THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION 01 OF 2016

(ARISING FROM CIVIL SUIT 018 OF 2015)

ENOTH MUGABI --------------------- APPLICANT/2ND DEFENDANT

VS

PALM DEVELOPMENTS (U) LTD ------- RESPONDENT/PLAINTIFF

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

By this application brought under S.98 of the Civil Procedure Act, S. 39 (1) & (2) of the Judicature Act, O. 1 r.13 & O. 52 rr. 1, 2 & 3 of the Civil Procedure Rules; the Applicant sought to be struck out as Defendant to the main suit. Costs of the application were also applied for.

The application is supported by the affidavit of the Applicant and is based on six grounds:

1. The Applicant is not privy to the 11th November, 2013, agreement.
2. The Applicant only acted as an advocate whilst witnessing the payment receipts
3. The Applicant is neither a shareholder nor director of the 1st Defendant.
4. There exists no court order lifting the veil against the 1st Defendant specifically targeting the Applicant.
5. Consequently, the Applicant is not liable in law for the acts and omissions of the 1st and 3rd Defendants who instructed him to witness the payment receipts.
6. It is just and equitable that the orders sought be granted.

The application is opposed by the Respondent in an affidavit in reply deponed by Dipak Patel, Managing Director of the Respondent.

The issue to be determined by Court **is whether the application should be allowed.**

When the application was called for hearing, it was submitted for the Applicant that the parties to the agreement –Annexture A2 are the Respondent and Camelot Agencies Ltd and the Applicant is not a party to it.

5 That the payment receipts Annextures B1 and B2 respectively are deeds of acknowledgment done in the presence of the Applicant as a witness and no single receipt indicates that the Applicant was a beneficiary to the payments and that was not rebutted by the Respondent.

In respect of ground 3 and 4, Counsel argued that Exhibit EX1 is an annual return of the 1st Defendant dated 11th February, 2010, and it is for the Annual General Meeting for the year 10 2009. It shows that shares were transferred from the Applicant to Waneloba Francis and Alexander Leo Ssajjabi. While Annexture EX2 is the subsequent annual return which shows four shareholders including Yun Wen Hu and Shimio Gao. And annexture EX3 is the amended Memorandum of Association which shows that the Applicant is not one of the subscribed shareholders as of 11th February, 2010.

15 Relying on S. 20 of the Companies Act, Counsel which empowers the High Court to ***"lift the veil"***, meaning "to disregard the corporate personality of a company in order to apportion liability to a person who carries out any act"; Counsel argued that by tendering the Company documents, the Applicant proved that he is not an officer of the 1st Defendant Company and no suit could be filed against him without lifting the veil.

20 Counsel pointed out that the application arises because the Applicant is not satisfied that the suit against him was withdrawn. He argued that, to prove that the suit has been withdrawn Court has to look at the procedure for withdrawing suits, the conditions the Applicant must satisfy and how court handles the withdrawal application.

It was then submitted that withdrawal of suits is governed by O.25 of the Civil Procedure 25 Rules and r.7 is instructive. Under r. 1 of the order the withdrawal shall be by chamber summons. Yet, the Respondent attempted to withdraw the suit by Notice of withdrawal – Annexture A3, which does not meet the requirements of O.25 r.7 CPR. There is no date and time for hearing the application and there is no supporting affidavit.

It is accordingly asserted by Counsel that it is false for the Respondent to state in the affidavit in reply that a formal notice of withdrawal had been filed; when there is no order of court striking out the Applicant as a Defendant to the suit.

Further that the Respondent ought to have sought leave of Court as other proceedings had already taken place in the suit that is mediation under reference ME 15/2015. There is a report from the Mediator indicating that mediation failed and the Respondent therefore deponed falsely that this application had been overtaken by events and that no other proceedings had taken place before Court. – Paragraphs 4 & 8 of the Respondent's affidavit in reply.

Counsel also argued that a Plaintiff is not competent to withdraw a suit without leave of Court yet there is nothing to show that such leave was granted. It was pointed out that on granting leave under O. 25 r. 2 CPR, court addresses its mind to the question of costs. The notice of withdrawal in this case does not bear any record that the Registrar addressed this question. That therefore the notice of withdrawal is an abuse of Court process for failing to substantially comply with the requirements of O.25 rr.1(1), (2) and (7) of the CPR.

It was submitted in reply by Counsel for the Respondent that both parties agree that the suit against the 2nd Defendant/Applicant was to be withdrawn because the Respondent did not find it necessary to prosecute the Applicant. When the main suit was called for mention on 15th September, 2015, Counsel indicated that he had instructions to withdraw the case against the 2nd Defendant/Applicant. Court was urged to revisit the record and find that Court and Counsel for the Applicant were notified of the Respondent's intention to withdraw suit against the 2nd Defendant/Applicant, whereupon Counsel for the Applicant objected that there was no leave of Court. Leave of Court was sought on the same day as all parties wanted the same thing, subject to filing of the notice of withdrawal.

