



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL CASE NO. 175 OF 2007

TERRA FLEU LIMITED.....PLAINTIFF

VERSUS

SWAMI COFFEE ESTATE LTD1ST DEFENDANT/RESPONDENT

KAMAL SHAH.....2ND DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant has filed a notice of motion date 21/10/2010 under section 1A and 1B of the Civil Procedure Act, Order 22 Rule 22, and Order 45 rule 1 of the Civil procedure Rules, seeking the following orders.

1. That this honourable Court be pleased to vary and/or set side the orders made on the 12th day of February, 2010 pending the hearing and determination of this application of further orders of this Court.
2. That this honourable Court be pleased to grant such further the orders as it shall deem fit and just to grant.
3. That this cost of this application be provided.

The application is based on the following grounds:

1. The parties herein agreed by consent to have this matter withdrawn with no orders as to costs, the suit herein having been overtaken by events.
2. The respondents in applying for judgment on costs concealed material facts and evidence from the Court.
3. The applicant has in his possession material evidence which it could not produce at the time the judgment on cost was entered as the same was ex parte.
4. The awarding of costs when parties had in fact agreed that the matter be withdrawn with no orders as cost amounts error apparent on the face of the record.
5. This application has been made timeously without unreasonable delay.
6. There are sufficient reasons to warrant a review of the orders of this Court made on the 12th February 2010.
7. The interest of justice tilts in favour of allowing the applicants applications herein.

In a supporting affidavit of Mr. Karim Sayed the operation manager of the plaintiff company he depones as follows in brief;

That the plaintiff company had an agreement with the 1st defendant to purchase L. R. No. 304/5. Simultaneously they had an agreement that the applicant would use the defendant's water line to pump water in its property. At paragraphs 2 to 12 the applicant narrates what happened between them during the subsistence of the said agreements. He depones further that after the 1st defendant breached the agreement it was forced to withdraw the suit hearing for the reasons stated at paragraph 15 of his affidavit. Thereafter the respondent sought to have the money deposited in Court released to it but the application was dismissed. The respondent's application for bill of cost which was also dismissed on the 15th July 2008 for want of jurisdiction. That on the 12th February 2010 the respondents obtained the judgment on costs against the plaintiff – KS7. The applicant argues that Respondent failed to disclose to the court that the entire suit had been withdrawn with no orders as to costs. That it is not disclosed that they had frustrated the water supply to the plaintiff premise and as such could not claim costs for the same.

In a replying affidavit dated 9th of November 2011 Kamal Shah the 2nd respondent responds to the issues raised in the supporting affidavit of the applicant as follows in brief: That there was an agreement for sale and purchase of L. R No. 304/5. At paragraphs 4 to 5 the respondent avers to the relationship they had at the time of the agreements. At paragraphs 11 the respondent explains the applicant's dealings with the Water Resource Management Authority. That the applicant instituted ELC 175 of 2007 before doing his investigations and that later the suit was overtaken by events. That although the letter dated 5th of May 2008 purports to be copied to M/S Ramesh Sharma Advocate the applicant has not shown that the letter was received by M/s Ramesh Sharma Advocate. That the applicant has not shown that M/s Ramesh Sharma Advocate confirmed that he had no objection to the suit being withdrawn with no orders as to costs. That the said letter is not in the form of consent from two advocates in a contentious matter. That the applicant is raising the issue of the purported consent four years after the applicant was served with the first Bill of costs. That he did not consent to the bill of costa being withdrawn with no orders as to costs at all. That the court record does not show that on 21st May 2009 the Registrar confirmed that the "suit had been withdrawn with no orders as to costs". That it is on record that the judge who dealt with the application dated 29th April 2010 held that there was a judgment on course on record. Thereafter the bill of costs dated 14th July 2008 was dismissed because judgment on cause had been entered by the Registrar as per order 24 of the former civil procedure rules. That the applicant raised a preliminary objection dated 11th November 2008 in which it did not raise the purported consent that the suit was withdrawn with no orders as to costs. He denies that he did not fail to disclose anything to the court .That the application has no merit and is brought to delay justice

In a Replying Affidavit dated 9th December 2011, the applicant rebuts what has been deponed by the respondent giving a sequence of events of the relationship they had and avers that the respondent frustrated his effort. In the letter dated 5th May 2008,he aver that the advocate on record J.H Ojiambo who has confirmed that he served the letter personally on Ramesh Sharma Advocate and that the Respondent's advocate expressly confirmed that he had no objection to the Application being withdrawn. That the suit was withdrawn pursuant to the letter of withdrawal dated 5th May 2008 which expressly provide that the suit was to be withdrawn with no orders as to costs and that the application was made timeously without any delay whatsoever.

