THE REPUBLIC OF UGANDA

IN THE HIGHCOURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS APPLICATION NO.343 OF 2015

(ARISING OUT OF CIVIL SUIT NO. 382 OF 2014)

MK FINANCIERS UMITED:::::;::::::::::::::::APPELLANT/ PLAINTIFF

VERSUS

1. **N. SHAH & CO. LTD**
2. **PARIKH HETAL**
3. **WERE FRANCO**
4. **JOHN MUHAISE-BITALEMESA:::::::::::::::RESPQNDENTS**

BEFORE: HON. LADY JUSTICE MARGARET C. OGULI QUMQ

(JUDGE)

RULING

The Applicant brings this Application by Notice of Motion under section 33 of the Judicature Act, S.98 of the Civil Procedure Act, Order 50 r 8 of the CPR, Order 25 r 1(2) & 7 of the CPR seeking for Orders that;

1. The decision of his worship Festo Nsenga, Deputy Registrar, High Court Civil Division delivered on 2nd September, 2015 withdrawing Civil Suit No. 382 of 2014 with costs basing on a mere letter which had a condition precedent of non-awarding of costs and awarding costs to the Defendants only basing on the Counsel for the Defendant's mere insistence on costs which he stated to have all made under Order 25 Rule 1 of the CPR :

a) Being set aside for being ;

i) Made without jurisdiction and hence null and void

ii) Made contrary to the Constitution , written Law and based on discretion which was not exercised Judicially

iii) Contradictory in itself and hence incapable of giving any legal effect

b) And in the alternative but without prejudice to the above, the Order of the Learned Deputy Registrar be varied with an Order withdrawing Civil Suit No.382 of 2014 with no Order as to costs.

2. Costs of the Application be provided for.

The grounds on which this Application is based are stated in the Affidavit deponed by Male H. Mabirizi K. Kiwanuka the Managing Director of the Applicant but briefly state that;

1. The Learned Deputy Registrar erred in Law when he made Orders to which

he had no Jurisdiction to make hence rendering them null and void.

2. The Learned Deputy Registrar erred in Law and fact when he made contradictory Orders in the same decision at the same time.

3. The Learned Deputy Registrar erred in Law when he made a decision without any application by way of Chamber summons made to Court for withdrawal of the suit as required under Order 25 Rule 7 of the Civil Procedure Rules.

4. The Learned Deputy Registrar erred in Law when he did not summon both parties to appear before him and present their respective cases especially after it came to his notice that the matter had become contentious thereby denying the Appellants their non derogable

Constitutional right to fair hearing thus causing mis-courage of Justice.

5. The Learned Deputy Registrar erred in Law and fact when he interpreted the Appellant's letter dated 22 July, 2015, to amount to withdrawal of Civil Suit No. 382 of 2014 yet it was a mere expression of intent to withdraw the suit subject to a condition precedent of non-awarding of costs well aware that the Law requires filing of Chamber summons for an Application for withdrawal of the suit if the Appellant so wished.

6. The Learned Deputy Registrar erred in Law and fact when he relied on Counsel for the Defendants' insistence on costs by a mere letter dated 30th July, 2015 to award costs without considering the general circumstances of the intent to withdraw the suit.

7. The Learned Deputy Registrar erred in Law and fact when he did not consider the fact that the dispute between the parties was still subsisting in the same Court under Civil Suit No.169 of 2015 between the same parties and thus failed to forecast that any award of costs at this stage will lead to double jeopardy or double benefit after the final outcome of Civil Suit No.169 of 2015.

8 The Learned Deputy Registrar erred in Law when he relied on Order 25 Rule 1 of the CPR yet Order 25 Rule 7 which requires all Applications under Order 25 Rule 1 to be by summons in chambers was not complied with.

9. It is in the interest of Justice, Just and equitable that the Appeal is allowed.

he Brief facts of this Application are that; The Appellant filed Civil Suit No.382 of 2014 against the Respondents on the 10th day of November, 2014 seeking remedies following a distress for rent exercise on the premises of the 1st Respondent.

The Respondents filed a joint written statement of defence on the 27th day of November, 2014.

Subsequently by a letter dated 22nd July 2015, the Appellant sought leave to withdraw Civil Suit No.382 of 2014 on conditions that no costs were awarded to either party. This letter was served on the Respondents who insisted on being paid costs upon the withdrawal in keeping with the Civil Procedure Rules as they had filed a written statement of defense to the suit

On the 31st day of August 2015 the Appellant file legal arguments stating why the suit ought to be withdrawn without costs. But on the 2nd of September, 2015, the Learned Deputy Registrar allowed the withdrawal of the suit with costs to the Respondents

The Appellant was aggrieved by the decision of the Learned Deputy Registrar on the aspect of costs hence this Appeal.

