REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 324 OF 2010

JOSEPH NDUNG'U NJOROGE……...…………PLAINTIFF

VERSUS

LILIAN ATIENO SIWOLO……………………….DEFENDANT

JUDGMENT

This appeal arises from the judgment and decree passed by the Principal Magistrate Hon. Mr. S.A Akato at Milimani Commercial Courts Nairobi delivered on 6th July, 2010 in the Chief Magistrate'sCourt Civil Suit No. 7077 of 2006.

The Memorandum of Appeal filed on 13th August, 2010 and dated the same day by B.W. Kamunge& Company Advocates on behalf of the appellant Joseph Ndung'u Njoroge sets out three grounds of appeal namely that:-

1. The Learned Principal Magistrate erred in law and fact in dismissing the Plaintiff/Appellant's suit in its entirety and against the weight of the evidence adduced at the trial.
2. The Learned Magistrate erred in law and in fact in failing to appreciate and invoke the provisions of Section 6 of the Civil Procedure Act.
3. The Learned Principal Magistrate erred in law and in fact in failing to assess the quantum of general damages awardable to the Plaintiff/Appellant.

The appellant therefore prayed that the said judgment of the Lower Court be set aside and this appeal be allowed with costs. He also prayed for any further or other order as justice of the case may demand.

The appellant's suit in the Lower Court was instituted vide a plaint dated 2nd June, 2006. In the said plaint, the appellant herein Joseph Ndung'u Njoroge sued the Respondent Lilian Atieno Siwolo claiming for special and general damages arising from a road traffic accident which occurred on 23rd July, 2004 along Suna Road in Nairobi involving the appellant and the Respondent's motor vehicle Registration No KAS 923D.

It was alleged that on that material day,the Plaintiff was lawfully pushing a wheelbarrow along Suna Road in Nairobi when the defendant, her driver, servant or agent so negligently, carelessly and or recklessly drove, managed and or controlled the motor vehicle registration No. KAS 923D that he caused the same to lose control and violently knock down the plaintiff/appellant thereby injuring him seriously.

The defendant/respondent entered appearance on 26th October, 2007 and filed her statement of defence on

13th November, 2007 denying the claim and putting the plaintiff to strict proof thereof. She further pleaded at paragraph 11 of the defence that there was indeed another suit pending between the plaintiff and the defendant over the same subject matter that is Nairobi CMCC No. 12713 of 2005 and the Defendant/respondent stated that she would move the Court to have the suit subject matter of this appeal struck out and or dismissed with costs as the same amounts to abuse of the Court process.

A perusal of the Plaintiff's/appellant's (plaint) dated 2nd June, 2006 shows that at paragraph 10 thereof, the plaintiff averred that there is no other suit pending and there has been no previous proceedings in any Court between the plaintiff and the defendant over the same subject matter.

The plaintiff/appellant had also sworn a verifying affidavit as to the correctness of the averments in the plaint, which prompted the Defendant/respondent to raise that objection at paragraph 10 of the defence that there was another suit pending before the same Court over the same subject matter and between the same parties.

By a reply to defence dated 14th November, 2007 and filed in Court on 15th November, 2007 the Plaintiff/appellant reiterated the contents of the plaint while denying the contentions by the defendant/respondent in her statement of defence.

On 13thJune, 2008 the plaintiff sought leave of Court to amend the plaint to include an averment that the defendant was convicted for the offence of careless driving contrary to Section 49 (1) of the Traffic Act. On 25th July, 2008 the said application for leave to amend the plaint was allowed and the plaintiff was given 14 days to serve upon the defendant the said amended plaint. The amended plaint was filed on 28th July, 2008.

On 9th September, 2008 by a Chamber Summons dated 9th September, 2008, the defendant/respondent sought orders for dismissal of the plaintiff/appellant's suit with costs for being frivolous, vexatious and an abuse of the Court process.

The said application was premised on the grounds that the plaintiff had filed another suit vide Nairobi Chief Magistrate's Commercial Court Civil Suit No.12713/2005 over the same accident on 23rd July, 2006 involving motor vehicle registration No. KAS 923D. Further, that the plaintiff had perjured himself by filing two verifying affidavits which were in conflict.

