

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
CIVIL SUIT NO. 182 OF 2014**

NABANJA NOOR PLAINTIFF

VERSUS

ISAAC SENDAGIRE

ALHASSAN DUMBA.....DEFENDANTS

RULING

BEFORE LADY JUSTICE EVA K. LUSWATA

When this suit came for hearing on 8/12/14, Harriet Nabankema counsel for the plaintiff reported that she had proof in the form of a withdrawal notice, to show that a matter filed in the Chief Magistrates Court of Nabweru between the parties herein and with similar facts had been formerly withdrawn. This was in response to objections raised earlier by defence counsel that the dispute was pending before two different courts. Ms Nabankema produced a copy and not original of the letter of withdrawal. Mpiima Jamil Sennoga, counsel for the 2nd defendant raised three objections as follows:-

- i) Only a copy of the withdrawal was availed to court and there was no indication that it bore the court stamp
- ii) The withdrawal alleged to have been endorsed by the Chief Magistrate was so endorsed after the current suit was filed in the High Court
- iii) The withdrawal or its endorsement is to the effect that no costs were to be paid contrary to Section 25 (1) (1) CPR

To elaborate on his objections, counsel Sennoga argued that under Order 25 (1) (1) CPR, if a case is withdrawn under the circumstances that the present plaintiff sought to withdraw the suit in Nabweru, then costs are to be paid. That under Order 25 (4) CPR, if costs are not paid, the court attending to the new suit may order a stay of proceedings until the costs have been paid. He was also in doubt as to whether the Chief Magistrate of Nabweru actually endorsed the notice of withdrawal.

In response to the third objection, Ms Nabankema responded that courts have the discretion whether to refuse or allow costs and finally that the letter withdrawing the matter in Nabweru was received by that Court on 9/4/14 and endorsed by the Magistrate on 2/10/14. That the suit in the High Court was filed on 10/4/14 which was after the lower court had been informed of the withdraw. She prayed that the objections be overruled and the matter continues.

From the submissions I noted that the objection was not that there had been a withdrawal of the suit in the lower court, but that a copy which did not have a formal court stamp made such withdrawal doubtful and also that the present suit was filed before the withdrawal was endorsed by the lower court. In order to assist court, I ordered Ms. Nabankema to provide an original or certified copy of the letter of withdrawal which she did on 10/12/14. Having done so, I confirmed that the contents of the certified copy provided, tallied very well to those in the copy provided at the hearing. This would settle the first objection.

Going by the record, the notice of withdrawal of the suit in Nabweru was filed in that court on 9/4/14 and the present suit was filed a day later on 10/4/14. This would be in order, for no two suits can exist concurrently albeit in different courts. However, that letter was endorsed by the Magistrate G1, several months later on 2/10/14. The question therefore would be at what point would the notice of withdrawal of a suit be taken to take effect in law? Order 25 (1) (1) CPR relied on by counsel Sennoga provides as follows:-

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 discontinue his or her suit against all or any of the defendants.....and thereupon he or she shall pay the defendant's costs of the suit.....Upon the filing of the notice of the discontinuance the costs shall be taxed, but the discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent suit. (Emphasis of this court)

My understanding of that provision is that the withdrawal of a suit shall be by notice in writing and nothing more. It is enough that the notice is recorded as filed in court and there is no

requirement that there should be an endorsement of a court official (in this case the Magistrate G1) to endorse the withdrawal. I take it therefore that the withdrawal of the case in Nabweru was made on 9/4/12. The present case being filed a day later on 10/4/14, would make the present case valid.

The third bone of contention is that the lower court was wrong in not awarding costs to the 2nd defendant and that this court is obligated to stay proceedings until the issue of those costs is decided upon in the lower court. In this counsel relied on Order 25 Rule 4 CPR which provides as follows:-

If any subsequent suit is brought before payment of the costs of the discontinued suit upon the same or substantially the same cause of action, the court may order a stay of the subsequent suit until the costs have been paid

The current action before me is indeed a subsequent suit to that which was earlier filed in and withdrawn from the Nabweru Chief Magistrates Court and is based substantially upon the same cause of action and between the same people. It would ordinarily fall squarely under this provision. However, by using the word “may” the provision appears to be discretionary rather than mandatory. The court is therefore open to considering the circumstances of each case before staying proceedings of the subsequent suit.

It is indicated on the notice of withdrawal that the Chief Magistrate accepted the withdrawal with no costs ordered. It is trite that under Order 25 a party withdrawing a suit should pay costs but I believe this provision would still fall under the general 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 even in instances when such Court is determined not to have jurisdiction to hear the dispute, as was the case here. A more liberal view given under Rule 2 is that costs will always follow the event, but where a Court declines to grant costs then they should give reasons for that decision.

The notice of withdrawal contains an endorsement of the Magistrate GDI stating that costs were not awarded considering the relationship between the plaintiff and 1st defendant. That relationship would not obviously bind the 2nd defendant but the order not to award costs of the withdrawal to both defendants would. I consider the endorsement of the Magistrate her/his final order on costs. This court is not sitting as an appellate court to decide on the correctness of that order or lack of it. The 2nd defendant would be open to appeal that decision, but subject to the law of limitation.

Under such circumstances, after finding that a formal withdrawal was filed in the Nabweru Court, I am not prepared to stay the current proceedings which should be heard on merit. This in my view would not prejudice whatever claims the 2nd defendant believes he has in the lower court with regard to the issue of costs.

I therefore move to dismiss all three objections but with no order as to costs. I decline to grant costs in that counsel for the plaintiff during her submissions bore the blame of her colleague having filed the previous suit in the wrong court. There is also no evidence that the defendants were notified of that withdrawal until the hearing of 8/12/14. An earlier service would have probably prevented the present complaints.

I so order.

EVA K. LUSWATA
JUDGE
12th December 2014