



Kajiado Multi-Investments Company Limited v Muhammed (Administrator of the Estate of Mohamud Mohamed Eman - Deceased) & another (Environment & Land Case 38 of 2019) [2023] KEELC 16344 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 38 OF 2019
MN GICHERU, J
MARCH 22, 2023**

BETWEEN

KAJIADO MULTI-INVESTMENTS COMPANY LIMITED PLAINTIFF

AND

HIBO MAHAMUD MUHAMMED (ADMINISTRATOR OF THE ESTATE OF MOHAMUD MOHAMED EMAN - DECEASED) 1ST DEFENDANT

THE LAND REGISTRAR, KAJIADO – LAND REGISTRY 2ND DEFENDANT

RULING

1. This ruling is on the notice of motion dated December 20, 2021. The motion is under sections 80, 1A, 1B and 3A of the [Civil Procedure Act](#) and order 45, rule 1 of the [Civil Procedure Rules](#) seeks the following orders.
 - i. The court be pleased to review and set aside its orders of August 8, 2021 and issued on December 14, 2021.
 - ii. Costs of this application be provided for.
2. The motion is supported by nine (9) grounds, an affidavit sworn by Mohamed Rashid Hussein, a director of the Plaintiff and two annexures. The gist of the above material is that on 10/6/2020, the Plaintiff filed a notice of withdrawal of the suit dated 25/5/2020. The notice of withdraw was on record on 8/12/2021 when the court dismissed the suit for want of prosecution. When the dismissal of the suit took place, there was no suit to be dismissed as it had already been withdrawn.
3. The motion is opposed by the first Defendant who has sworn a replying affidavit dated 30/3/2022 in which she deposes as follows.
4. Firstly, the notice of withdrawal was never served upon the first Defendant or her counsel.



5. Secondly, the Plaintiff ought to have sought leave to withdraw the suit since there were orders in place in favour of the first Defendant conserving the substratum of the suit.
6. Thirdly, after being served with the application for dismissal of the suit, the Plaintiff did not raise this issue of withdrawal of the suit then and it is therefore an afterthought.
7. Fourthly, the Plaintiff has corruptly obtained a sum of Kshs 25, 319, 425.00 from KETRACO Limited as compensation for a way leave over the suit property when this suit is pending. For those and other reasons, the motion by the Plaintiff should therefore be dismissed.
8. Counsel for the parties filed written submission on 20/1/2023 and 7/2/2023. There are only two issues identified by the parties.

- i. Whether the court should allow review of the order that dismissed the suit?

- ii. Who should bear the costs?

I find that I should add a third issue namely,

- iii. Whether the suit was withdrawn by the mere filing of the notice of withdrawal dated 25/5/2020?

9. I have carefully considered the motion dated 20/12/2021 including the affidavits, the grounds, the annexures, the submissions by learned counsel for the parties and the law cited in the said submissions.

I make the following findings on the three issues identified above.

10. On the third issue of the withdrawal of the suit, I find that the mere filing of the notice of withdrawal was not enough to withdraw the suit. The notice ought to have been served on all the parties to the suit as required by Order 25, rule 1 of the Civil Procedure Rules. It provides as follows.

“At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action”.

11. There is no evidence in form of an affidavit of service to prove that the defendants were ever served with the notice of withdrawal. In fact, service is denied by the first Defendant and the Applicant did not file any supplementary affidavit to rebut this deposition by the first Defendant.

12. The Plaintiff, having failed to comply with the mandatory requirement as to service as required by Order 25 rule 1, cannot be heard to say that the suit had been withdrawn.

13. On the second issue of whether review ought to be allowed, I find no new evidence, no error apparent on the face of the record and no other sufficient reason have been proved by the Applicant to warrant review of the order dismissing the suit. When the application for the dismissal of the suit came up for hearing on November 22, 2021, the Plaintiff’s counsel who had been served with it on 23/9/2021 chose not to file a replying affidavit or attend court.

The same Plaintiff cannot now be heard to say that the order issued in his absence should be set aside. The threshold set in Order 45 rule (1) (b) *Civil Procedure Rules* has not been met.

14. Finally on costs, I find that they should follow the event.

For the above stated reasons, I dismiss the notice of motion dated December 20, 2021 with costs to the first defendant.



15 It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 22ND DAY OF MARCH, 2023.

M.N. GICHERU

JUDGE

