REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.136 OF 2015

JOSEPH GACHAGUA …….……1ST PLAINTIFF

SAMUEL BUNDOTICH…..……..2ND PLAINTIFF

VERSUS

ALICE C. KALYA …..…..…….1ST DEFENDANT

RHODA AHONOBADHA……....……...2ND DEFENDANT

DUNCAN MWANGI……...…..…….3RD DEFENDANT

KEN OMANGA …….……..4TH DEFENDANT

BATRAM M. MUTHOKA …….....…….5TH DEFENDANT

(Sued on their own behalf and on behalf

Of the Agriculture Society of Kenya)

RULING

This ruling determines the issue of whether or not the defendants are entitled to costs of a suit that was wholly withdrawn.

The defendants through their counsel Mr Milimo submitted that albeit the defendants were not served with summons to enter appearance or process but that they were informed of the suit and what it intended to do and that out of due diligence they got particulars of the suit and filed a memorandum of appearance and defence before the withdrawal of the suit.

The Memorandum of Appearance was filed on 30th April 2015 and statement of defence filed on 17th April 2015. He submitted that they also filed grounds of opposition and served all the documents upon the plaintiffs.

He therefore contended that they are entitled to costs as a matter of right, having participated as parties who were sued, since notice of withdrawal was not filed before their participation in the proceedings, and that the defendants had incurred costs in hiring an advocate.

Miss Gichuhi counsel for the plaintiffs left the matter to this court to determine since no service of summons or other documents was effected on the defendants.

The history of this matter is that on 8th April 2015, the plaintiffs through the firm of Wanyaga and Njaramba advocates instituted suit against the defendants herein, who were officials of Agricultural Society of Kenya in their capacity as officials of the said society claiming that the defendants had purported to make new Rules of the Society (the Green Book) contrary to the provisions of the Constitution and that when the plaintiff submitted their application to vie for offices of National Chairman of the Agricultural Society of Kenya as required under the Agricultural Society of Kenya Constitution, they were notified by the 1st defendant in her capacity as the chair of the Electoral Committee, that their applications had been rejected citing that the plaintiffs were not in good standing with the society, which action was wrong, and based on an earlier decision.

It was also contended that some Council members were unilaterally and unconstitutionally removed from membership thereby making them ineligible to vote, among other allegations. The plaintiffs therefore sought for injunctive and declaratory orders against the defendants jointly and severally and an order that the society conducts its elections in accordance with the Society's Constitution. They sought for a declaration nullifying the elections; the new rules; the validity of council members and a permanent injunction restraining the defendants from approving, presenting, tabling or in any other way putting into effect the results of the purported elections of 27th February 2015.

The record shows that no summons to enter appearance were taken out or issued, admittedly, no service of any process was ever effected upon the defendants.

Nonetheless, as submitted by the defendants counsel, they learnt of the existence of the suit from undisclosed sources and what it intended to do and they accordingly entered an appearance on 17th April 2015 and filed defence on 30th April 2015.

The plaintiff had, simultaneous with the filing of suit also lodged an application seeking for a injunctive orders. The said application was brought under certificate of urgency and on 9th April 2015 Honourable Mbogholi Msagha J declined to certify the matter as urgent for reasons that despite the plaintiff having received notice of an Annual General Meeting on 10th March 2015, they had waited until 8th April 2015 to present their application for injunction. He directed that the application follows the normal steps for listing.

Later on 10th June 2015, the matter was brought before Mabeya J duty Judge to certify the application dated 8th June 2015 as urgent. The latter application sought leave of court for the plaintiff's advocates to cease acting for the plaintiffs for lack of instructions. Honourable Mabeya J rejected/declined to certify that application as urgent and on 12th June 2015 the plaintiff's advocates filed notice to withdraw the said application which withdrawal was effected by the Deputy Registrar on 9th July 2015.

On 12th June 2015, the plaintiff's counsel also filed notice of withdrawal/discontinuance of suit under Order 25 Rule 1 of the Civil Procedure Rules and the Deputy Registrar endorsed that withdrawal/discontinuance on 9th July 2015.

On 8th July 2015, vide a request for judgment on costs under Order 25 Rule 3 of the Civil Procedure Rule, the defendants' counsels sought judgment for costs in the matter hence this ruling.

I have carefully considered the request for judgment for costs and the submissions by counsel for the defendants.