When this matter came up for hearing the Appellant was represented by Mr Male Mabirizi Kiwanuka its Managing Director while Ms. Rose Wakikona represented the 1st, 2nd, 3rd and 5th Respondents and Mr. Obiro Ekirapa Isaac the 4th Respondent represented himself.

With regard to ground 1:

That the Learned Deputy Registrar erred in Law when he made Orders he had no Jurisdiction to make thus rendering them null and void.

Mr. Mabirizi the Managing Director for the Applicant while referring, to Order 25

Rule 2 of the **Civil** Procedure Rules and the cass of **Shell (u) LTD & 9 Others Vs Muwema & Mugerwa Advocates S.C.C.A No.02 of 2013** contended that the suit could not be withdrawn by the Registrar when it was pending hearing before the Judge.

He stated that in the cited case of **Shell Uganda & 9 others Vs Muwema (supra),** the Assistant Registrar of CA purported to prevent a Judge of the High Court to hear a case fixed by her and Justice Kitumba stated that;

"The acting Registrar to issue an Order to stop the proceedings in High Court was an abuse of Court process."

He also contended that under Order 25 Rule 2 of the Civil Procedure Rules when a suit has been set down for hearing, it can only be withdrawn by consent of the parties and that at the stage of the consent is when Order 50 Rule 2 of the Civil Procedure Rules comes into play when the Registrar is allowed to enter consent judgement since the matter is uncontested.

That when a case is fixed by the Registrar, he can't say he had jurisdiction without the Judge's knowledge and this was contrary to Article 138(3) of the Constitution on the composition of High Court which does not include

the Registrar.

That secondly, the matter by the Registrar was contentious yet Order 50 Rule 2 of the CPR restricts the Registrar's powers to make Orders in Uncontested cases and matters.

That under Annexure 'A' of the Affidavit in support:, the Registrar was notified that since the matter had become contentious, it would be safe if he referred it to a judge so the Registrar didn’t have further junsdicbon

on that case.

While citing the case of Mukula international Vs. Cardinal Wamala

1982 HCB 11 to support his contention, Mr. Mabirizi stated that Jurisdiction can't be inferred, and a Court can't exercise jurisdichon not conferred to it by Law.

Mr. Mabirizi further while contending that having returned the matter to the judge, the registrar did not have jurisdiction over this matter stated that jurisdiction is not a mere technicality but a substantive matter and that any decision made without jurisdiction is a nullity and not just voidable.

In reply counsel representing the 1st ,2nd ,3rd and 5th respondents with regard to this argument that the Registrar had no jurisdiction, reffered court to practice direction no.1 of 2002 issued by the chief justice on the 31st day of December 2002 where the chief justice gave the powers of the registrars clearly stating their boundaries and that under order 25 of these directions a registrar has powers to handle withdrawals of suits .

While referring to annexure A' of the Appellant's Affidavit in support contends

that the letter written by the Appellant to the Registrar under its paragraph 2, states that they as the Plaintiffs write to withdraw the case, contended that the statement put the matter firmly in the Jurisdiction of the Registrar who has all powers to handle withdrawal of suits as the Law empowers the Registrar to handle matters which he rightly did.

Counsel also contended that in the withdrawal a matter of contention of costs came up with the Appellant insisting that the Respondents are not entitled to

costs, the Appellant sought to have the matter referred to the Judge with directions as to costs and that indeed the Judges attention was brought with regard to the matter of costs and he directed that the Registrar withdraws the suit with consideration to costs as can be seen on court record and the Registrar complied with these directions.

Counsel thus submitted that the Registrar acted lawfully and fully within his powers and with the direction of Court and he therefore had powers to withdraw civil Suit No. **382** of **2014** with costs and therefore this ground of appeal must fail.

The 4* Respondent who represented himself in response to the submission on this ground contended that under Practice direction No. **1** of **2002,** issued by the Chief Justice on **31*** day of December, **2002,**

Registrars have Jurisdiction in all matters under Order 25 of the Civil Procedure Rules

That Order 50, Rule 3 of the CPR provides that all formal steps preliminary to the trial may be made and taken before the Registrar and within the confines of Order 25 Rule 1(1) and Orders 50 Rule 3.

Counsel also states that in paragraph 17 of the Affidavit of Male Hassan Mabirizi the Managing Director of the Applicant, he states that he was informed by the Registrar that the Learned Trial Judge had made some comments on the file for Civil Suit No. 382 of 2014.

Counsel further submitted that the practice of the Registrar forwarding a file to the Judge for directions is explicitly provided for under Order 50 Rule 7 of the Civil Procedure Rules that provides that the Registrar may refer a matter to the High Court and the Judge may either dispose of the matter or refer it back to the Registrar with such directions as he or she may think.

