



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 11 OF 2004

SAMUEL KARUGA..... PLAINTIFF

VERSUS

SARKISH FLORA LIMITED..... RESPONDENT

DELOITTE CONSULTING LTD.....3RD PARTY

RULING

1. The application before the court is brought by the Third party under **Order 45 rules 1, 2 and 3, and 25 Rule 2** of the **Civil Procedure Rules**, and seeks the following orders:

1. That the order of 9th June 2014 be reviewed to the extent that order (b) be set aside and order granting costs of the suit and applicant to the third party.
2. That costs of this application be awarded to the third party.

The applicant relies on grounds that at the time the suit was withdrawn, it had already filed an application for its dismissal and that as the plaintiff withdrew the suit, the third party was entitled to costs of defending the suit as provided under the provisions of **Order 25 of the Civil Procedure Rules**.

2. In the supporting affidavit, Allen Waiyaki Gichuki Advocate for the third party deposes that any party that withdraws a suit is by law obligated to meet the costs of the suit, and further states that it had already filed an application for striking out of the plaintiff suit and by advertent, the third party representative did not attend court when the plaintiff withdraw the suit with no orders as to costs, and without notice to the third party.

3. The plaintiff opposes the application by an undated sworn affidavit by Nancy W. Njoroge Advocate, and filed on the 26th May 2015. In it she explains reasons for the withdrawal and states that the current application was filed after over one year hence applicant guilty of laches.

4. I have considered the application and rival affidavit arguments by counsel, and applicants authorities. I have also perused the courts proceedings on the 9th June 2014. The respondent on the said date indicated to the court that he wished to withdraw the suit against the third party with no orders as to costs. The court in issuing the order subject of this application noted that the third party was absent and had failed to prosecute its application(for dismissal of suit against third party), and therefore made no order as to costs.

5. The replying affidavit by Nancy Njoroge Advocate is undated. Under the **Oath and Statutory**

Declarations Act, Chapter 15, Section 5, it is a requirement that the place and on what date an affidavit or oath is taken. In the case **Abdul Azizi Juma -vs- Nikisulu Investments & 2 Others. ELC 291 of 2013**, Justice Mutungi, stated that rules are rules and must be obeyed otherwise failure may create anarchy and chaos in courts. I have no reason to depart from the above sediments. The replying affidavit sworn and filed on the 26th May 2016 is therefore expunged from the record.

Order 25 Rule 2 of the Civil Procedure Rule provides for withdrawal of suits either by consent of parties or by the plaintiff against other parties, upon terms as to costs. The plaintiff by his advocates, orally requested the withdrawal of the suit against the third party who was absent with no orders as to costs. The court proceeded to withdraw the said suit as requested, on grounds that the third party had failed to prosecute its application for striking out the suit. With great respect to my sister Judge, I find it very harsh that the court failed to order costs to the third party who had all along defended the suit and no doubt incurred expenses, and that it was clear that the plaintiffs oral application to withdraw the suit was prompted by the third party's application for dismissal of the suit.

6. **Order 45 Rule 1 of the Civil Procedure Rules** authorises the court to make an order of Review of a Court order on account of either a mistake or error apparent on the face of the record, or any other sufficient cause.

I have noted that the offending order was made on the 9th June 2014 and this application was filed on the 20th April 2015. The explanation given for the delay is not convincing at all as extracting an order cannot take a year. I find the applicant guilty of laches. In the case **Gladys Mukwalu Marangu and Another -vs- Emilio Marangu M'ndiri & Another (2008) KLR** it was held that a party who withdraws a suit must pay costs. Same holding was upheld in the case **Joseph Oduor Anode -vs- Kenya Red Cross Society (2012) KLR**.

7. It is trite law that costs follow the event, unless there are circumstances that speak otherwise. Had the applicant been present in court, I believe the court would not have made the order subject of review. The respondent took advantage of the absence of the applicant to urge the court to make no orders as to costs upon withdrawal of the suit by the plaintiff.

As held in the case **Joseph Oduor (Supra)**, a successful party ought not be denied its costs.

In the result, I find the application dated 14th April 2015 merited in terms of Prayer No. 1. However, as the Applicant failed to attend court on the fateful day, and no plausible reasons given, I shall exercise my discretion and review the order on costs and substitute it with an order granting the applicant, the third party, $\frac{2}{3}$ of the costs of the withdrawn suit.

Each party shall bear its own costs of this application in view of circumstances explained above.

Dated, signed and delivered in open court this 10th day of March 2016

JANET MULWA

JUDGE