In addition, it was contended by the respondent that as the two suits were the same,to allow them to proceed would highly prejudice the defendant/respondent and would embarrass the Court.It was further stated that the Defendant had been made to incur unnecessary costs of defending the two suits and that the plaintiff/appellant was seeking to recover damagestwice over the same cause of action and injuries.

The affidavit in support of that application was sworn by Jenipher Catherine Ombonya advocate on 9th September, 2008, reiterating the contents of the application, and annexing pleadings in the Chief Magistrate's Court Civil Suit No.Court 7077/2006, her client's instructions, pleadings in CMCC 12713/2005 filed on behalf of the plaintiff /appellant by Kamau Kuria & Company Advocates on 25th November, 2005 and a defence in the same latter suit filed by Ombonya& Company Advocates on 4th December, 2006.

The record does not reflect what happened to the application dated 9TH September, 2008. However, on 14th January, 2010, the defendant/respondent in CMCC 7077/2006 again filed a similar application dated 7th October, 2009 seeking similar orders for dismissal of the Plaintiff/Appellant's suit on the grounds that the said suit was a replica of Chief Magistrate'sCommercial Court suit No.12713/2005. She annexed copies of pleadings in both files. She further annexed copies of Notice to act in person in CMCC 12713/2005, Notice of withdrawal of the said suit dated 30th July, 2008 and filed on 9th September, 2008, a request for judgment for costs of suit by the defendant/respondent in that suit under order 24 Rule 3 of the Civil Procedure Rule and a letter dated 23rd March, 2009 by the Chief Magistrate to the

Plaintiff/appellant in CMCC12713/2005 advising that the Notice of withdrawal of the suit as filed in Court on 9th September, 2008 was not a withdrawal of suit but an intention to withdraw the suit, which were two different things.

The above latter application by the respondent was never prosecuted, just like the earlier application. The hearing of the case in the Court below commenced on 17th March, 2009 before S. A. Akato (Mr.) Principal Magistrate with the plaintiff testifying on how the accident subject matter of the suit occurred.

On being cross-examined by Mr. Githinji advocate holding brief for Mrs. Wachira for the Defendant, the witness PWI who was the Plaintiff/appellant admitted that he had filed another suitvide CMCC 12713 of 2005. He also stated that he had written a letter to Court asking to withdraw that case but that the suit was still pending.

The Plaintiff called two other witnesses PW2Dr.GeorgeKung'uMwaura who examined him on 10th July, 2006 and produced a medical report and PW3 PC Charles Karumba. No 5084 attached to Divisional Traffic Office Kilimani Traffic Base, who produced the police abstract, OB extract and P3 form.

The Plaintiff /appellant closed his case and parties filed written submissions as the Defendant had no witness to call. On 16th July, 2010 Hon. S.A Akato (Principal Magistrate) delivered a judgment dismissing the plaintiff's suit with costs on account of the plaintiff had filed another suit against the defendant over the same subject matter being 12713 of 2005, whichcase was still pending.

Further, that by maintaining the two cases against the defendant over the same subject matter the plaintiff was abusing the due process of the Court. The Learned Magistrate found that as the matter had reached judgment stage, he could not invoke Section 6 of the Civil Procedure Act to stay the proceedings. He dismissed the suit so that the plaintiff could pursue compensation in the pending case.

It is that judgment of 16th July, 2010 that provoked this appeal, comprising the three grounds of appeal reproduced in this judgment.

This being the first appeal, this Court is under a duty under Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya to;

a. Determine a case finally
b. Remand a case
c. Frame issues and refer them for trial
d. Take additional evidence or to require evidence to be taken
e. Order a new trial

In addition, this Court has the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Act, on Courts of original jurisdiction in respect of suits instituted therein.In other words, this Court is empowered to analyze and re-evaluate the evidence and the law and exercise as nearly as may be, the powers of the trial Court and come to my own independent conclusion. I am also bound by the holding in the case of ***SelleVs Associated Motor Boat Company [1968] Court of Appeal 123*** that an appellate Court is not bound to follow the trial Court's findings of fact if it appears that either it failed to take into account particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

This appeal was admitted to hearing on 13th May, 2014 and directions given pursuant to the provisions of order 42 Rule 13 of the Civil Procedure Rules by Hon. Waweru J on 11th June, 2014. On 29th September, 2014, the parties agreed to dispose of the appeal by way of written submissions. However, the Respondent's Counsel pointed out that the record of appeal contained strange documents that belonged to Nairobi CMCC 12713 of 2005 at pages 24-45 and 59-69 of the record. It was also stated that the said documents were never produced in that Court as evidence. Counsel for the appellant, after seeking more time to examine the record, conceded to the Court expunging the said documents from the record on 21st

October, 2014.

