



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELC CASE NO. 213 OF 2015

MESHACK OCHORA OSORO ARICHAPLAINTFF

VERSUS

NATIONAL BANK KENYA LIMITED.....1ST DEFENDANT

SADDABRI AUCTIONEERS2ND DEFENDANT

RULING

Introduction

1. The plaintiff filed his case on 30th July 2015 against the first defendant, a bank and the second defendant, an auctioneering firm.

2. He seeks a permanent injunction to restrain the defendants from selling land known as Nakuru Municipality Block 25/338. He also prays for a declaration that the first defendant is in breach of an agreement in the nature of a charge between itself and the plaintiff among other prayers.

3. The first defendant has responded to the case by accusing the plaintiff of filing a multiplicity of cases which have been dismissed with costs or withdrawn by the plaintiff yet the plaintiff has failed to pay the costs.

4. Ultimately, the defendants filed Notice of Motion dated 24th August 2016 in which they seek the following prayer:

"that this suit be stayed pending payment of costs in Nakuru HCCC No. 2 of 2015 MESHACK OCHARO OSORO ARICHA vs NATIONAL BANK OF (K) LTD ANOR and Nakuru CMCC No. 942 of 2005 MESHACK OCHARO ARICHA vs NATIONAL BANK OF (K) LTD"

5. The grounds on which the application is based are:

a. That on 21st July 2015 the plaintiff withdrew his suit against the defendants in Nakuru HCCC No. 2 of 2015

b. That the plaintiff was ordered to pay KShs 175,105 as costs which he has never paid to date

c. That on 22nd September 2014 the plaintiff's application was dismissed with costs in Nakuru CMCC No. 942 of 2005

d. That's the plaintiff was ordered to pay KShs 180,330 as costs which he has never paid up to date

e. That failure to pay costs as ordered by the honourable court denies the plaintiff and or his advocates audience in further prosecution of this suit

6. It is the Notice of Motion dated 24th August 2016 which is this subject of this ruling. The plaintiff has not filed any response to the application. At the hearing of the application I was satisfied that the application had been served upon the plaintiff's advocates. Consequently the hearing of the application proceeded unopposed.

Submissions

7. Referring the court to the supporting affidavit of Mrs. Mary Tallam sworn on 24th August 2016, counsel for the defendants submitted that following the withdrawal of Nakuru HCCC No. 2 of 2015, costs of that suit were awarded to the 1st defendant and were subsequently taxed at KShs 175,105 as is witnessed by the certificate of costs dated 17th August 2016. Those costs remain unpaid.

8. Further, following the order for payment of costs in Nakuru CMCC No. 942 of 2005, the costs were assessed at KShs 180,330 as is witnessed in the certificate of costs dated 15th February 2016. These costs remain unpaid too.

9. Consequently, the defendants argue that the plaintiff's conduct disentitles him from further audience before this court. The defendants therefore urge that the plaintiff's suit herein should be stayed until such a time as the plaintiff will have made amends by paying the costs.

Analysis and determination

10. The present application is brought mainly under Order 25 rule 4 of the Civil Procedure Rules, 2010. Order 25 is titled "**WITHDRAWAL, DISCONTINUANCE AND ADJUSTMENT OF SUITS**". Rule 4 thereof states:

"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".

11. There is uncontroverted evidence on record that on 21st July 2015 the plaintiff withdrew his suit (Nakuru HCCC No. 2 of 2015) against the defendants and that costs of that suit which were awarded to the 1st defendant and which were taxed at KShs 175,105 have not been paid.

12. Similarly, there is evidence on record that on 15th February 2016 costs of KShs 180,330 were awarded to the 1st defendant herein in Nakuru CMCC No. 942 of 2005 and that the costs have not been paid.

13. Notwithstanding these non-payments, the plaintiff filed and is prosecuting the current suit against the defendants. It is this kind of a situation that Order 25 rule 4 addresses with a view to protecting the party who is owed costs from incurring further losses.

14. It has not been suggested before this court that the plaintiff was not aware of the awarded costs. In **PATRICK KIGERA MATHIA & ANR v DR. PETER MUNGAI NGUGI & 2 OTHERS [2011] eKLR** J. W. Mwera J. (as he then was) stated as follows:

"In this cause the plaintiffs filed RMCC 1931/10 which they later discontinued as against the defendant/applicants here. Costs were awarded to the 3rd defendant and the 1st and 2nd defendants respectively. It is not claimed that the plaintiffs were not aware of those costs at all. The

3rd defendant served a demand but the 1st and 2nd defendants do not appear to have done likewise. But the plaintiffs do not claim that they never knew or all the time were not aware of the fact that the costs had been awarded to the defendants and they fell to be paid. The plaintiffs do not claim that they are ignorant of the law (Order 25 rule 4 Civil Procedure Rules) that to bring the subsequent suit (the present one), the court whether on its own motion or as is usual, the respondents/defendants in the discontinued suit, would move the court, to ask that those costs be paid first or the subsequent suit could be stayed. But still before payment of those costs the plaintiffs brought the present suit on the same or substantially same cause of action.

In the circumstances of this matter and so that the defendants are not moved from one suit to another with costs building up due to no acts of their own, e.g. to discontinue the earlier case(s), it is directed that the plaintiffs do first pay the costs due the 3rd defendant and the 1st and 2nd defendants in the suit RMCC 1931/10, it discontinued before proceeding in the present cause”.

15. Further afield, in the English case of **Teasdale v HSBC Bank Plc [2010] EWHC 612 (QB)** Judge Waksman QC gave the following useful considerations for dealing with an application such as the one now before the court:

1. When a party discontinues, there is a presumption by reason of CPR38.6 that the Defendant will get his costs. The burden is firmly upon the Claimant to show that there is good reason to disapply it;;

2. The fact that the Claimant would have, or might well have succeeded at trial (a point sometimes advanced by a discontinuing Claimant) is not itself a good reason. This is because the Claimant has, by discontinuing, chosen not to have a trial by which the claim could be determined. Once there is to be no trial, it is not the function of the Court to attempt to decide whether or not the claim would have succeeded.....;

3.;

4. The mere fact that the Claimant’s decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not, without more, assist. This is because the Claimant has taken the risk of litigation by commencing it and exposing the Defendant to the costs involved in defending it.....

16. Whatever the factors which may have led the plaintiff to decide to withdraw Nakuru HCCC No. 2 of 2015, the obligation to pay costs remains. The fact that other costs of KShs 180,330 awarded to the 1st defendant herein in Nakuru CMCC No. 942 of 2005 also remain unpaid only aggravates the situation.

17. I have said enough to show that Notice of Motion dated 24th August 2016 should be allowed.

Conclusion

18. For all the foregoing reasons, this suit is stayed until the costs awarded to the 1st defendant herein in Nakuru HCCC No. 2 of 2015 MESHACK OCHARO OSORO ARICHA vs NATIONAL BANK OF (K) LTD ANOR and Nakuru CMCC No. 942 of 2005 MESHACK OCHARO ARICHA vs NATIONAL BANK OF (K) LTD will have been paid in full. The defendants shall have the costs of this application.

19. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 28th day of February 2017.

D. O. OHUNGO

JUDGE

In the presence of:

for the defendants/applicants

for the plaintiff/respondent