

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 106 OF 2019
(ARISING FROM HCT – 01 – CV – CS 007 OF 2018)

5 **KASWARA HASSAN ALI ::: APPLICANT**

VERSUS

- 1. FORT PORTAL MUNICIPAL COUNCIL**
- 2. WEST DIVISION ::: RESPONDENTS**

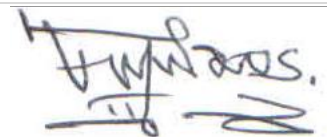
BEFORE: HON. JUSTICE VINCENT WAGONA

10 **RULING**

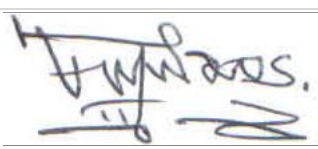
The Applicant brought this Application under Order 50, 25 and 52 of the Civil Procedure Rules and Section 33 of the Judicature Act and 98 of the Civil Procedure Act for orders:

- 15 **1. That all court orders issued in High Court Civil Suit No. 007 of 2018 by the Assistant Registrar be set aside.**
- 2. That Civil Suit No. 007 of 2019 be withdrawn with no orders as to payment of costs.**
- 3. That the court issues any other order deemed necessary.**
- 4. That the costs of taking out the Application be provided to the Applicant.**

20 The grounds in support of the Application are contained in the affidavit in support deponed by the applicant to wit:



1. That he sued the Respondents for a declaration that the 2nd respondent's act of erecting a container in a planned road blocking the plaintiff's commercial rooms which were adjacent to the planned roads in unlawful; an order that the Respondents removes their containers and the pit latrine erected on the planned road.
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2. That the reason he sued the Respondents was because they had erected containers in a planned road that blocked his commercial rooms to the access.
3. That the plaint was served and the Respondents requested to have the case settled out of court.
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4. That in the settlement, the respondents adjusted the containers and removed them from their initial position. That in the same meeting it was agreed that he withdraws the suit since the Council had not filed a defense.
5. That after settlement, he was shocked to be served with a taxation hearing notice of 20th February 2019.
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6. That he later engaged the officials of the respondents where the Town Clerk of West Division wrote to the Town Clerk of the Division confirming the settlement.
7. That the said letter was presented to the registrar who ignored the same and proceeded with the taxation.
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8. That if court cannot set aside the order for payment of costs, then the suit should be reinstated and heard on merits. That court has the discretion to set aside the taxed bill and that it was in the interests of justice that the application is granted.
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The Application was opposed by the 1st Respondent through an affidavit deponed by Bamanyisa Geoffrey, the 1st Respondent's Town Clerk who averred as follows:

1. That the Applicant filed Civil Suit No. 007 of 2018 seeking special and general damages for the alleged trespass. That the Respondents filed their defence and duly served the plaintiff. That the Applicant on the 4th day of April 2018 withdrew the said suit claiming that the litigation was costly and he could not afford the expenses and costs involved.
2. That court allowed the withdrawal with costs to the respondents. That the Respondent's filed a bill of costs which was taxed and execution was issued but the Applicant has been hiding.
3. That there is no justification for setting aside the order as there is no agreement entered into between the applicant and the respondents prior to the said withdrawal of the suit.
4. That the Application lacks merits and the same should be dismissed with costs.

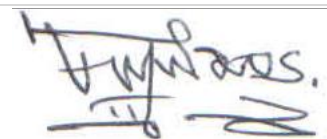
Representation and hearing:

M/S Ahaabwe James & Co. Advocates represented the Applicant while M/s Kaahwa, Kafuuzi, Bwiruka Advocates represented the Respondents. The parties did not file submissions thus I considered the pleadings in this ruling.

DECISION:

Order 25 of the Civil Procedure rules governs withdrawal of suit. Rules 1 and provides thus:

Rule 1: Withdrawal of suit by plaintiff or defendant.

