



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 162 OF 2010

ELMELDA KERUBO MECHA PLAINTIFF

VERSUS

CHARLES MORIRA MOCHERA DEFENDANT

RULING

1. On 10th November 2014, one Kaburi Advocate appeared before the court on summons to explain how he got instruction from the plaintiff to file the instant suit following a claim by the plaintiff that she had not instructed the said advocate to file this suit. Mr. Kaburi advocate was emphatic he had instructions from the plaintiff to file the suit. Mr. Kaburi advocate stated thus:-

“I filed this suit on instructions from the plaintiff. It is not true that this suit was filed without instructions. This is not the only matter that I am handling for the plaintiff. I have acted for the plaintiff in other matters. Before filing this suit, the plaintiff instructed me to apply for a limited grant of letters of administration in respect of the estate of Ignatius Mencha Oroo which I did and obtained the grant. I would not have done all that without instructions.....The plaintiff has even paid my fees on this matter. She could not have done so if she had not instructed me. If the plaintiff wants to withdraw the suit, she is at liberty to do so without involving me.

2. After Mr. Kaburi’s statement Mr. Ayienda advocate then acting for the plaintiff merely stated the plaintiff had instructed him that she had not instructed Mr. Kaburi to file the suit. He then sought to withdraw the suit and Mr. Okemwa advocate for the defendant stated he had no objection to the withdrawal of the suit subject to the defendant’s costs being paid. The court then made an order in the following terms:-

“This suit is marked as withdrawn with costs to the defendant”.

3. It is the plaintiff who applied to withdraw the suit and consequently if costs were awarded the same were payable by the plaintiff. The court record shows the costs were taxed by consent between the plaintiff’s and the defendant’s advocates at kshs. 80,000/= on 7th May 2015 and a stay of execution was granted for 30 days. Subsequently a notice to show cause in execution of the decree for recovery of the taxed costs was taken out by the defendant against the plaintiff and it is this process of execution that has resulted in the committal to civil jail of the plaintiff/judgment debtor for failure to pay the decretal sum.

4. The plaintiff/judgment debtor/applicant by a Notice of Motion dated 5th July 2016 interalia seeks orders that:-

- 1. The decree issued by this court on 16th December 2015 be set aside pending the hearing and determination of this application.**
- 2. The judgment debtor be released on grounds of her bad health pending the hearing and determination of this application.**
- 3. That the judgment debtor be ordered released on bond or cash bail pending the hearing and determination as to who filed this suit and by whom costs ought to be paid.**

5. The application is supported on the grounds set out on the face of the application and supporting affidavit sworn by the applicant. The defendant has sworn an affidavit in opposition to the application where the defendant basically sets out the background facts of the matter which clearly show the plaintiff was an active participant in this suit having filed a notice of intention to act in person on 26th April 2013 and subsequently having appointed the firm of C. M Ayienda & Co. advocates on 13th May 2014 to act for her.

6. I have reviewed the application by the judgment/debtor together with the affidavit in support and in opposition and in my view the only issue for determination is whether there was an order for payment of costs for the withdrawn suit and if so by whom such costs were payable.

7. At the commencement of this ruling I set out the background to the matter that led to the present application by the judgment/debtor. On 10th November 2014 the plaintiff was represented by counsel and it was her counsel who applied to withdraw the suit. The court in my view must have accepted the explanation by Mr. Kaburi advocate as to who instructed him. The plaintiff's advocate then on record did not seek to cross examine Mr. Kaburi Advocate on the evidence he tendered and his statement was thus not challenged by the plaintiff. The court accepted the application to withdraw the suit at the instance of the plaintiff and ordered the costs of the suit to be paid to the defendant. Mr. Kaburi was not a party to the suit so that costs could have been ordered against him. I find no ambiguity in the order for payment of costs to the defendant made by Hon. Justice Okong'o. The order is only capable of one interpretation that the costs of the suit were payable to the defendant by the plaintiff being the party who was withdrawing the suit. The withdrawal of a suit by a party has consequences as the other party is entitled to seek an order for costs and in the instant matter the defendant quite properly sought an order for costs which was granted. If it is the plaintiff's assertion that Mr. Kaburi advocate acted unprofessionally, the plaintiff may well have a separate cause of action against the advocate for misconduct but such suit cannot be merged into this suit which at any rate does not exist anymore as the plaintiff opted to seek its withdrawal and the request was granted.

8. The plaintiff cannot wriggle out of the order for payment of costs. Indeed the plaintiff participated in the taxation of the defendant's bill of costs which was taxed by consent at kshs. 80,000/=. The defendant was entitled to execute for the same after the plaintiff failed to pay within the period of stay that was granted. The plaintiff was served with an appropriate Notice to Show Cause but failed to attend. In the absence of any cause being shown the deputy registrar was in order to order the judgment/debtor committed to civil jail. I see no basis upon which I can interfere with the deputy registrar's exercise of her discretion.

9. I find no merit in the application by the judgment/debtor dated 5th July, 2016 and I accordingly dismiss the same with costs to the respondent.

10. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 15th day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Sagwe for the plaintiff

Mr. Okemwa for the defendant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE