



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC CIVIL CASE NO 25 OF 2015

JUDITH CHERONO MOSONIK (Suing as the administrator of the estate of

ADREW KIPROTICH CHEPKWONY (DECEASED).....PLAINTIFF

VERSUS

DICKSON KIPKEMBOI KIPKEMBOI KIPLAGAT CHANGWONY.....1ST DEFENDANT

JOYCE JEPKEMBOI TOROITICH.....2ND DEFENDANT

R U L I N G

1 The defendants by a Notice of Motion dated 14th March 2019 brought under Order 25 Rule 4 of the Civil Procedure Rules and Sections 3A, 1A & 1B of the Civil Procedure Act seeks an order that :-

“The Court be pleased to stay proceedings in the matter herein until payment of cost amounting to Kshs 71,425/= of the previously withdrawn suit filed by the plaintiff raising the same cause of action over the same subject matter against the 1st Defendant being case “Nakuru CMCC No 126 of 2014 which costs should be settled before further action in the matter ”

2 The grounds upon which the application is founded are set out on the body of the application and the affidavit sworn in support of the application by the applicant /1st defendant The applicant avers that the plaintiff filed Nakuru CMCC No 126 of 2014 which the plaintiff wholly withdrew on 18th November 2014 The applicant states he had filed a defence in the case and after the withdrawal applied for costs pursuant to the provisions of Order 25 Rule 3 of Civil Procedure Rules on 2nd March 2015 He avers that costs were assessed by the Court at Kshs 66, 300/= on 3rd June 2015 These are the costs together with accrued interest the applicant seeks payment of before the present suit which is on the same subject matter as the withdrawn suit can be proceeded with

3 The plaintiff filed a Notice of Preliminary Objection dated 17th May 2019 in regard of the applicant’s Notice of Motion stating the issue of costs was *resjudicata* the same having been canvassed by the lower Court where the Court ruled no such costs were awarded to the defendant Further the plaintiff filed a replying affidavit dated 24th September 2019 on 25th September 2019 effectively obliterating the preliminary objection On 18th September 2019 the Court directed the parties to canvass the application by way of written submissions

4 The position taken by the plaintiff in the replying affidavit was that no costs were awarded to the defendant and there was no order to that effect The plaintiff further contended the issue of costs had been dealt with during the hearing of Notice to Show Cause why execution should not issue and referred to rulings made by Hon B Mararo, PM on 13th July 2016 and 3rd January 2017 The plaintiff argued that by the said rulings, the learned Magistrates had stated that he lacked the jurisdiction to deal with the issue of costs as the suit related to land and Magistrate had no jurisdiction to deal with land matters The plaintiff further contended the defendant had the option of appealing the rulings by the Magistrate and since he never appealed the issue was *Resjudicata*

5 The parties filed written submissions to canvass the application The 1st defendant/applicant filed his submissions on 24th September 2019 and the plaintiff on 9th October 2019 I have read the submissions and I have reviewed the authorities referred to in the respective submissions The issue that is at the centre of this application is whether the 1st defendant was granted costs for the suit withdrawn by the plaintiff in the lower court, and if so, whether the present proceedings should be stayed until the plaintiff settles those costs

6 There is no dispute that the plaintiff in the present suit filed Nakuru CMCC No 126 of 2014 where the 1st defendant in the present suit was the defendant It is also not disputed that the plaintiff wholly withdrew the said suit as against defendant Following that withdrawal of the suit, the 1st defendant who had appeared and filed a defence in the suit in the magistrate’s court case made a written request to have costs

assessed in his favor pursuant to Order 25 Rule 3 of the Civil Procedure Rules vide a letter dated 2nd March 2015. The request was acted upon and the costs were on 3rd June 2015 assessed at Kshs66,300/= and a certificate of costs issued. The plaintiff raised issues with the award of costs when the 1st defendant commenced execution proceedings for the costs which resulted in Hon B Mararo, PM making the rulings referred to earlier in this ruling. The record does not show that the certificate of costs issued on 3rd June 2015 was ever set aside.

7 Order 25 Rule 3 of the Civil procedure Rules, 2010 provides as follows:-

“Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing of the costs of any part of the claim against him which has been withdrawn ”

8 Under order 25 Rule 1 a plaintiff can withdraw a suit at any time before it is set down for hearing. The provision is on the following terms:-

O 25 rule 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 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

9 In the suit before the Magistrate’s Court the plaintiff exercised her right as provided under Order 25 Rule 1 of the Civil Procedure Rules to withdraw the suit wholly as against the defendant. Once a plaintiff exercises the option to withdraw a suit as provided under Order 25 Rule 1, the court has to accept the withdrawal and cannot reject the same. However there are consequences that flow from the exercise by a plaintiff of his right to withdraw or wholly discontinue a suit against a defendant who has appeared in the suit. Under Order 25 Rule 2 of the Civil Procedure Rules where a suit has been set down for hearing, the plaintiff can only discontinue the suit or withdraw any part of his claim with the leave of the Court and upon such terms as to costs and/or filing of any other suit, as the Court may consider just.