In response to the applicant's affidavit dated 9th December 2011, the 2nd Respondent filed a Replying Affidavit dated 15th March 2012.He avers as follows, that he did not consent to withdrawing the suit with no orders as to costs as alleged or at all and that is why his signature is not on the letter dated 5th May 2008 and that the applicant acted without disclosing his actions to the Respondents by not informing the Respondents that they were withdrawing the suit and further the manner in which the withdrawal of the suit was done with an ulterior motive of depriving the Respondent of their costs. He also stated that the application was brought inordinately late.

The applicant filed its submissions on 1st August 2012.The applicant reiterated the contents of his application and the genesis of the dispute that concluded in the withdrawal of the suit. It further

submitted that after the withdrawal of the suit, the applicants then advocates JH Ojiambo wrote to the Deputy Registrar High Court in the terms that “Kindly note that the plaintiff wishes to withdraw this matter with no orders as to costs. *Please expedite as the suit has been overtaken by events, the suit premises having been sold*” He further submitted that Mr Ojiambo confirmed in his affidavit of service that “7. THAT I further state that we agreed as the Advocates for the parties that this suit should be withdrawn with no orders as to costs” and says that the suit was withdrawn by the consent of the parties with no orders as to costs. That since the Respondents have never challenged the consent and as such the same is still in force. He quoted Mulla on the civil procedure at page 1353 that “No formal order is necessary for the withdrawal of a suit. But the proceedings must show that the plaintiff has withdrawn the suit or part of the claim”

The applicant further submitted that there were two conflicting orders on record with one awarding the Respondents costs while the other confirms that the suit had been withdrawn with no orders as to costs. He stated that costs are discretionary and quoted section 27 of the Civil Procedure Act and concludes that the court should indeed uphold that each party should bear its own costs in this matter.

The Respondents submitted that the allegation that the letter dated 5th May 2008 withdrawing the suit with no order as to cost was done by consent was not unilateral, that the letter not in the normal format of a consent and not signed by the Respondent’s advocate and that the withdrawal was only served to the Respondent’s advocate only after the same had already been filed. Further there is no evidence offered showing the alleged consent by the Respondent. They further submitted that in the previous proceedings relating to costs the applicant argued that the withdrawal was by consent and the Registrar confirmed withdrawal with no orders as to costs though a unilateral action of withdrawing the suit the applicant is trying to deny the Respondent the costs of the suit. On the issue that the applicant’s application was withdrawn without costs and the suit not heard inter parties the award of costs is unlawful. The Respondent quoted section 26 of the civil procedure act where it states that costs are a discretion of the court and a party cannot demand them but has to apply for them and section 26 of the Civil Procedure Act where it states that costs follow event and as a result it is the successful party that is entitled to costs. Since the applicant brought the Respondents to incur costs it is only just and fair that the applicant meets the said cost. The respondents conclude that the applicants intention of withdrawing the case was unilateral and in bad faith and was done ex parte at every stage in order to deny the Respondents their just entitlement to costs and prays that the application be dismissed with costs.

I have considered the affidavit and the submissions and carefully gone through the proceedings. The issue at hand in this application is whether the court should vary or set aside the order of 12th February 2010 awarding the respondent costs. The issue is not what happened between the parties at the time they negotiated the agreement and its breach thereof. I have carefully perused the proceedings and pleadings and documents filed by the parties on the 6th May 2008, the firm of M/s Ojiambo filed a letter stating that “*Kindly note that the plaintiff wishes to withdraw this matter with no orders as to costs. Please expedite as the suit has been overtaken by events, the suit premises having been sold*”

I note that the said letter was not signed by both counsels and when the matter was placed before the Deputy Registrar on the 13th May 2008 the order recorded was as follows “that this matter is hereby withdrawn” subsequent to that order the respondent filed a letter dated 13th May 2009 where Mr Wandabwa for the Defendant following the plaintiffs application dated 5th May 2008 to wholly withdraw the suit against the defendant requested the Deputy Registrar to enter judgment as to costs of the suit pursuant to Order 24 Rule 2 and 3 of the civil procedure Act. Thereafter judgment on costs was entered on the 12th of February 2010. This was done after it was noted that the matter had been withdrawn as per the order dated 15th May 2008. Nowhere in the court file is there an order that the suit was withdrawn with no orders as to costs. In the submissions the applicant refers to Mr. Ojiambo’s affidavit SK11 which was not attached. The provisions of Section 27 of the Civil Procedure Act deals with costs and provides that costs of an incidental to all parties

shall be at the discretion of the court or the judge and the proviso is that cost of any action cause or to the matter shall follow the events unless the court or judge shall for good reason otherwise order. There being no consent order that the parties were withdrawing the suit without costs the respondent procedurally sought costs as provided under Order 24 of the Civil Procedure Rules and the same was granted. Bearing this in mind I find that the application before me has no merit it is dismissed with costs to the Respondents.

Orders accordingly.

R.OUGO

JUDGE

Dated, Signed and Delivered this 3rd May 2013

In the presence of:-

.....Applicant

.....Respondent