Counsel in addition stated that in paragraph 17 of his Affidavit, the Appellant's Managing Director confirms that the Learned Trial Judge complied with Order 50 Rule 7 of the CPR and that therefore the Learned Registrar rightfully exercised jurisdiction in the matter after the Learned Trial Judge sent the file back to him for disposal.

The 4th Respondent on the argument by the Appellant that the Registrars of the High Court can only exercise jurisdiction over uncontested matters is flawed since the Registrars entertain contested Applications like issuing interim Orders , security for costs , garnishee proceedings among others and that there is no provision in the Civil Procedure Rules that bars Registrars from hearing

contested Applications.

In rejoinder, the Appellant contended that practice Direction No. 1 of 2002 to claim that the Registrar has jurisdiction, which is not the case as the practice Direction cannot supersede the dear provisions of the Constitution, the Judicature Act and the Civil Procedure Act.

He also contended that a mere reliance on the practice direction is not enough for the registrar to allocate to himself jurisdiction as two things happened all of which superseded the powers in the practice direction to determine a case which is fixed by a judge.

He also submitted for the Appellant the 4th Respondent misrepresented paragraph 17 of the Affidavit in support of the Application as he does not state that the Learned Judge referred back the file to the Registrar for determination of costs as alleged but under paragraph 18 he states that he knew that any further action on the file was to be by a Judge who contemplated parties to appear before him to argue the Issue of costs and not the Registrar.

In this case the Appellant filed Civil Suit No. 382 of 2014 against the Respondents for its remedies following rent distress on the premises of the 1st Respondent on 1st November, 2014.

Later by a letter dated 22nd July, 2015, the Appellant through Its Managing Director sought to withdraw Civil Suit No. 382 of 2014 purportedly on condition that no costs be awarded to either party.

He did this by writing a letter to the Deputy Registrar, which was served on the

Respondents, who insisted on being paid costs of the withdrawal in compliance with the Civil Procedure Rules as they had already filed a written statement of defense on the suit.

The Appellant however filed legal arguments stating why the suit ought to be withdrawn without costs on the 31st /8/2015.

However the Learned Registrar decided to allow the said withdrawal of the suit with costs to the Respondents.

The appellant being aggrieved by the decision and order of the learned registrar brought this appeal.

The managing director of the appellant Mr. Mabirizi raising a number of issues touching on the validity of the decision contending inter alia that the learned deputy registrar did not have jurisdiction to make the decision thus making his decision null and void.

That it couldn t be withdrawn when it was pending hearing by the Judge under Order 25 Rule 1 of the CPR.

As to the Applicant's withdrawal on condition that withdrawal is subject to no costs, being granted to the Respondent;

The Law with regard to withdrawal by a Plaintiff is contained in Order 25 Rule 1 of the Civil Procedure Rules which provides inter alia as follows;

" The Plaintiff may at any time before the delivery of the Defendant's defence or after the receipt of that defense before taking any other proceedings in the case (except any Application in chambers) by notice in writing wholly or discontinue his or her own suit against all or any of the Defendants or withdraw any part or parts of his or her alleged cause of complaint and

thereupon 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 the filling of the notice of discontinuance or withdrawal as the case may be shall not be a defense to any subsequent action."

The use of the word shall in the above provision, makes it mandatory that costs shall be paid upon withdrawal of the suit.

According to the Learned Authors Sekaana and Sekaana in their book; Civil Procedure In Uganda at pg 197, It Is stated that a Plaintiff who wishes to discontinue may be allowed to do so on terms as to payment of costs.

1 beg to disagree with the Applicant and state that its condition to court is of no legal consequence as the relevant provision is coached in mandatory terms that once the Plaintiff withdraws his case then he shall pay the costs for the withdrawal under Order 25 Rule 1 of the CPR.

The grant of costs is a preserve of the Court, giving conditions to the grant of the cost amounts to usurping the mandate of Court in regard to costs

As regards to the powers of the Registrar being null and void;

Counsel for the Appellant stated that the Registrar was not alive to the fact that the matter had become contentious

That the contention here was whether the costs should be paid or not."

In this case when the matter had become contentious, the Registrar after due consultation from the Trial Judge, the Judge who was Justice Musota in his letter in response to the Learned Registrar dated 27/8/2015 stated that;

"The issue of costs is a preserve of the trial court to decide upon not the litigant

to decide whether to pay or not to pay. It is not open for the litigant to usurp the authority of the Court in regard to costs. The Law guides parties and the Court on issues of Costs."

The Judge thus recommended that the withdrawal be allowed but the Appellant pay the costs of the Defendants/ Respondents.

