamega suit.

4. Upon being served, the person named as respondent in both suits had filed grounds of opposition. The principal ground is that the Kakamega suit had been withdrawn and hence it was not available for transfer.

5. The applicant has not attached to his affidavit copies of the pleadings in the Kakamega suit for me to compare with those in the Butali suit, and assess whether or not the two suits were between the same parties and turned on the facts. I have taken the liberty of calling for the court file in the Kakamega suit for perusal. The file was availed and I have perused it. I have compared the plaint filed in it with that filed in the Butali matter. The two suits are complementary, in the sense of being between the same parties and founded on the same facts and cause of action.

6. Is the Kakamega suit available for transfer? It has been argued that the same is not so available as the applicant withdrew it when he filed the notice of withdrawal of the suit. My perusal of the said file indicates that the applicant did indeed file a notice of withdrawal on 21st February 2019, dated 19th February 2019.

7. What does the law say on notices to withdraw suits? There is relevant provision on this is Order 25 Rules 1 and 2 of the Civil Procedure Rules, for withdrawal and discontinuance of suits. Order 25 provides for both withdrawal before the setting of a date for hearing and where the suit has been set down for hearing. In the latter the parties may discontinue the suit by consent or the plaintiff may be granted leave by the court to discontinue the suit.

8. The notice the subject of these proceedings was for withdrawal of the suit before it was fixed for hearing, and therefore the relevant provisions for the purposes of this ruling is Order 25 Rule 1, which states as follows:

“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 discontinuation or withdrawal shall not be a defence to any subsequent action.”

9. How have the courts interpreted and applied Order 25 Rule 1? The general consensus appears to be that once a notice to withdraw is filed the suit is automatically discontinued. The endorsement of or leave by the court for the withdrawal or discontinuance of the suit is not necessary.

10. It was said in *Kofinaf Company Ltd & another vs. Nahashon Ngige Nyagah & 20 others* [2017] eKLR as follows:

“... the law can be stated to be that as a general proposition the right of a Plaintiff to Discontinue a Suit of or Withdraw a Claim under the provision of order 25 Rule 1 (that is where the suit has not been set down for hearing) is an absolute and untrammelled right. Also again as a general proposition, it takes effect upon the filing of the Notice. No leave of Court is required nor a Court endorsement necessary to give effect to this withdrawal.

21. And it has to be said that unlike some other procedural Rules, The Civil Procedure Rules, in respect to order 25 Rule 1, does not have any provisions requiring the Leave of Court to Discontinue a suit or withdraw a claim.”

11. The position then appears to be, which I agree with, that once a notice to withdraw or discontinue a suit under Order 25 Rule 1 is filed, the immediate effect would be that the suit is automatically withdrawn, and in particular when the same is served and brought to the notice of the court. It would appear that such notice does not need to be endorsed by the court, or put differently, there would be need for the court to grant leave for the withdrawal.

12. Can a notice to withdraw suit be itself be withdrawn? On that point the court in *Bahati Shee Mwafundi vs. Elijah Wambua* [2015] eKLR, said:

“... Order 25 does not permit to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be thereafter, a setting aside of the notice to withdraw or discontinuation of the suit.”

13. I could not agree more. The plaintiff herein filed a notice to discontinue his suit at a time when it had not been set down for hearing. Consequently, Order 25 Rule 1 applied to the circumstances. The suit was automatically withdrawn even though there was no endorsement of the notice to withdraw the suit by the court. Having withdrawn the suit, it was not open to the plaintiff to apply for the notice withdrawing his suit to be itself withdrawn. It was simply not available for withdrawal. That being the case, the suit herein was withdrawn. It is no longer pending. There is no suit, and there is nothing to transfer.

14. The plaintiff has a suit pending at Butali. It is for all purposes the same suit as the one he withdrew. Transfer of the suit herein would add no value to the proceedings at Butali, and the failure to transfer the suit would not take away anything from the Butali suit. The transfer, in my very humble view, would amount to an abuse of court process. The Butali court would end up with two carbon-copy pleadings; the same plaintiffs the same parties, the same facts, the same causes of action, *et cetera*. It would be completely pointless.

15. In the end I find that there is no merit in the application dated 30th April 2019 and the same is hereby dismissed with costs. The court file in Kakamega CMCCC No. 347 of 2015 shall be returned to the relevant registry.

DATED, SIGNED and DELIVERED at KAKAMEGA this 1st DAY OF November 2019

W. MUSYOKA

JUDGE