Counsel pointed out that O;25 r.2 CPR also provides for withdrawal by consent prior to the hearing of either the Plaintiff or the Defendant; but that instead of seeking for parties to file consent of withdrawal, this application was filed. Wondering what amounts to ***"a notice in writing to wholly discontinue the case against the Defendant";*** and whether such notice under O.25 r.1 CPR should be a summons under O. 25 r.7 CPR, Counsel sought court's guidance on the matter.

It was the further contention of Counsel for the Respondent that ***"taking any other proceedings in the suit"*** under O.25 r.1 CPR refers to the main suit and not to the mediation process, which cannot be used against either party in the main suit. He insisted that withdrawal was effected and the notice thereof served on Counsel for the Applicant, who instead of asking for costs or filing a bill of costs filed this application. He maintained that the application was overtaken by events.

In rejoinder, Counsel for the applicant maintained his earlier submissions, emphasizing that the procedure for granting leave should be exhaustively examined and that the mediation process constitutes part of the Court proceedings. However, he concurred with Counsel for the Respondent that court should interpret O.25 r.1 (1) CPR, paying attention to rr.1 (2) & (7) thereof.

Court has given the submissions of both Counsels the best consideration it can in the circumstances.

O. 25 r. 1 (1) CPR allows a Plaintiff at any time before the delivery of the Defendant's defence, or after the receipt of that defence ***before taking any other proceeding in the suit (except any application in chambers)*** by notice in writing wholly discontinue his or her suit against all or any of the Defendants or withdraw any part or parts of his or her alleged cause of complaint, and there upon he or she shall pay the Defendant's costs of the suit, or if the suit is not wholly discontinued the costs occasioned by the matter so withdrawn. Upon filing the notice of discontinuance the costs shall be taxed, but the discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action; and

(2) ***Except as in this rule otherwise provided***, it shall not be competent for the Plaintiff to withdraw or discontinue a suit without leave of the court, but the court may, before or at, or after hearing upon such terms as to costs, and as to any other suit, and otherwise as may be just, order the action to be discontinued or any part of the alleged cause of complaint struck out.

Decided cases have established that the above rule has two limbs in respect of withdrawal or discontinuance of proceedings. Nigeria has a similar provision under O. 23 r. 1 (1) & (20 0f its Civil Procedure Rules, and it was interpreted in the case of **Abayomi Babatunde Vs Pan Atlantic Shipping & Transport Agencies Ltd & Others , Suit No: SC. 154/2002.** The court stated in that case that ***"a careful reading of the rules shows that it is conveniently***

broken into two limbs for purposes of application in this respect. That is to say, firstly, discontinuance before and after receipt of the Defendant's defence but before taking any other proceeding in the action (save any interlocutory application). And secondly, in any other circumstance the Plaintiff shall not competently do so, that is to say, withdraw without leave of court.

The court stated that under the 1st limb of the rule it terminates the action in fact and law beyond the point of no recall. The court ordinarily has to strike out the action and it is no bar to defence to a subsequent action as **litis contestation** ***has not been reached; while under the 2nd limb of the rule court in exercise of its discretion has either to strikeout or dismiss the action; and under both limbs of the rule with costs. In the event of a dismissal of the suit it is a bar to re-litigation of the matter and thus open to a likely plea of estoppels per res judicata".***

While it is apparent that leave of court is not required in the first limb, the court clearly stated that "for a Plaintiff to discontinue he has to file in court and serve on the Defendant against whom he intends to discontinue or withdraw… a written notice of discontinuance or withdrawal. Once the service has been duly effected, the notice effectively terminates the action subject to the plaintiff's liability for costs of the Defendant's action up to the date of discontinuance. But, in a situation where discontinuance is after the receipt of the statement of defence(s), the Plaintiff would not have taken ***"any other proceeding in the action"*** other than interlocutory application. This certainly presents its unique problem.

The Court went on to say that this is because the phrase ***"before taking any other proceeding in the action"***, as used in the rule, would imply ***taking any proceeding with the view of continuing the litigation with the Defendant against whom the proceeding is taken and not putting an end to the action.***

Courts have also explained that ***"from the point of view of the prevailing law, it follows that for a proceeding to be taken by the Plaintiff after service of the statement of defence on him to prevent him from discontinuing the action without leave of court, the proceeding must be a formal step in the action, required by the rules to be taken by him for the prosecution of the action. If it is that formal, then, he needs leave of court to discontinue. If it does not, then he can discontinue without leave of the court. The proceeding or step taken must be for the prosecution of the action and must be required to be taken by the rules of court. The two conditions should co-exist.***

On the other limb of the provision…under consideration, ***a Plaintiff who wants to discontinue an action should make an application to the court for leave to do so. He can no longer file a notice of discontinuance; otherwise such a notice is invalid and should be struck out. In such a situation, the trial Judge has discretion as to whether or not to allow***
5 ***the Plaintiff to discontinue or withdraw his claim at that stage of the proceedings and as to whether to dismiss or strike out the claim. The discretion however must, as is always the case, be placed on the judicial and judicious proverbial scale of justice".***