The Learned Registrar therefore went ahead to allow the withdrawal with costs based on this advice by the trial Judge and since under practice Direction No. 1 of 2003, the Registrar had the Jurisdiction to handle the

case, he went ahead to permit the withdrawal but with costs to the respondents in conformity with the legal provision of order 25 rule 1

in view of the above, having reviewed the pleadings and the submissions of both Counsel, I am compelled to find and this Court finds that the Registrar acted within his Jurisdiction and the Orders he made_ weren t null and void as they were made In accordance with the Law as stated above.

Thus this ground of Appeal therefore fails.

With regard to ground 4;

That the Learned Deputy Registrar erred in Law when he did not summon both parties to appear before him and present their respective cases especially after it came to his notice that the matter had become contentious thereby denying the Appellants their non derogable Constitutional right to fair hearing thus causing a miscourage of Justice.

While contending that this ground relates to fair hearing stated that throughout the record, there is no record to show that the parties appeared before the Registrar to present their respective cases especially after it came to their notice that the matter had become contentious thereby denying the Appellants their non derogable Constitutional right to a fair hearing this causing a miscourage of Justice.

That there is no evidence that there was summoning of the parties and hear them on whether the suit was withdrawn or whether costs be paid and this is a violation of the Constitution Article 28 (1) and 44(c) of the Constitution.

While citing the case of **Fangamin Vs Belex Tours, SCCA No. 6 of 2013**, where the supreme Court set aside the decision of the Court of Appeal and the parties were not allowed to advance their legal arguments, that there were correspondences for withdrawing the suit but without summoning the parties to argue the case out fell short, submitted that in this case the hearing was null and void and therefore reached without hearing the arguments of the parties.

In reply to this ground, for the 1st, 2nd, 3rd and 5th Respondents it was contended that this ground is misleading because the parties did address the Registrar on the issue of costs in writing. That under Annexure 'A' of the Affidavit in support a letter dated 28th July, 2015 is the Appellant withdrawing the suit and requesting that costs be waived and that again in a letter dated 28th July 2015 is a letter by the appellant addressing the

issue of costs on both letters the respondents noted that they will pursue costs and formally wrote a letter dated 30th august ,2015 which is annexture B to the respondents affidavit in reply

Counsel contended that all these correspondences amount to a fair hearing because the Appellant's objection to costs was duly noted even in the duet lions made by the Judge and so was the Respondent's claim for costs noted and a decision based on the Law was made after considering the two warring opinions, That for the Appellant to turn around and claim that he was not heard is a fallacy otherwise that why did he write all those letters,

Counsel thus submitted that the right to a fair hearing was adhered to through written addresses to Court and properly considered thus this ground must fail

For the 4th Respondent on this ground it was argued in reply that the Appellant's argument that the Appellant was not given a fair hearing is not supported by the record. The record shows that the Appellant made submissions in writing vide the letter dated 31st August, 2015 as regards the Issue of costs and that that was the only item in contention.

In rejoinder to this Mr., Mabirlzl contended that the arguments that the Appellants letters amounted to a fair hearing was upsurd as even In a normal suit parties file pleadings but court Is still mandated to hear them. And that in this case hearing was not done and thus the presence of some documents on court record does not warrant dispensation of the right to fair hearing.

In this case while withdrawing the case on the 22/7/2015 the Appellant wrote a letter that costs be waived and further in its letter dated 28/7/2015 the Appellant wrote again addressing the issues of costs.

To both the Letters, the Respondents wrote that they will be praying for costs as seen by letter dated 30/8/2015, as attached as annexure B to the Respondents reply.

All those correspondences show that both parties were given a chance to be to give their views about the issues of costs.

Considering that the provision of the Law on costs is mandatory that is when you withdraw a case you shall pay costs, I find that the Registrar awarded costs in compliance with the Law.

Besides that the Appellant's contention on the award of costs and that the Judge should have heard both of them is not supported by any Law or authority. And so the Appellant's expectation that the Judge should have heard them both in a formal process is misplaced.

In those circumstances having perused through the pleadings and the proceedings on Court record.

I am compelled and Court is compelled to find that the decision of the Registrar was arrived at after considering the views of both parties and in compliance with the direction of the Learned Judge.

Consequently this ground of Appeal also fails.

Ground 3 and 8

That the Learned Deputy Registrar erred in Law when he argued the case without permission of the parties

Learned Deputy Registrar erred when he relied on Order 25 r 1 of the CPR yet Order 25 r 7

which requires oral application was not complied with.

Mr. Mabirizi contended that Order 25 r 7, which states that the Application shall be by Chamber Summons was not complied with as there was no Chamber summons filed and determined by the Deputy Registrar.

Mr. Mabirizi cited the decision of Dr .Ahmed Mohamed kisuule vs. Green land Bank SCCA NO 07 OF 2010 WHERE THE SUPREEME COURT set aside a decision which had been entered under a wrong law.

Mr. Mabirizi contended that in this case there were two options available in withdrawing the case first by chamber summons and secondly by filing consent but none of them was used and so the registrar erred in law.

He thus prayed that ground 3 & 8 be granted as presented

In reply for the 1st, 2nd, 3nl & 5"' Respondents, Counsel while citing Order 25 Rule 7 of the CPR and the case of **Mugabi Vs. Palm Developments (U) Ltd H.C.M.A No. 1 of 2016,** where the Court found out that leave of Court was not required to withdraw the suit as the Plaintiffs letter was enough notice to withdraw the suit but that this did not take away the Plaintiff's liability to pay costs to support her contention and stated that in the instant case, the parties had completed pleadings and the matter was set for scheduling but nowhere the pleadings had been concluded and the matter was set down for scheduling to support her contention stated that in the instant case the parties had completed pleadings but no evidence was taken whatsoever and the matter was not yet litis contended that therefore what the **Appellant** had to do was to file a Notice of withdrawal which he did as seen in annexure 'A' of his Affidavit In support and served the same on the Respondents which he did on the 27th July, 2015 which effectively terminated the action subject to the Appellant's liability to pay

Costs of the **Respondents.**

While stating that the Appellant is the one who Initiated the withdrawal by way of Notice In writing that it cannot turn again and disown its chosen method Counsel submitted that Civil Suit No. 382 of 2014 was properly withdrawn and the Registrar therefore acted correctly in allowing the

withdrawal with costs.

For the 4» Respondent, It was contended that the Appellant contention St withdrawal of the suit under Order 25 Rule 7 Is misconceived.

Counsel contended that this order provides that a suit under order 25 may be withdrawn by notice in writing as provided for under order 25 rule 1 (1) or by filing an application under order 25 rules 1(3).

That a withdrawal' under Order 25 Rule 2 only requires leave of Court. And that the Appellant satisfied this requirement when it wrote to Court seeking permission to withdraw the case and Court accepted the withdrawal as reflected by the record of Court.

Counsel also contended that formal Applications are provided for under Order 25 Rule (1) 3 which provides that; "The Court may in a tike manner and with a like discretion as to terms; upon the Application of a Defendant order the whole or any part of his or her alleged grounds of defense or counterclaim to be withdrawn or struck out but it shall not be competent fix a defendant to withdraw his or her defence or any part of it without any such leave' that it is therefore applications by a Defendant that requires summons under Rule 7 of Order 25.

Counsel in addition contended that any failure to follow the correct procedure while withdrawing the suit was occasioned by the Appellant and the Appellant cannot therefore seek to benefit from his own default.

In rejoinder Mr. Mabirizi on this ground contended that the decision of Mugabi Vs palm Developments is a High Court decision which cannot override an earlier supreme Court decision of **Dr. Ahmed Kasuule Vs. green land Bank SC Civil Appeal No. 07 Of 2010**

And that the facts in this case are also very much distinguishable from the facts in that case as in that case the Plaintiff wanted to withdraw a suit against one **of** the

Defendants before any step had been taker but in this case the parties had filed their scheduling memorandums and the suit had been called for hearing at a specified date

That the 4th respondents argument that the file had not been called for hearing because mediation as not complete was wrong as mediation had been done in the commercial court.

The appellant thus cited the case of Hon. Kato Lubwama Paul vs. Buwembo Habib misc. .cause no .272 of 2016 to support his contention that an oral application is untenable where the law clearly provides for institution procedure of a suit.

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In this, case the Appellant filed *Cr*, No, 302 of 2014 and the Respondents/ defendants filed a written statement' of defense on the 27lh of November, 2016.

By a letter dated 22ml July, 2015 the Appellant sought leave to withdraw CS No, 382 of 2014 on condition that; no costs are awarded to either party,

When the Respondents were served with the letter, they insisted on being paid costs upon withdrawal In conformity with the order 25 of the CPR as they had already written and filed written statements why the suit should not be withdrawn without costs.

However the Learned Trial Registrar allowed the withdrawal of the suit with costs to the Respondent on the directions of the trial Judge.

The Appellant contended that the Learned Trial Magistrate erred when he relied on Order 25 rule 1 of the CPR which was not complied with and that no chamber summons was filed and determined by the learned registrar.

1 have looked at the submissions of both parties in regard to these

grounds;

In the instant case, the parties had completed pleadings but no evidence had been taken, the appellant is the one who initiated the withdrawal by notice in writing so civil suit no .382 of 2014 is properly withdrawn with costs which the registrar allowed.

I do agree with counsel for the respondents that if there was any procedure in withdrawal it was not occasioned by the registrar.

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The Applicant himself initiated the withdrawal by a written Notice not chamber summons as required under Order 25 Rule 7 to the Deputy Registrar who went ahead to exercise his powers under practice direction No. 1 of 2003 after consulting the Judge as reflected on Court record.

The Applicant now is trying to distance himself from the procedure chosen by him which is an abuse of the Court process and an afterthought.

The Law with regard to withdrawal is stated dearly in Order 25 Rule 1 of the CPR which provides as follows;

"The Plaintiff may at any time before the delivery of the Defendant's defense, or after the receipt of that defense 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 or withdraw any part or parts of his or her alleged cause of complaint., and thereupon he or she shall pay the defendants costs of the suit or if the suit is not wholly discontinued the costs occasioned by the matter so withdrawn. Upon filing of the notice of discontinuation or withdrawal as the case may be, shall not be a defense to any subsequent action.

According to Order 25 Rule 7 it mandates Applications under Order 25 Rule 1 to be by chambers in summons.

In this case the **Applicant's** Managing **Director** who **wrote** the letter **complained** of should have known this.

By writing a letter to the registrar the appellant put himself put himself out of order 25 rules 7 and yet he is

the one turning around from this very procedure which he himself chose and blaming the Deputy Registrar tor taking a decision under the wrong Law.

This court in the circumstances of this case disregards the appellant's arguments on the wrong procedure used according to article 126 (2) (e) of the Constitution as this court is enjoined to administer justice without undue regard to technicalities.

I find it a gross abuse of court process for the Appellant to take the Court through that process, then turn around to say that it was the wrong procedure.

Court thus finds that the Learned Registrar did not error when he considered the Notice in writing as initiated by the Appellant and not chamber summons in allowing the withdrawal.

With regard to ground 2:

That the Learned Deputy Registrar erred in Law and fact when he made contradictory Orders in the same decision at the same time.

Mr. Mabirizi for the Appellant submitted that by allowing the withdrawal letter dated 22/07/15, the Registrar had allowed withdrawal on condition precedent set by a letter without costs and that awarding costs after was contradictory.

In reply for the 1st, 2nd, 3rd and 5th Defendants, Counsel while contending that the Appellant's arguments on this ground do not hold water stated that the Learned Registrar withdrew the case under Order 25 Rule 1 of the Civil Procedure Rules which Order allows withdrawal with costs to the affected party and not under the letter of the Appellant.

In addition, Counsel contended that the Registrar is not bound by the requests or demands of a party to the suit and has discretion to depart from the requests of a party to ensure that justice is

done. That even if annexure 'A' initiated the withdrawal of the suit, this withdrawal is regulated by Order 25 of the Civil Procedure Rules which can't be escaped except with the consent of the parties.

In rejoinder to this ground, it is submitted for the applicant that it is erroneous for counsel for the respondents to argue that the registrar did not withdraw the case under the appellant's letter but under order 25 rules 1 of the CPR that the registrar in his first letter states that withdrawal is allowed.

That on this case the Appellant expressed his wish on condition precedent and that once this condition is not allowed, there is no way court can depart because it was free will of the Appellant

That as submitted by Counsel for the Respondents withdrawal in regulated by order 25 of the CPR which cannot be escaped except by consent of the parties. And that absence of a Chamber summons or consent of the parties the Registrar couldn't withdraw the suit.

I have looked at the Order of His Worship Festo Nsenga in regard to Civil Suit No. 382 of 2014 dated 23rd December, 2015 and it states that;

"Withdrawal of the suit by the Plaintiff is allowed with costs."

In this case I find this Order to be direct and not contradictory as alleged by the Appellant's representative as it was arrived at in accordance with the Law and the direction of the Learned Judge thus not contradictory.

On ground 5:

That the learned Deputy Registrar erred in law and fact when he interpreted the appellants letter dated 22 July, 2015,to amount to withdrawal of civil suit no. 382 of 2014 yet it was a mere expression of intent to withdraw the suit subject to a condition precedent of non-awarding of costs well aware that the law requires filing of chamber summons for an application for withdrawal of the suit if the appellant so wished .

Mr. Mabirizi while referring to o a letter attached as annexure 'A' contended that the words therein were clear that they only withdrew CS No. 382 of 2014 on condition precedent that no costs are awarded.

That the key word here is condition precedent which is defined by the Black s Law Dictionary at pg 887, as an act or event other than lapse of time that must exist or occur before a duty to perform some promise arises.

That without making an Order that each party bears its own costs he wouldn't have relied on the letter of withdrawal.