The applicable law for judgment for costs on a wholly discontinued or withdrawn suit is Order 25 Rule 3 of the Civil Procedure Rule which provides:

" ***Upon discontinuation of a suit and upon request in writing by any defendant the Registrar has the power to 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 wholly withdrawn."***

The statutory substantive provisions for costs are as enacted in Section 27 of the Civil Procedure Act. The Section enacts that:

1. Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers; provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

The principle of costs follow the event was discussed by the Court of Appeal in **Devram Nanji Datan v Haridas Kalidas Dawda CA 11/1949 16 EACA 35** where Sir John Gray CJ stated:

" A successful defendant who after all is brought into account against his will, can only be deprived of his costs when it is shown that his conduct, either prior to or during course of action, has led to litigation which but for his own conduct might have been averted."

In **R. V SPM Mombasa & Others Exparte Nicholas Katumo Peter** Mombasa **Misc. CA CJR 65/2013** the court held:

"The court must consider that litigation as with other legal business is costly in terms of time, Money, inconveniences and the opportunity cost while attending to the court matter, and a party who by conduct causes another to seek relief in court or who seeks court's intervention upon grounds that the court ultimately dismisses as unmeritorious must be ready to meet the costs incurred by the other party in seeking the court's intervention <u>or in defending himself or protecting his interests in the subject matter</u>. The successful party is entitled to the costs in accordance with the principle that costs follow the event. The law as set out in Section 27 of the Civil Procedure Act requires good reasons for departing from the said principle."

Further, in **Singh V Gurbanlite Ltd (1985) KLR 920** the Court of Appeal held that the discretion of the court is to be exercised as the basis of the extent of success of the case.

In this matter, it is clear that there was no successful party as such. The suit and motion were filed and subsequently withdrawn before service of any process was effected upon the defendants. The defendants nonetheless learnt of the existence of the suit from their own undisclosed sources and hired an advocate who entered an appearance and filed defence on their behalf and upon the suit being withdrawn/discontinued, they now seek judgment for costs.

This court notes that the notice of withdrawal of the suit is dated 12th June 2015 and was filed in court on the same day. However, the same never took effect until that notice was endorsed by the Deputy Registrar on 9th July 2015 by way of an order. That latter date is when the order of the court endorsed the withdrawal of suit was made. Yet, the request for judgment for costs was made on 8th July 2015, vide request dated 6th July 2015, by which time no suit had been withdrawn. Obviously that request was premature as there was no order endorsing the withdrawal of the suit as at 8th July 2015.

Consequently, and on tat ground alone that the request for judgment for costs was premature and therefore misconceived, I proceed to strike out that request for judgment on costs for a withdrawn/discontinued suit.

On the other hand the defendants entered appearance and filed defence on their own volition, without any invitation by the plaintiff or by the court. They admit in their submissions that indeed they were never served with any court process in this matter but having learnt of its existence and what it intended to do, they entered an appearance and filed defence thereto hence they should be paid costs of the suit as withdrawn.

The notice of withdrawal of suit was to be served upon the defendants but there is no evidence that they were served. Even if that were to be the case, this court does not find any merit in the request. It is only service of process that invites a party to the suit to file a response especially in interlocutory applications and in cases of the main suit, only summons to enter appearance invites the defendant to enter an appearance and file defence.

My appreciation of the record is that no sooner had the plaintiffs filed this suit than they realized that they ought not to have filed it in the first instance especially after the court declined to entertain the certificate of urgency. A party can only enter appearance and file defence after being served with summons to enter appearance and copy of plaint.

In this case, not even the interlocutory application seeking injunctive orders was ever served upon the defendants thereby inviting them to file any response. Neither were there in place any injunctive exparte orders against the defendants necessitating urgent action. In the circumstances of this case, this court does not find merit in such request which is hereby declined.

This court finds that in the absence of any evidence that the defendants were served with any court process requiring them to do anything in this matter, the request for judgment on costs of a wholly discontinued suit which Order the Deputy Registrar has powers to make under Order 25 Rule 3 of the Civil Procedure Rules lacks merit and is accordingly dismissed with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 6th day of October 2015.

R.E. ABURILI

JUDGE

6/10/2015

Coram R.E. Aburili J

C.A. Henry

Miss Gichuhi for plaintiff

No appearance for defendant

COURT – Ruling read and pronounced in open court as scheduled.

Ruling to be typed forthwith.

R.E. ABURILI

JUDGE

6/10/2015