I shall however, in deciding this appeal, bear in mind that I neither saw nor heard the witnesses testify and shall give an allowance to that.

In his skeletal submissions filed on 12th November, 2014 the appellant submitted on ground Number 2 of the appeal that the plaintiff having told the Court below that he had filed another case against the defendant in another Court but that having written to Court withdrawing the same, the Learned Trial Magistrate should have invoked Section 6 of the Civil Procedure Act and stayed the suit subject of this appeal.

Further, it was submitted that having taken evidence and written a judgment, the Magistrate should not have dismissed the appellant's suit. In addition, that the issue of pending proceedings had been spent as per the record of appeal at paragraph 113 and 114 where the defence counsel told the Court that "***It is true we were served with Notice to act in person and notice to withdraw suit.***" That it was a settled matter and non issue even if the plaintiff was cross –examined on it.

The appellant further submitted that the trial Magistrate erred in law in failing to assess damages awardable to the plaintiff. He prayed for setting aside of the judgment of the trial Magistrate delivered on 16th July, 2010 and the case remitted to the Lower Court for assessment of damages.

The respondent briefly submitted that since there was a dispute as to whether or not the other suit was still pending in court, it was upon the appellant to prove that the other suit was not pending at the material time except for CMCC 7077 of 2006, which burden cannot shift. The respondent also submitted that filing of a document like notice to withdraw suit or consent did not take effect until the court endorses the said document as an order of the court. The respondent supported the decision of the trial magistrate in dismissing the suit since the appellant admitted in cross examination that the earlier suit was still pending in court.

I have carefully considered and examined the record of appeal, the Lower Court record and the submissions by the respective parties' advocates. Four (4) issues emerge for my determination

Issue No. 1

Whether the Learned Magistrate erred in law in failing to invoke the provisions of Section 6 of the Civil Procedure Act, and in dismissing the appellant's suit for duplicity.

Issue No. 2

Whether the Learned Magistrate should have assessed quantum of general damages awardable to the appellant.

Issue No. 3

What orders should this Court Make?

Issue No. 4

Who should pay the costs of the suit below and this appeal?

On issue No. 1

As analyzed above, it is true that the Learned Magistrate dismissed the appellant's suit with costs on the grounds that the appellant had admitted in cross examination that another similar suit Nairobi CMCC No. 12713/2005 was still pending in Court. The trial Magistrate was clear that had the case not reached judgment stage, he would have invoked Section 6 of the Civil Procedure Act and stayed the suit.

However, in his view, the Plaintiff could still pursue compensation in the pending case.

The record herein is clear that when the defendant/respondent filed her defence, at paragraph 10 thereof, she contended that there was a suit pending between the same parties over the same subject matter. That paragraph effectively controverted the plaintiff/appellant's averment in his paragraph 10 (ten) of the plaint that there was no other suit pending in Court between the same parties over the same subject matter.

As the suit in the CMCC 12713/2005 had been filed much earlier, the Plaintiff/appellant was sufficiently placed on notice that the defendant/respondent would seek dismissal of the latter suit subject matter of this appeal.

However, when the plaintiff received the defendant's statement of defence, he filed a reply to defence in which he maintained that his suit was in order and that there was nothing to be dismissed. This prompted the defendant to file an application dated 9th September, 2008 seeking to have the suit dismissed for duplicity, which application was never responded to by the plaintiff and neither was it prosecuted. It remained on record even as at the time of commencement of the hearing of the main suit in the Lower Court.