Mr. Mabirizi further cited the case of **Atom out door Vs. Arrow center Uganda Ltd Commercial Court Civil Suit No. 488 of 2003,** where Justice Amoko as she then was held that; "the duty of the Court is simply to give effect to the contract and not to dictate to the parties what the Court thinks they ought to have agreed, or what a person (reasonable or otherwise) might have agreed if he had read the contract and addressed his mind to the problem which in the outcome has arisen." To support his contention.

He thus submitted that in this case the Learned Registrar relied on a letter which was not positive, equivocal and with conditions to withdraw the suit. That he ignored the contents of the entire letter in making the decision that he made which in the Appellant's view is illegal.

In reply for the 1st, 2nd , 3rd and 5th Respondents it was contended that from Annexure 'A' which the Appellant wrote seeking to withdraw his case, the intention of the Appellant is clear that he wishes to withdraw the suit, that this intention should be implemented but with regard to the Law which provides for costs.

For the 4th Respondent Mr. Obiro Ekirapa Isaac while stating that Order 27 (1)

allows Court's discretion to award costs subject to conditions as may be prescribed. That order 25 rule 3 prescribes that if a suit is withdrawn wholly or in part; the plaintiff must pay the costs,

Counsel while contending that the Appellant had an option of amending the Plaint in Civil Suit No. 382 of 2014 but chose to withdraw it, prayed that this Court takes the guidance of the Civil Procedure Rules and dismisses this Appeal with costs.

I have looked at the submissions of both Counsel with regard to this ground of Appeal.

In this case by a letter dated 22nd July, 2015 the Appellant sought leave to withdraw CS No. 382 of 2014 on condition that no costs are awarded to either party.

The Respondents on the other hand contended that although the Appellant seeks by letter to withdraw the suit, it must be done In accordance with the Law.

In this case I have looked at the Law relating to withdrawal under Order 25 Rules 1 8i 3 and it seems to be clearly coached in mandatory terms that the plaintiff upon withdrawal shall pay the Defendants' costs of the suit.

This in my practice as a Judge has only been waived with the Defendants/ r'-JT consent to waive the issue of costs which was not the case in the case where the Respondents (Defendants then) outwardly asked the Learned Registrar for the same.

Although the appellant cites the case of atom out door vs arrow center Uganda ltd commercial court (supra) to argue that the duty of the court is simply to give effect to the contract and not to dictate to the parties what the court thinks they ought to have agreed or what a person (reasonable or otherwise) might have agreed if he had read

the contract.

With due respect disagree with this contention in relation to this case as I find that case inapplicable in this case as the parties in this case did not agree to withdraw but it was the appellant(plaintiff then) who wrote a letter withdrawing stating the condition of not granting costs which are clearly a disregard to the law.

Besides that the Respondents in this case clearly In the lower court as *VpA* for their costs upon the withdrawal as even submitted in this case,

I consequently disregard this ground of Appeal and It fails.

With regards to grounds 6 &. 7.

Mr. Mabirizi on behalf of the Appellant contended that it was unlawful for the Registrar to entertain and consider communication from the 4th Respondent who purported to act as an advocate representing all the defendants as can *be* seen from his signatures and personal pretrial stamps on the Appellant's letter dated 22'- July,2015 received by him on the 27"' Of July , 2015, at pg. 10 of the application , the appellants letter dated 28" July, 2015 at pg. 11 received by him on the same day, his letter written by the registrar dated 30th July,2015 all making part of annexure A to the affidavit in support of the appeal yet he himself was the 4th respondent.

while relying on the case of MK Financiers ltd vs. Shah & co & 4 others Misc. application no. 343 of 2015, where it was stated that" Mr. Ekiripa cannot represent the respondents as their counsel when he was involved in the matter

to support his contentions stated that this means that the letter purportedly written by counsel for the respondents was a mere nullity which would not be relied upon by the registrar yet it was clear from the letters on record that Obiro Ekirapa Isaac had signed and stamped the letters yet he was the 4th defendant.

He also relied on the case of Makula International vs. Cardinal Nsubuga (1982) HCB 11 where it was stated that an illegality once it has come to the attention of court overrides all questions of pleadings to support his contention that illegality overrides all other points

Mr. Mabirizi while stating the circumstances under which this suit was filed and stating that the reason for withdrawal was the Ruling of Justice Owiny Dollo between the same parties in which part of the claim was satisfied to which the Judge advised filing of a fresh suit if some properties were not returned and given the fact that the initial suit had substantially changed thus the need for a new suit, contended that had the Registrar looked at all the circumstances of this case, he would have discovered that even with their defense, the defendants were not entitled to costs but instead the Plaintiff because the Plaintiff had succeeded against the Defendants who had brought back a substantial part of the Plaintiff's claim and that going by the provisions of section 27 of the Civil procedure Act, it is the Appellant herein who was entitled to the costs of the suit and not the Respondents as the Appellant herein was the successful party who had sued for recovery of the properties and that by the Respondents returning the properties to the Appellant, that the appellant was the successful party by virtue of section 27 of the Civil Procedure Act.

