



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 24 OF 2018

JULIUS WANYAMA KHATE.....PLAINTIFF

VERSUS

DAVID MAKHETI NAMIANYA.....1ST DEFENDANT

JACOB WALUKAYA.....2ND DEFENDANT

R U L I N G

Order 25 Rules 1 and 2 of the Civil Procedure Rules allow a plaintiff to withdraw his suit against a defendant at anytime before the same is heard. This is subject to such terms as to costs that may be just.

Rule 4 of the same order provides that:-

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the Court may order a stay of such subsequent suit until such costs shall have been paid.” Emphasis added

On 15th November 2016, the plaintiff herein filed **BUNGOMA ENVIRONMENT & LAND COURT CIVIL SUIT NO 142 OF 2016** seeking the main prayer that the defendant be evicted from land parcel **NO BOKOLI/CHWELE/951**. That suit was however withdrawn by consent on 28th March 2017 with costs to the defendant. Those costs were again, with the consent of the parties, taxed at Kshs. 47,475/= on 12th September 2018. The defendant was also allowed 45 days to pay the costs.

Meanwhile on 11th May 2018, the plaintiff filed this suit against the same defendant and another seeking their eviction from land parcel **NO BOKOLI/ CHWELE/951**. That has provoked the defendant to file the Notice of Motion dated 2nd April 2019 premised under **Order 25 Rule 4 of the Civil Procedure Rules** seeking the following orders:-

1. That the proceedings herein be and are hereby stayed until the plaintiff has paid the costs in BUNGOMA HCCC NO 142 OF 2016.

2. That costs of this application be provided for and be borne by the plaintiff.

The application is premised on the grounds set out in the application and is also supported by the 1st defendant's affidavit dated 2nd April 2019.

The gravamen of the said application, which is not opposed, is that having withdrawn **BUNGOMA ELC CASE NO 146 OF 2016** after which the costs were taxed at Kshs. 47,475/= by consent, the plaintiff, having failed to pay the said costs, has now filed this suit seeking the same orders as in the withdrawn suit. Annexed to that affidavit are the Plaint in **BUNGOMA ELC CASE NO 142 OF 2016**, the withdrawal order, the Decree and Certificate of Costs.

When the application came up on 14th May 2019, **MS MUTUNDA** for the plaintiff told the Court that she had advised the plaintiff to pay the costs. However **MR WERE** for the defendant told the Court that the plaintiff will not pay.

I have considered the application un-opposed as it is. I have also called for and perused **BUNGOMA ELC CASE NO 142 OF 2016** and I notice from the record that a Notice to Show Cause has been issued against the plaintiff to show cause why he should not be committed to civil jail for failure to pay the taxed costs.

It is clear from the provisions of **Order 25 Rule 4 of the Civil Procedure Rules** that the Court has a discretion whether or not to order a

stay of any subsequent suit before the payment of costs in a previous suit. It is therefore not mandatory that any subsequent suit be stayed. That is clear from the use of word “**may**”. In exercising such discretion, the Court will take into account several factors including whether indeed the costs have been taxed or agreed and the conduct of the parties.

When this application came up for hearing, **MS MUTUNDA** for the plaintiff told the Court that he had asked his client to pay the costs. However, **MR WERE** for the defendant replied that the plaintiff would not pay the costs though taxed by consent. It is not clear how **MR WERE** arrived at that decision but the fact that there is a Notice to Show Cause coming up against the plaintiff on 22nd May 2019 in **BUNGOMA ELC CASE NO 142 OF 2016** is sufficient proof that the plaintiff does not intend to obey the terms of the consent order recorded on 25th March 2017 with regard to payment of costs. It is obvious therefore that whereas I have the discretion whether or not to order a stay of these proceedings until the costs in **BUNGOMA ELC CASE NO 142 OF 2016** are paid, the plaintiff has demonstrated from his own conduct that he is not deserving the exercise of such discretion in his favour. Indeed he has not even filed any response to the application and neither did he attend the hearing of the same.

Ultimately therefore, the defendants Notice of Motion dated 2nd April 2019 is hereby allowed as prayed with costs to the defendant.

Boaz N. Olao.

J U D G E

23rd May 2019.

Ruling dated, delivered and signed in Open Court at Bungoma this 23rd day of May 2019.

Ms Mutunda for plaintiff present

Mr Onyony for Mr Were for defendant present

Parties absent

Joy/Felix – Court Assistants present

Boaz N. Olao.

J U D G E

23rd May 2019.