Later on 14th January, 2010 the defendant/respondent once again filed another similar application, seeking for the same orders seeking for dismissal of the plaintiff's suit, as the earlier application, the difference being that she annexed more documents which included pleadings in CMCC 12713/2005, Notice by the Plaintiff to act in person dated 30th July, 2008, Notice of withdrawal of suit dated 30th July, 2008 and filed on 9th September, 2008 with remarks on it by the defendant's Counsel on 10th September, 2008 that:

"N/B the defendant hereby calls for costs of this suit to be paid before the plaintiff can proceed with any other suit arising from the same cause of action."Other annextures included request for judgment for costs of suit dated 5th March, 2009 filed on 10th March, 2009 on behalf of the 1st Defendant/respondentin the Lower Court being costs following the filing of Notice of withdrawal of suit on 9th September, 2008 by the Plaintiff and a letter dated 23rd March, 2009 to the plaintiff's advocate by the Chief Magistrate advising him that the Notice of withdrawal did not take effect as it was an intention to withdraw the suit and not a withdrawal of suit. The said letter was copied to the 1st Defendant's counsel M/S Ombonya& Company Advocates referring them to their request for judgment for costs dated 5th March, 2009.

It is the view of this Court that the two similar applications by the defendant/appellant herein, though not prosecuted gave sufficient notice to the plaintiff to consider and select which of the two suits CMCC 7077/2006 or CMCC 12713/2005 should proceed to hearing and not both. I say selection because from the Chief Magistrate's letter dated 23rd March, 2009, addressed to the appellant, it is clear that the Plaintiff/Appellant in that suit had purported to withdraw the suit from Court but the withdrawal had not been effected by the Court as the Notice filed refereed to an intention to withdraw and not a withdrawal of suit.

I have examined the said Notice of withdrawal of suit annexed to the affidavit of the Respondent herein supporting her application dated 7th October, 2009 and it states in part: **"NOTICE OF WITHDRAWAL OF THE SUIT**

***TAKE NOTICE* that the plaintiff herein intends to withdraw the above stated suit. *TAKE FURTHER NOTICE* that all future correspondence should be addressed to him.**

Dated at Nairobi this 30th day of July, 2008.

Joseph Ndung'u Njoroge

Signed

In my view, it is the statement that ***"the plaintiff herein intends to withdraw the above stated suit"*** that was clearly understood to mean that the Notice was not meant to be a withdrawal but a notice of intention to withdraw the suit and therefore, the Court took the earliest opportunity to notify the plaintiff that in fact, he had not withdrawn the suit, and for that reason, no judgment for costs could be entered against him. The Court did not endorse the withdrawal Notice to give it effect.Further, when Counsel for the defendant sought judgment for costs of the supposedly withdrawn suit, she was advised by the Court that the said judgment could not be entered in view of the fact that the suit had not been withdrawn.

Again, to my mind, the above scenario gave the plaintiff an opportunity to rectify the situation and actualize his intentions of withdrawal of that suit as per his earlier notice of intention filed on 9th September, 2008. He did not seize the opportunity.

During his testimony in Court on 17th March, 2010, the appellant stated as follow:-

In Cross Examination:

"I had filed another case CMCC 12713/2005. I wrote a letter to Court asking to withdraw that case. That case is still pending. The two cases are still pending against the defendant…"

In the course of preparing this appeal for trial, the appellant's counsel informed this Court on 21st October, 2014 that ***"However, I shall be relying on page 113 of the record of appeal where it was admitted that the suit No. 12713/2005 was withdrawn as matters stood then."***

I have carefully perused that page 113 of the record of appeal and compared it with the Magistrate's handwritten as well as the typed proceedings. The proceedings as originally handwritten show that it was on ***"11th September, 2008 before R. N. Kimingi (Mrs.) Senior Principal Magistrate Court Clerk Kevin.***

Nzayi for Mwangi for Plaintiff.

Mrs. Wachira for Defendant.

Counsel for plaintiff: Mr. Mwangi is not ready to proceed. The plaintiff filed another suit 12713/05 and this one and Mr. Mwangi wants to confirm……… (not legible) whether ……………….(not legible) plaintiff has already filed a notice to withdraw the other case"

Court:

Mrs. Wachira: ***I urge Court under Order 24 Rule 4 to stay the proceedings. In the case until the costs in civil case 12713/2005 have been paid. It is true we were served with Notice to act in person and notice to withdraw and as it stands the other suit stands (illegible).***

Court:

Fresh hearing date be taken in the registry. Plaintiff to pay Court adjournment and defendant's costs. Application may be made at a later date when the other file is made available.

