



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 98 OF 2016

ANTHONY WANDERA MAJANGA.....PLAINTIFF

VERSUS

STEPHEN TAABU BALONGO.....DEFENDANT

R U L I N G

1. This ruling is on a preliminary objection that seeks to bar trial or hearing of this suit before costs in a previous suit – P&A No. 318 of 2011 – are paid. The notice of that objection was filed here on 4/12/2017 and is dated the same.

2. The objection was canvassed by way of written submissions. The Defendant, - **STEPHEN TAABU BALONGO** - is the objector and filed his submissions on 19/1/2018. It appears clear that the Plaintiff - **ANTONY WANDERA MAJANGA** - had filed a succession cause - **BUSIA HIGH COURT P&A No. 318 of 2011** - which he withdrew upon advice and filed this case. The withdrawal came about because the issue in that case concerned title to land and the high court correctly opined that it had no jurisdiction to handle the issue.

3. The Defendant appears to have no problem with the filing of this case but he desires that costs in the withdrawn case be paid first. In this regard, he finds succor in the provisions of order 25 Rules 2(2) and 3(4) of Civil Procedure Rules, 2010. Order 25 rule 2(2) provides as follows:

25 Rule 2(2): “where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”

And order 25 rule 3(4) is worded thus:

25 Rule 3(4): “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 stay of such subsequent suit until such costs shall have been paid.”

4. The Defendant wants costs of the other suit. The court is empowered to stay any subsequent suit filed until payment of costs of a withdrawn or discontinued suit. The court’s power to order such stay is discretionary as the provision is couched in the permissive word “MAY” instead of the compelling or mandatory “SHALL”.

5. It is clear the Plaintiff does not want to pay costs. In his submissions filed on 7/2/2018, he argues that it is the court, not himself, that directed the withdrawal of the previous suit owing to lack of jurisdiction. It seems to be the Plaintiff’s position that he was right to file the previous suit as he had done. To him, the court had jurisdiction and he alleges that he was vindicated in this view by the outcome of the case in **THE LAW SOCIETY OF KEYA, NAIROBI BRANCH Vs MALINDI LAW SOCIETY & 6 Others: Civil Appeal No. 287 of 2016, NAIROBI**. (“The Malindi Case” hereafter).

6. The Malindi case is, in my view, used by the Plaintiff to support an untenable position. The case is authority for the position that apart from the Environment and Land Court, the lower courts also have jurisdiction to handle Environment and Land matters subject only to jurisdictional prescriptions or limits imposed by the statutes governing them. That case does not confer any jurisdiction to the High Court, and my understanding is that the previous case had been filed at the High Court.

7. Besides, the decision in the Malindi case came later. At the time the Plaintiff filed the previous case in the High Court, the legal position was that the Environment and Land Court had exclusive jurisdiction to handle environment and land matters. This is the legal position that

the Plaintiff should have been alive to instead of assuming a presumed position that was not in existence then.

8. I do not therefore agree with the Plaintiff. He filed his case in a court without jurisdiction and was directed by that court to go to the correct forum. By the time the directive or advice came, the Defendant, through his counsel, had already expended time, money, skills, and energy to defend the case. A question then arises: who is to bear these costs? If the costs are left like that, the Defendant will have been made to incur unjustified losses. Yet the Defendant did not take himself to court; he was dragged there. The Plaintiff is being too clever by half when he tries to bring ingenious arguments to evade the issue of costs. He should not be allowed to do it.

9. The law cited by the Defendant is clear and to the point. The costs of the previous suit should be paid by the party who withdraws or discontinues a previous suit. The Plaintiff herein should therefore pay the costs of the previous suit.

10. I therefore uphold the defendant's objection. The suit herein is stayed until the Plaintiff herein pays the costs of the previous suit.

Dated, signed and delivered at Busia this 24th day of April, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: