



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 114 OF 2016

GILBERT KABAGE KARIANJAH.....PLAINTIFF

VERSUS

RICHARD MAINA MUTUNGI.....DEFENDANT

RULING

1. This ruling is in respect of defendant's Notice of Motion dated 10th May 2017. The application is brought inter alia under Order 25 rule 4 of the Civil Procedure Rules 2010 and seeks the following orders:

1. That this suit be stayed pending payment of costs in Nakuru CMCC No. 2396 of 2006 Gilbert Kabage Karianjahi –vs- Richard Maina Mutungi and Nakuru CMCC No. 595 of 2009 Gilbert Kabage Karianjahi –vs- Richard Maina Mutungi.

2. The costs of this application be awarded to the defendant.

2. The application is supported by an affidavit sworn by the defendant. He deposed that the plaintiff filed Nakuru CMCC No. 2396 of 2006 against him and that the case was dismissed with costs on 11th November 2008. The costs were assessed at Kshs.29, 450/= and a Certificate of Stated Costs dated 2nd September 2001 issued. The costs have not been paid so far. He further deposed that the plaintiff also filed Nakuru CMCC No. 595 of 2009 against him and that the suit was struck out on 3rd October 2013. The court file went missing before the costs could be assessed.

3. The plaintiff opposed the application through a replying affidavit sworn on 2nd November 2017. He deposed that the costs due to the defendant in the two cases are not in dispute but added that the defendant is not reluctant to recover the costs using mechanisms available under Civil Procedure Rules. He further deposed that Order 25 rule 4 only applies to suits which have been discontinued.

4. The application was argued by written submissions. The applicant filed submissions on 21st November 2017 while the respondent opted not to file any submissions. Instead, the respondent relied on the replying affidavit.

5. I have considered the application, the affidavits and submissions. The application is principally brought under **Order 25 rule 4** of the Civil Procedure Rules, 2010. Order 25 is titled "**Withdrawal, Discontinuance and Adjustment of Suits**". 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. (Emphasis supplied)

6. The rule refers to costs of a discontinued suit. The two suits cited by the applicant herein were not discontinued. One was dismissed while the other was struck out. Even assuming that the subject suits were discontinued, it is important to note that the rule gives the court discretion on whether or not to stay the subsequent suit.

7. There is good sense in limiting the impact of rule 4 to costs of a discontinued suit. This is because it is both just and reasonable that a litigant who withdraws a suit prior to its determination on the merits should settle the costs of the opposite party before embarking on new litigation with the same party on the same or substantially the same cause of action. As correctly pointed out by counsel for the plaintiff, there are ample provisions in the rules to facilitate recovery of costs of a suit which has been determined otherwise than through a discontinuance.

8. In view of the foregoing, I find no merit in Notice of Motion dated 10th May 2017. It is dismissed with costs to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 16th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Karanja for the plaintiff/respondent

No appearance for the defendant/applicant

Court Assistants: Gichaba & Lotkomoi