Senior Principal Magistrate

11.9.2008"

Comparing what I have gathered from the handwritten proceedings for that day and the typed proceedings which are contained in the record of appeal at pages 113 and 114, no doubt, the typist had a difficult time comprehending the Magistrate's handwriting which, in some areas, is quite illegible such that some of the

typed parts do not make sense at all.

Be that as it may, an admission by Mrs. Wachira that the CMCC 12713/05 stood withdrawn did not render that suit withdrawn, considering the fact that the Court in that case file had advised the Plaintiff that his suit had not been withdrawn by virtue of his notice which was only an intention. Furthermore, the Court also notifiedMrs. Wachira of the position with reference to her request for judgment for her costs.

Order 24 of the Old Civil Procedure Rules which is now Order 25 of the 2010 Civil Procedure Rules provides:

25(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.

> ***(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 parties.***
>
> ***(2). Where a suit has been set down for hearing the Court may grant the Plaintiff leave to discontinue his suit or withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just."***

From the above provisions, and considering that the withdrawal of CMCC 12713/2005 had not been effected by the Court, which matter was fully defended, and in the absence of any evidence as to whether that suit had been set down for hearing or not, I find that the said suit had not been withdrawn or discontinued by the appellant from Court. This finding is supported by the record in that on 30th September, 2009 when the suit in the Court below again came up for hearing before the same Magistrate, Mrs. Wachira informed the Court that there was another suit, and at that point, the Magistrate stood over the matter generally with costs in the cause.

A similar issue was raised on 17th March, 2010 before a different Magistrate Mr. S. A.Akato Principal Magistrate when Mr. Mwangi advocate for the Plaintiff opposed an application for adjournment by the defence Counsel on the ground that there was pending an application dated 7th October, 2009 to dismiss the suit. Mr. Mwangi submitted that in fact there were 2 applications on record. The other was dated 9th September, 2008 and both had never been prosecuted. The Court rejected the application for adjournment and ordered the case to proceed for hearing at 12.00 noon. The Plaintiff/appellant then made it clear in his answers in cross-examination that ***"That case is still pending. The two cases are still pending against the defendant."***

This Court therefore poses the question, which cases were pending as at 17th March, 2010 if as at 11th September, 2008,the other case had been withdrawn? Firstly, between the Plaintiff and the advocate for the defendant, who was giving evidence on oath as to the pendence or withdrawal of the other suit? The answer is dual. First that only the plaintiff could attest to the issue of withdrawal of the other suit as he was acting in person in that other suit and secondly, there must have been an order of the Court acknowledging the withdrawal of that suit for the suit to be considered withdrawn or discontinued.I am fortified by the decision of Khamoni J(as he then was) in ***Nairobi High Court Civil 531/2004 in JacksonWahomeNgatiaVsAgridutt (K) Limited & 2 Others*** where the plaintiff had filed similar suit in the High Court in Nakuru against the Defendants and concerning the same subject matter and in the case before the Judge in HCCC 531/2004, the Plaintiff's amended plaint had averred that the Nakuru High Court Civil Case No. 95/2004 had been withdrawn on 14/6/2004 and the defendants in their amended joint defence dated 4th August, 2007 and filed on 6th August 2007 acknowledged the fact of filing of the Nakuru suit as well as the fact of withdrawal of that suit. The relevant Court order about the withdrawal was not brought to the Court's attention and the defendant's Counsel had submitted that it ought to have been exhibited while the plaintiff advocate submitted in disagreement.

The Learned Judge agreed with the defence Counsel's submissions and held that;-

"I must agree with Mr. Ndubi because I know many a time parties in a suit will unanimously say in Court that a suit is withdrawn when in fact the suit is not withdrawn. Such a situation usually arises where one party or both or all of them have written a letter to the Court informing the Court that they are withdrawing their suit and there after they do not care to follow up the matter <u>to ensure that the Court has acted upon their letter and recorded an order marking the case withdrawn.</u> Parties ought to realize <u>that it is the Court order marking the case withdrawn that effects the withdrawal of a case.</u> Mere letters or request to have a case withdrawn without a subsequent relevant Court order marking the case withdrawn is no withdrawal at all. So is the fact that one party or both or all parties claim, without the relevant Court order being exhibited, that their case has been withdrawn. Where a party claims that a particular case was withdrawn therefore, it is necessary for that party to exhibit the relevant Court order to confirm that claim. That has not been done in this case to confirm what Mr. Kioko is telling me with reference to paragraph 12 of the Amended plaint and paragraph 12 of the Amended Defence especially since Mr. Ndubi is now appearing to renege from his client's statement in paragraph 12 of the Amended defence by demanding the relevant Court order from the Plaintiff."