While contending that the Respondents forced the Appellants to file Civil Suit No 382 of 2014, after they had distressed the Appellant's properties, it was **contended** in this case that the Registrar was wrong to award costs on withdrawal and that the decision should be reversed.

Mr Mabirizi also contended that the Respondent for the 1* 2« 3» and 6» **Respondents** did not submit on this ground and that hence agreed with that indeed the Registrar erred.

And that while the 4th Respondent **relied on section** 27 **of** the civil procedure Act to state that costs follow the event, but fell short is explaining what the event was in this case and failed to distinguish the authorities **cited** by **the Appellant.**

That the 4th respondents reliance on order 25 rule 4 is misplaced since in this case civil suit no. 196 of 2015,was filed in pendency of civil suit no. 382 of 2015 and not after the withdrawal as it has never been withdrawn.

Mr. Mabirizi contended that the argument that the Appellant had the option to amend the plaint is untenable since under Order 6 Rule 20 CPR a plaintiff has only two options to amend the plaint; after service of summons or within 14 days after his defense has been filed. That it exhausted the last option and the only way it could case Court's determination of the dispute was to suggest a withdrawal with no Order as to costa, although it was the one entitled to costs.

In the instant case, I have looked at the record of this case, and by a letter dated 22nd July, 2015 the Appellant sought leave to withdraw CS No. 382 of 2014 on condition that no costs are awarded to either party.

I have also looked at the Law under Order 25 Rule 1 on discontinuance of suits by a plaintiff and where it is by Notice in writing, it does not seem to state whether the Defendants should Respond or not on the issue of costs as in itself it is mandatory that when you withdraw a suit, you pay the costs.

I disregard the Appellant's submission referring to section 27 of the Civil Procedure Act that the Appellant was the one entitled to costs as this matter related to a withdrawal that was done by the Plaintiffs **representative** before the Registrar and had nothing to do with the decision of Justice Owiny Dollo.

I find this ground of Appeal misconceived and dismiss it accordingly.

With regard to ground 9:

That it is in the interest of justice, just and equitable that the appeal be allowed.

Mr. Mabirizi with regard to this ground submitted that a decision reached without jurisdiction, without affording the parties a non derogable right to be heard, made under a non-applicable rule, contradictory in itself amend which falls short of appreciating the circumstances of a case only defeats all the intents and tenets all justice and is definitely contrary to articles 126(1) and (2) of the constitution hence the decision needs to be set aside.

The Appellant thus prayed that the Appeal be allowed with the terms set out in the Notice of Motion and invited court to look at the conduct of counsel for the Respondents due to his misconduct in the main suit and Application where he purported to represent the Respondents yet not to award costs to the appellant

The Appellant thus prayed that the Appeal be allowed as presented with costs or in the unlikely event, an alternative order be made withdrawing Civil Suit No.382 of 2014 with no Order as to costs.

In rejoinder the Appellant maintained that the fairness and justice of this case requires that the Appeal be allowed because the decision of the Registrar is founded on illegalities and lack of proper analysis of the case to find that indeed the Appellant was the successful party.

That it will be unfair for the Appellant who sued to recover his properties, to be ordered to pay for the costs of the Respondents who illegally distressed its properties and returned it and it will indeed be a mockery of the Justice system.

The appellant this reiterated his earlier prayers that the Appeal be allowed as presented and that in the unfortunate event that the Appeal is not allowed, then the alternative prayers should be allowed.

Having found under grounds 3 & 8 above that the Learned Deputy Registrar relied

on the right Law to arrive at his decision as he is mandated to withdraw matters as per practice direction stated above and that he dully consulted the Judge on how to go about the issue of costs.

Besides that it is the appellants who initiated the withdrawal thus I find that it is in the intersts of justice that he had to pay the costs as the learned registrar ordered as the provision on withdrawal with regard to costs is mandatory unless the parties waive them and in this case the respondents did not waive the same.

This appeal fails in this ground also.

Consequently, this Appeal fails and is therefore dismissed with costs to be paid by the Appellant.

MC. OGULIOUMO

(JUDGE)

7/6/2017.

Present

1. **Male Mabirizi Kiwanuka Applicant's Managing Director**
2. **Onyango Joseph the 1 * Respondent's estate manager**
3. **Imelda Court Clerk/ Interpreter**

Mr. Mabirizi;

For the record the Applicant intends to Appeal against this decision

Court: That is your right, you will get a copy of the Ruling.