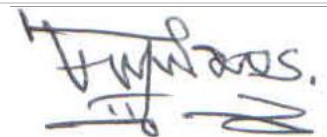
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1. *The plaintiff may at any time before the delivery of the defendant's defence, or after the receipt of that defence before taking any other proceeding in the suit (except any application in chambers) by notice in writing wholly*
5 *discontinue his 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 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 filing*
10 *of 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.*

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*
15 *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 to be struck out.*

3. *The court may, in like manner, and with the like discretion as to terms, upon*
20 *the application of a defendant order the whole or any part of his or her alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent for a defendant to withdraw his or her defence or any part of it without such leave.*

25 **Rule 2: Withdrawal by consent.**

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When a suit has been set down for hearing it may be withdrawn prior to the hearing by either the plaintiff or the defendant upon filing a consent signed by all the parties.

5 A plaintiff may withdraw a suit either before the delivery of the defense by the defendant or after. A withdrawal after the defense has been filed should be done with leave of court. A withdrawal made within the 21 days within which the plaintiff is to serve the summons and before the delivery of the defense, may be done wholly or partially without leave of court.

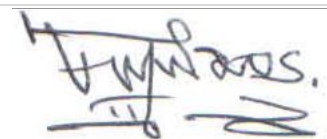
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Where a withdrawal is done after the delivery of the defense, then the plaintiff should pay costs of the withdrawal to the defendant. It is however settled law that it is not automatic that whenever a withdrawal is made, then the defendant is entitled to costs.

15 In **Kiska Limited V. Vittorio Angelis [1968] EACA 7**, it was held that a successful defendant can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit has led to litigation which but for his own conduct might have been averted.

20 Under Order 25 a party withdrawing a suit should pay costs but it appears that this provision is subject to the provisions on costs in Section 27 of the Civil Procedure Act. It is provided under Section 27(1) that costs shall always be in the discretion of the Court or Judge who has powers to order to what extent such costs should be paid. It appears under Section 27(2) CPA that this discretion is unfettered.

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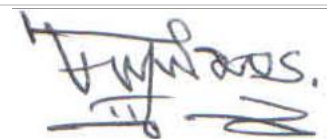
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In **Prince J. D. C Mpuga Rukidi versus Prince Solomon Kioro and Others, Civil Appeal No. 15 of 1994 (S.C)**, it was held that: ” *That however, where Court is of the view that owing to the nature of the suit, the promotion of harmony and reconciliation is necessary, it may order each party to bear his/her own costs.* ”

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In this case the Applicant contended that after the institution of the suit, the respondents expressed interest to settle and indeed there was a settlement where the Respondents adjusted the containers and removed them from their initial position and agreed that the suit be withdrawn. These facts were not disputed by the Respondent in the affidavit in reply and thus are taken to be admitted. The Applicant attached a letter dated 24th May 2019, authored by Mr. Kalenzi Clovis, the Senior Assistant Town Clerk of Western Division where he intimated that there were several engagements with the Applicant and that he found it prudent to the have the case withdrawn in the interests of both parties. That there was poor communication with the lawyer who later served the bill of costs totaling to Ugx 17,001,500. This letter was not denied by the Respondent in the affidavit in reply neither did the Respondent give a contextual background under which the same was written. In my view, the letter confirmed the Applicant averment of the engagements he had with the Respondent regarding the suit at hand and the fact that the containers the Respondents had put in the access road were adjusted.

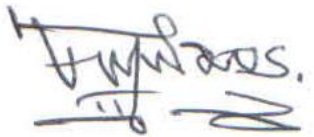
I find that the Respondents’ actions led to the institution of the suit and the withdrawal was a result of the understanding that the applicant had with the agents of the 2nd Respondent. The learned Assistant registrar should have taken this into

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consideration in making an order whether to grant costs. It is my finding that this is a proper case where each party should bear its costs. This application therefore succeeds with the following orders:

1. That the order granting costs of the withdrawal to the Respondent in Civil Suit No. 007 of 2018 is set aside.
2. That the certificate of taxation dated 20th June 2019 is hereby set aside together with the resultant execution orders.
3. That Civil Suit No. 007 of 2018be is hereby withdrawn and each party shall bear their own costs.
4. That no order is made as to costs in this Application.
5. That Misc. Application No. 107 of 2019 for stay of execution is overtaken by events and it is accordingly dismissed.

It is so ordered.



Vincent Wagona
High Court Judge
FORT-PORTAL
6.3.2023