Albeit persuasive, I agree with the above holding which is in ***parimateria***with this instant case and add that in this appeal, it is the plaintiff/appellant himself who testified in Court confirming the pendence of both suits and who did not appear interested in having the suit subject of this appeal stayed. He also did not produce any order of withdrawal of that other suit. That being the case, that indeed CMCC 12713/2005 was still pending in Court while CMCC 7707/2006 was being heard without any order staying either of the two cases whose parties and the cause of action was the same, then, according to the Plaintiff (appellant, the Learned Magistrate should not have dismissed the suit, but should have invoked the provisions of Section 6 of the Civil Procedure Act. The said provisions enact:

"6 No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties, under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant relief claimed."

In ***<u>Barclays Bank of Kenya Limited Vs Elizabeth Agidza& 2 Others [2012] eKLRMabeya J</u>*** held that:-***"The mischief sought to be avoided by Section 6 of the Civil Procedure Act is likelihood of two different Court's adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions that will be embarrassing to the judicial process."***

In that case, the Court found that the suit contravened Section 6 of the Civil Procedure Act and on being asked by the Defendant to strike out the suit under Order 2 Rule 15 (1) (d) of the Civil Procedure Rules that the suit was an abuse of the process of the Court, on that point the Court held that ***"although Section 6 provided a remedy for stay of suit,"the plaintiff may be correct but with the enactment of Sections 1A and 1B of the Civil Procedure Act the position had changed. There is pressure on the Courts to conclusively expeditiously and proportionately determine civil disputes. What will the stay of the proceedings achieve if the issues herein can be subsumed and be determined in the Kisumu suit?"***

Hon Mabeya J proceeded and struck out the suit with costs to the defendant.

There is nothing in this record of appeal to show whether the other suit had been set down for hearing although there is evidence that a defence had been filed by the defendant/respondent. That being the case, assuming pleadings had closed, then the appellant herein could only have sought for discontinuance of the suit or part of it withdrawn with consent signed by all the parties to the suit or with leave of Court as contemplated in Order 25 Rule 4 of the Civil Procedure Rules.

The above provisions also mandate the party withdrawing suit to ensure that costs for the discontinued suit are paid to the party before proceeding with the subsequent or latter **<u>suit (See High Court Civil 319/2009. Mudhihiri Mohamed & 2 Others</u>** Per Nambuye J(as she then was).

The appellant herein never indicated the part of the suit that he was or intended to withdraw. The Notice did not state whether he intended to withdraw or discontinue the whole or part of the suit. It therefore follows that the Plaintiff/Appellant ought to have filed notice to discontinue his suit. In the absence of any clear intention on the part of the appellant, and in the absence of any order of the court withdrawing or discontinuing that other suit in CMCC 12713/2005, or other evidence to the contrary, that suit in my view is still pending.

In ***Theluji Dry Cleanness Limited Vs Muchiri & 3 Others [2002] KLR/46.***Etyang J held that:

"a notice of withdrawal of suit did not take effect from the date of its filing but from the date it is adopted as an order of the Court, when it is endorsed by the Deputy Registrar."

I wholly associate myself with those views of the Learned Judge and add that the act of filing a notice of withdrawal or discontinuance of suit is not sufficient. There must be an endorsement by the Deputy Registrar, which act is not merely administrative but is judicial and holds judicial or legal consequences. See also Fitzwanga Vs.Environment Disaster Research Foundation [2002] I KLR 283.

