



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CIVIL CASE NO. 659 OF 2017

HARJEET SINGH SEHMI.....PLAINTIFF/APPLICANT

VERSUS

JOGINDER KAUR SEHMI.....1ST DEFENDANT/RESPONDENT

GURPAL SINGH SEHMI.....2ND DEFENDANT/RESPONDENT

TEJPARKASH SINGH SEHMI.....3RD DEFENDANT/RESPONDENT

OTIENO OMUGA T/A OTIENO OMUGA &

OUMA ADVOCATES.....4TH DEFENDANT/RESPONDENT

ERIC BENGI T/A BENGI, MIRITI &

ASSOCIATES ADVOCATES.....5TH DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 24th September 2018 brought under order 51 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Rules and all enabling provisions of the law.

2. It seeks orders:-

(1) Spent

(2) That the above suit be re-instated and processed for hearing on merits without undue delay.

(3) That the mention for directions scheduled to take place on the 27th September 2018 be declared overtaken by events.

(4) That the applications filed by the defendants prior to the withdrawal of the suit be set down for hearing on priority basis to facilitate the fixing of the hearing date for the main suit as soon as possible.

(5) That costs of this application be provided for.

3. The application is supported by the affidavit of Harjeet Sehmi, the plaintiff/applicant sworn on the 24th May 2018 and a further affidavit by F. H. Nubutete Advocate sworn on 2nd November 2018.

4. The application is opposed. There are grounds of opposition by the 1st, 2nd and 3rd defendants/respondents dated 2nd October 2018 and filed in court on 3rd October 2018.

There is also a replying affidavit sworn by Maurice Otieno Omuga the 4th defendant/respondent on the 3rd October 2018. The 4th defendant/respondent has also filed grounds of opposition dated 26th September 2018. The 5th defendant/respondent has also filed grounds

of opposition dated 4th October 2019.

5. I have considered the notice of motion, the affidavit, the grounds of opposition, replying affidavit. I have also considered the oral submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.

6. By notice a notice to withdraw the above suit against all the five defendants dated 16th January 2018, the plaintiff intended to withdraw the suit herein. Counsel representing all perspective parties went before the Hon. Deputy Registrar (D. Orago) on 6th February 2018 where she made an order as follows:-

“The suit stands withdrawn against all the five defendants as per the application dated 16th January 2018. Let all the parties agree on costs. Mention to confirm if parties will have agreed on 4th April 2018”.

7. Thereafter, there were two mentions before the Hon. Deputy Registrar in which she was informed that the parties had failed to agree.

8. On the 24th September 2018 the plaintiff/applicant filed this application under a certificate of urgency. The same was heard by way of oral submissions on 5th November 2018.

9. It is not in doubt that the plaintiff/applicant withdrew this suit under Order 25(1) of the Civil Procedure rules 2010.

Order 25 (1) of the Civil Procedure Rules provides that:

“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”.

In paragraph 7 of the supporting affidavit, the plaintiff/applicant admits that he gave instructions to withdraw the suit. He has not demonstrated that there was any mistake, fraud or collusion in the part of his advocate.

10. A withdrawal under order 25 rule 1 of the Civil Procedure Rules does not envisage a situation where a plaintiff may want to reinstate the suit. The only avenue open for him is to file a fresh suit.

11. In his supporting affidavit he admits that the reasons for withdrawal was so as to file two fresh suits. It appears the plaintiff/applicant changed his mind when the defendant/respondent demanded costs. Under Section 27 of the Civil Procedure Act, the costs follow event. Since the parties failed to agree on costs, the only option is for the plaintiff/applicant to wait for the defendants to file their respective bill of costs for taxation. I rely on the cited case of **of Kinuthia Eston Maina & 2 others vs Coffee Board of Kenya ELRC No. 218/2015**, where J Nduma Ndere quoted the case of **Juma vs Khaunya & 2 others [2004] eKLR** where the court held:-

“The applicant seeks to have the order withdrawing the suit set aside and for an order reinstating the former suit. I have already pointed out that the suit was withdrawn pursuant to the provisions of Order XXIV rule (2) (2) of the Civil Procedure Rules.....It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated. A party has the option of instituting a fresh suit.”

12. I agree with the defendants/respondents’ submissions that there is no pending suit between the parties herein, the same having withdrawn by the plaintiff as against the defendants.

13. In conclusion, I find that the application is an abuse of the court process and the same is dismissed with costs to the defendants/respondents.

It is so ordered.

Dated, signed and delivered in Nairobi on this 4TH day of APRIL 2019.

.....

L. KOMINGOI

JUDGE

In the presence of:

.....Advocate for the Plaintiff

.....Advocate for the Defendants

.....Court Assistant