The Court noted that ***"once a litigant withdraws his action in a situation where no leave of Court is required, the trial court has no option but to strike out the suit or where evidence***
10 ***has been taken to a reasonable level to dismiss the suit".***

In the present case, the Respondent /Plaintiff had been served with the Applicant/2nd Defendant's defence. The parties agree that the matter went for mediation but the process failed. The issue therefore is ***whether the mediation process amounted to "other***
15 ***proceedings" which necessitated the obtaining of leave by the Respondent before withdrawing the suit against the Applicant/2nd Defendant.***

Mediation is ***"a process by which a neutral third person facilitates communication between parties to a dispute and assists them in reaching a mutually agreed resolution of the dispute". -*** Rule 3 of the Judicature (Mediation) Rules

20 Mediation is alternative dispute resolution process that does not amount to ***"any other proceeding"*** within the meaning of O.25. r.1 (1) CPR). refers to the main suit and not to the mediation process, which cannot be used against either party in the main suit

*****Matters are referred to mediation before the Scheduling Conference under Rule 4 (1) of the Judicature Mediation rules. However in the present case, there was no**
25 **settlement between the parties and there is no outcome legally binding on the parties recorded as a consent judgment. If that had been the case, the process would have amounted to *"other proceedings"* legally and officially recognized and enforceable by court. Without judgment being entered, it cannot be said that there were *"other proceedings"* within the meaning of O.25 r.1 CPR; more so as whatever transpires at**
30 **mediation is not supposed to be known by the trial court."**

For those reasons, this Court finds that at the time the Respondent/Plaintiff withdrew the suit against the Applicant/2nd Defendant leave of court was not required.

The withdrawal of a suit where leave of court is not required under the rule is by ***"notice in writing".*** The rule does not provide for the form such notice should take but contrary to the submissions of Counsel for the Applicant, it is clear that no chamber summons is required.

The Chamber summons would be required under O. 25 r. 1 (2) where leave of court is required before withdrawal. What has been established by decided cases is that ***"for letter to amount to a notice of withdrawal it must meet the requirements of a notice".*** That is, it must state the law under which the case was being withdrawn, it must be served on the party against whom the suit was being withdrawn or his Counsel and before the case is heard by Court.- Refer to the case of **British American Tobacco (U) Ltd Vs Sedrach Mwijakubi & Four Others, SCCA 01 of 2012.** While the case concerned withdrawal of an appeal, I find it gives valuable guidance.

In the present case, Counsel for the Respondent intimated to Counsel for the Applicant that the Plaintiff/Respondent wished to withdraw the case against the 2nd Defendant/Applicant. This is confirmed by both Counsels. Counsel for the Respondent/Plaintiff then orally informed Court that he had instructions to withdraw the case against the 2nd Defendant/Applicant but that he would do so formally. Later he filed in Court Annexture A to the affidavit in reply and the notice was also served on Counsel for the Applicant/Defendant. The notice indicates that the suit is being withdrawn under O.25 r.1 CPR. The requirements for notice of withdrawal were therefore complied with and the suit was accordingly withdrawn.

Although no order was given by court to indicate that the suit had been withdrawn against the Applicant/2nd Defendant that did not in any way imply that the suit had not been withdrawn nor did it adversely affect the Applicant. I am fortified in my finding by the decision of the Supreme Court of Kenya, where it was held that ***"where rules allow for leave to withdraw matters informally, then an Applicant can informally apply to court for leave to withdraw the application; and that it is not in doubt that the Applicant informally expressed desire to withdraw the application vide a letter addressed to the Registrar…and court was satisfied that the application before court was withdrawn". –*** See the case of **Nicholas Kiptoo Arap**

Korir Salat Vs The Independent Electoral & Boundaries Commission & Wilfield Rotich Lessan, SC Applc. 16 of 2014.

Such withdrawal would not in any way deprive the 2nd Defendant/Applicant of his right to costs as under O. 25 r. 1 (1) CPR it is mandatory that the Plaintiff pays the costs of the suit.

5 Having found that the suit against the Applicant/2nd Defendant was effectively withdrawn, I find that it was not necessary for the Applicant to file this application. The Applicant/2nd Defendant would have saved courts time if he had filed a bill of costs or reached consent with the Respondent as to how much was due to him.

However, since it is the Respondent who ought to have moved court to strike out the suit 10 against the 2nd Defendant after filing and serving the notice of withdrawal; the Court will strikeout the suit against the Applicant/2nd Defendant, with costs as required by O.25 r.1 CPR.

The Application is accordingly allowed for that reason, with orders that each party to bears its 15 own costs of this application.

FLAVIA SENOGA ANGLIN

JUDGE

21.03.16

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