10 Where the suit is discontinued in its entirety under the provisions of Order 25 Rule 1 a defendant is entitled to seek to be granted costs as provided under Order 25 Rule 3 of the Civil Procedure Rules. The Court before which the wholly discontinued suit was lodged has no discretion not to award costs of the discontinued suit to the defendant. The wording of Order 25 Rule 3 in regard to award of costs where a suit is wholly discontinued is in mandatory terms thus:-

“...Upon request in writing by any defendant the registrar shall sign judgment for costs of a suit which has been wholly discontinued...”

11 In the suit before the lower Court the plaintiff wholly discontinued her suit against the defendant and the defendant properly applied in writing under Order 25 Rule 3 to be awarded the costs of the suit. The Magistrate’s Court assessed the costs and issued a certificate of costs for Kshs66,300/= on 3rd June 2015. This was in accord with Order 25 Rule 3. I am satisfied the costs were properly awarded.

12 The certificate of costs which was duly signed by the Magistrate was never set aside. Hon B Mararo P M in the rulings he made in the execution proceedings did not set aside the certificate of costs and there was no application for him to do so. The learned magistrate’s position was that since the Magistrate’s Court then had no jurisdiction to deal with land matters, the Court could equally not deal with any issue of costs arising from such a suit. With respect, it is my view that the learned magistrate misconstrued and misapprehended the purport of Order 25 Rules 1, 3 and 4. There is no denying that a defendant in a suit does not have any say in regard to where a suit is filed. If a suit is filed in a court that turns out did not have any jurisdiction, that cannot be a ground for a defendant to be denied cost if he appeared and defended the suit. Under section 27 (I) of the Civil Procedure Act, the fact that the Court, before which the suit was filed did not have jurisdiction cannot be a bar to an award of costs in the suit.

13 In the present matter even if it was true the lower court lacked jurisdiction to deal with land matters, the fact is that the plaintiff had filed the suit and the defendant appeared and filed a defence. Once the plaintiff elected to withdraw/discontinue the suit against the 1st defendant herein, the incidence of costs was inevitable and the same were properly assessed in favor of the defendant upon a written request. The certificate of costs issued on 3rd June 2015 constituted a valid order for costs after assessment by the Court.

14 The Court under Order 25 Rules 4 has the discretion to order a stay of a subsequent suit brought after the withdrawal or discontinuance of a previous suit which was on the same cause of action.

15 Order 25 Rule 4 provides:-

“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 ”

16 I am satisfied the discontinued suit before the Magistrates Court related to the same subject matter as in the present suit being land parcel **Nakuru/Lengenet/792/formerly (Morgan Farm plot No 45)** which the plaintiff claimed ownership of as she claims in the present suit.

17 It was the plaintiff’s duty and obligation to ensure the magistrate’s court had jurisdiction to handle land matters when she filed the suit in the magistrates Court. The 1st defendant cannot share in the blame. Order 25 Rule 3 was intended to shield defendants in suits from being “tossed” from one court to another by a plaintiff who exercises their right under Order 25 Rule 1 to withdraw or discontinue a suit for any reason.

18 The plaintiff in her submissions has argued that no order for judgment for costs was made and hence no costs were properly awarded. I have dispelled this argument as there was a formal request for costs in writing by the defendant which was duly acted upon and a certificate of costs duly signed by the Magistrate issued on 3rd June 2015. Further the plaintiff has argued the instant suit was on a different cause of action founded on fraud and forgery. However the substantive claim is the ownership of the suit property which the plaintiff claims was fraudulently transferred by the defendants to their names. The subject matter of the suit before the Magistrate's court was the same as in this court and in my view the present suit is on the same and/or substantially the same cause of action as in the previous suit within the meaning of Order 25 Rule 4 of the Civil Procedure Rules.

19 I am in the premises persuaded that the Notice of Motion dated 19th March 2019 has merit and that the 1st defendant is entitled to have the costs of the previous suit in the sum of Kshs 71,425/= settled before the present suit can be proceeded with. I accordingly order the present suit to be stayed until the 1st defendant's costs of the said previous suit are paid.

20 Orders accordingly.

Ruling dated signed and delivered at Nakuru this 21st day of November 2019

J M MUTUNGI

JUDGE