



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**

**CIVIL CASE NO.421 OF 2010**

**PACIS INSURANCE COMPANY LTD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FRANCIS NJERU NJOKA.....DEFENDANT/APPLICANT**

**R U L I N G**

This is a ruling on the Defendant's application dated 13<sup>th</sup> December, 2017. It seeks leave to tax its Bill of Costs the Plaintiff having withdrawn the suit without notifying the Defendant.

**Grounds On The Face Of the Application**

1. **THAT** the Plaintiff instituted the suit seeking among others a declaration that the Plaintiff was entitled to avoid the policy insurance number 010/070/1/001810/2007 issued to the Defendant.
2. **THAT** the Defendant pursuant to the said suit filed a defence therein.
3. **THAT** the Plaintiff subsequently withdrew the suit by filing a notice of withdrawal dated 23<sup>rd</sup> September 2013 requesting the Court to withdraw the matter with no order as to costs.
4. **THAT** the said notice of withdrawal of suit was not served on the Defendant until July 2015 after the Defendant filed application dated 9<sup>th</sup> June 2017 to dismiss the suit for want of prosecution.
5. **THAT** the said notice of withdrawal does not estop the Defendant from taxing his bill the Plaintiff having tried to avoid the policy through this Court and again withdrawing the suit on its own motion without involving the Defendant and serving it late.

The application is supported by Affidavit sworn by Francis Njeru Njoka the Defendant/Applicant herein sworn on 13<sup>th</sup> December, 2017. He averred that this suit last came up for hearing on 27<sup>th</sup> March, 2012 and on 23<sup>rd</sup> September, 2013 the Plaintiff filed a notice of withdrawal of suit. He restated ground on the face of the application.

In response the Plaintiff/Respondent filed Grounds of Opposition and Replying Affidavit sworn by Margaret Opondo 26<sup>th</sup> January, 2018. She confirmed that this case was withdrawn before it proceeded for hearing and that the Deputy Registrar did not make any entry on the file for the payment of any costs to the Defendant when the notice of withdrawal was filed in September 2013.

She averred that the Plaintiff stands to be prejudiced if ordered to pay costs for the matter. She further averred that the Plaintiff withdrew this case in good faith and has no malice or ill will against the Defendant. She also stated that the Plaintiff had filed the case to avoid a policy which the Defendant had breached; but since no claim was filed against the Plaintiff within the limitation period, they decided to withdraw it.

**DEFENDANT/ APPLICANT'S SUBMISSIONS**

Counsel for the Defendant highlighted the background of the matter and submitted that the main issue for determination is whether or not the Defendant is entitled to costs the Plaintiff having filed a notice of withdrawal with no order as to costs. The Defendant/Applicant placed reliance on Order 25 Rule 1 & 2 of the Civil Procedure Rules which 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.**

**2) Discontinuance (Order 25 Rule 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 of the parties.**

**(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.**

**(3) The provisions of this rule and rule 1 shall apply to counterclaims.**

The Defendant/ Applicant relied on the case of **PIL KENYA LIMITED V. JOSEPH OPPONG** where J. W. Onyango Otieno JA held that;

**“The effect of a notice of withdrawal is to terminate the suit of course subject to costs to the opposite party.”**

**PLAINTIFF/ RESPONDENT’S SUBMISSIONS**

Counsel for the Plaintiff/Respondent highlighted that the Plaintiff had filed the case to avoid a policy which the Defendant had breached but decided it withdraw it after no claim had been filed against the Plaintiff within the limitation period.

The Plaintiff/Respondent submitted that the Court has discretion on whether costs are payable by one party to another, the amount of such costs and when they are to be paid.

Reliance was placed on the case of **Little Africa Kenya Ltd v. Andrew Mwitii Jason (2014) eKLR** where the Court stated that:

**“But despite that right, the Defendant chose not to pursue the counter-claim and withdrew it also. On the basis of the entire circumstances of this case and the above rendition, I order that each party shall bear own costs in the suit and the counter-claim...”**

In arriving at that decision, the Court had cited **JASBIR SINGH RAI & 3 OTHERS v. TARLOCHAN SINGH RAI & 4 OTHERS (2014) eKLR** where the Supreme Court stated:

**“It is plain to us that, at the time the petition was lodged in the Supreme Court, it was, in every respect, a valid cause of action; and thus, no blame attaches to the act of filing. By Article 50(1) of the Constitution of Kenya, 2010- ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court...’**

**ANALYSIS AND DETERMINATION**

I have considered arguments by both parties herein. The issue for determination is whether the Defendant is entitled to cost following withdrawal of this suit by the Plaintiff.

On perusal of the Court file, I note that the Defendant entered appearance on 1<sup>st</sup> September 2010 and filed defence on 27<sup>th</sup> September 2010. Reply to defence was filed on 30<sup>th</sup> September 2010. On 23<sup>th</sup> November 2010 the Plaintiff invited the Defendant to the Court registry on 2<sup>nd</sup> December 2010 for purposes of fixing a hearing date for the suit; another invitation to fix a hearing date was sent to Defendant on 31<sup>st</sup> October 2011. On 22<sup>nd</sup> May 2012, the Defendant attended the Court registry in person to peruse the Court file. This matter was before Court for hearing on 27<sup>th</sup> March 2013 when the Plaintiff failed to attend Court. On the same day Counsel for the Defendant who was present informed the Court that they had not complied with pretrial requirements and that they intended to amend the defence to include a counterclaim. Notice to withdraw the suit was filed by the Defendant on 24<sup>th</sup> September 2013. On 30<sup>th</sup> September 2013, the Deputy Registrar ordered withdrawal of suit with no orders as to costs.

There is no indication that the Defendant was notified of the Plaintiff’s intention to withdraw suit. It is evident that the Defendant had taken steps to oppose Plaintiff’s claim and was also intending to amend defence filed to include a counterclaim. Defendant had instructed a lawyer to defend him. It is also not disputed that the suit had been set down for hearing. Defendant was invited to the registry twice to fix the suit for hearing and they were given a date for hearing on which date the Plaintiff failed to attend.

No doubt the Defendant had incurred expenses by the time the suit was withdrawn and should have been notified of intention to withdraw and invited to appear before the registrar for issue of costs to be addressed.

A party having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party instituting the suit decide to withdraw it unless parties agree otherwise or Court on exercising its discretion decide otherwise after giving the parties opportunity to submit on costs.

In the instant case, the suit was withdrawn after hearing date was set. Defendant had engaged an Advocate to defend the suit. Defendant is

therefore expected to have incurred expenses and is entitled to costs expended.

From the foregoing, I do order Plaintiff to pay the Defendant costs of this suit to be taxed by the Deputy Registrar.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of July, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF**

GRACE: **COURT ASSISTANT**

MUSERA H/B FOR ODUOR: **COUNSEL FOR DEFENDANT/APPLICANT**

WESONGA: **COUNSEL FOR PLAINTIFF/RESPONDENT**