It is the act of recording and endorsement by the Deputy Registrar that is the only act which legitimately transforms the terms of the consent letter or notice of withdrawal into an order of the Court. As was held in ***Church Road Development Company Limited Vs. Barclays Bank of Kenya Limited & 2 Others [2006] eKLR by Ochieng Judge that :***

"….. In similar vein it would be inappropriate to consider the notice of withdrawal of a suit to take effect immediately upon its presentation to Court…"Even though the plaintiff would not need the approval of either the defendant or the Court to withdraw his suit, pursuant to the provision of Order 24 Rule 1, until the said notice is endorsed by the Deputy Registrar, so as to render it a part of the Court record, the suit would not have been withdrawn. Therefore, as the Deputy Registrar had not yet endorsed the Court records in acknowledgement of receipt of the notice of withdrawal, the suit in the other suit was still alive as at the time when this suit was filed."

The Learned Judge in the above case went on to state:-***"However, as the Plaintiff had set in motion the process of discontinuing the other suit, and appears to have honestly held the belief that the said other suit had been discontinued automatically upon his filing the discontinuance notice, I hold the view that he did not deliberately set out to abuse the process of the Court."***

In this case, the record clearly shows that the appellant had proper notice of the existence of the other suit. The respondent had incessantly raised objections to the suit subject matter of this appeal being heard until the other suit was terminated. The objections had been raised in the defence and in the two applications on record seeking to strike out the appellant's suit. However, the appellant did not pursue the option of withdrawing or discontinuing the other suit despite the fact that in both cases, he was ably represented by advocates. Neither did he seek to rely on Section 6 of the Civil Procedure Act, to have the suit subject of this appeal stayed by the Court until the other suit was heard and determined.

In the circumstances, it cannot be said that the appellant honestly believed that the other suit had been discontinued or withdrawn since even the Chief Magistrate had written to him pointing out that his notice was only an intention which could not be endorsed by the Court; and not a withdrawal or a discontinuance of suit.

The appellant did not take the cue from the Chief Magistrate's advisory on the effect of his notice and neither was he prepared to have his latter case stayed that is why he pursued for a hearing even when the respondent objected to a hearing on account of the other suit being alive.

In my view, the appellant's conduct must be taken into account in assessing whether or not the trial Magistrate should have invoked Section 6 of the Civil Procedure Act to stay suit.

It is trite that the trial Magistrate had been notified that there was another similar suit pending in Court

before he proceeded to direct the hearing to commence. However, in my view, the record shows that the appellant was not ready to have Section 6 of the Civil Procedure Act invoked. He pushed for the hearing. I find that the appellant played a critical role and or was privy to the proceedings with full knowledge of the consequences of proceeding with the suit when the other suit had not been discontinued or withdrawn. He cannot plead ignorance or be seen to fault the trial Magistrate for finding that by his own admission, the other suit was pending.

In my view, the appellant deliberately refused to have the suit stayed and at the same time declined to have the other suit discontinued or withdrawn or even consolidated with the latter suit for fear that the respondent would have demanded for payment of costs for the other suit before being allowed to prosecute the latter suit. He was, in my view, abusing the Court process.

In the circumstances, I agree with the findings of the trial Magistrate that the case having matured, the appellant had himself to blame as he remained unwilling to have the suit stayed and cannot find a remedy for a retrial from this Court. To remit the case back for trial will be allowing parties to oscillate around Court corridors in perpetuity and deliberately abusing Court processes.

Since the other suit is still pending, the appellant has not suffered any prejudice. He cannot therefore be allowed to hang onto the suit subject matter of this appeal as if it is a matter of life and death. He has not lost the claim. He has a fall back mechanism and a window of opportunity to proceed and prosecute the pending suit.

In the end, I find that the appellant was complicit to the decision reached by the trial Magistrate and therefore invocation of Section 6 of the Civil Procedure Act is belatedly unacceptable.

On issue No. 2

Whether the Learned Magistrate should have quantified general damages for the Plaintiff/Appellant, it bears reiterating here what Courts have held time and again that assessment of quantum of damages is a matter of discretion of the trial Judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions. It is also trite law that a trial Court is under a duty to assess the general damages payable to the plaintiff even after dismissing the suit. This position was confirmed in the Court of Appeal case of ***Mordekai Mwangi NandwaVs Bhogal's Garage*** **Limited Court of Appeal No*. 124 of 1993 [1993] KLR 4448*** where the Court held that ***"that practice that damages be assessed even if the case is dismissed does not imply writing an alternative judgment."***

Further, in the case of ***Mathiya Byabaloma & Others Vs Uganda Transport Company Limited (Uganda Supreme Court,)Civil AppealNo.10/93***, the Court held that the Judge erred in not assessing the damages he would have awarded had the appellant been successful in her claim.

From the above authorities, it is clear that the trial Magistrate erred in law by not assessing the award of general damages he would have awarded to the appellant had he been successful in proving his case.

Therefore, had the plaintiff/appellant proved liability against the defendant/respondent, what damages then would this Court propose? The appellant had submitted for an award of Ksh 300,000/= general damages for pain suffering and loss of amenities, citing the case of ***EATEC & Peter EmachukuVsFesto Ananza Angosi, Eldoret Court of Appeal 147/2001*** where the plaintiff had sustained:

a. Cut wound on the right forearm resulting in amputation of the same at the digital end.
b. A deep and large cut woundon the head (parietal region)
c. A deep cut wound on the head.

He was awarded Kshs 450,000/= which was upheld by the appellate Court.

The defendant/respondent on the other hand submitted a figure of Ksh 90,000/= based on ***Nairobi High Court Civil suit No.539/1983 –Alphonce Nyangilo AketchVs Stephen Waweru;& Mombasa High***

Court Civil suit No. 557/1989MunyauGitauVs Kenya Ports Authority.

In the instance case, the Plaintiff/Appellant pleaded injuries as follows in his plaint.

a. Partial amputation right small finger
b. Blunt injuries right arm
c. Blunt injuries right leg

In his testimony, the Plaintiff/Appellant testified that his right little finger was severed and amputated at Masaba Hospital on 3rd September, 2004 and he returned there for dressing. He did not mention any other injury.

The P3 Form, filled on the 5th September 2004, confirms the injury he sustained and testified about in Court. Doctor G.K. Mwaura, a Physician who examined him and prepared a medical report on 10th July, 2006 at Kinoo Medical Clinic assessed the injuries sustained by the appellant as: 1). Crush injury – right small finger and partial traumatic amputation.

2). Blunt injuries (tender bruised) right arm.

3). Blunt injuries (tender bruised) right leg

4). Pain and bleeding.

The appellant was treated, cleaned and dressed on the wound and put on anti-biotic analgesic and injections tetanus toxoid. The percentage of incapacity was 5 %. He had healed with an amputated finger. In my view, the authority relied on by the appellant showed more serious injuries than thosesustained by the appellant. On the other hand, the authorities citedby the respondent were totally irrelevant, as they concerned i.e Munyau case (supra)- Rapture of biceps muscle at the elbow Wambilianga Judge 12th April, 1991. The one of Alphonce (supra) had fracture of left index finger, middle phalanx, sprained left knee, injury to the pelvis and multiple wounds on the knee, he was awarded Kshs 60,000/= on 8th November, 1990 by Mbogholi Msagha J.

In addition, the authorities cited by the respondent were decided over 15 years earlier. In the circumstance of this case, I would award the Plaintiff/Appellant Kshs 150,000/= general damages for pain, suffering and loss of amenities. However, as the dismissal of his suit is upheld by this Court, he gets nothing.

On special damages, the law is that they must be specifically pleaded and strictly proven.

The appellant had pleaded Kshs. 3000/= to cover medical report and Kshs 200 for police abstract. He however produced receipt for medical expenses for Kshs. 2310/= and search for copy of records for Kshs 500/= in addition to those pleaded. The law is clear that special damages must not only be specifically pleaded but they must be strictly proved. In this case, I would only award the appellant Kshs 3200/= - pleaded and proved at the hearing as the other items were never pleaded.

I find that the trial Magistrate, correctly exercised his discretion in declining to invoke the provision of the Section 6 of the Civil Procedure Act, and in dismissing the appellant's suit for duplicity.

On issue no 3

In the end, this appeal fails and only succeeds on ground 3 of the Memorandum of Appeal as regards the trial Magistrate's failure to quantify the damages that would have been payable to the appellant had the case been determined in favour of the appellant against the Respondent.

I uphold the decision of the trial magistrate dismissing the appellant's suit in the Nairobi CMCC 7077/2006.

On costs

I shall not interfere with the trial Court's discretion on costs of the suit below and uphold the same. The respondent shall also have costs of this appeal.

Dated, Signed and Delivered at Nairobi this **8th May, 2015.**

R.E. ABURILI

JUDGE