



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nasieku & 2 others v County Government of Nakuru & 15 others (Petition  
66 of 2014) [2023] KEHC 22821 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22821 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
PETITION 66 OF 2014  
HK CHEMITEI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**SIMON SANGALE NASIEKU ..... 1<sup>ST</sup> PLAINTIFF**

**RONALD ABUGA NYAMIKA ..... 2<sup>ND</sup> PLAINTIFF**

**RAHAB MUGURE ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF NAKURU & 15 OTHERS ..... DEFENDANT**

**RULING**

1. In their preliminary objection dated March 27, 2023 the defendants prayed as follows;
  - (a) That the application dated March 14, 2023 and filed in court on March 15, 2023 is subjudice and offends the provisions of Section 6 of the [Civil Procedure Act](#) since there is an application dated July 22, 2022 seeking similar prayers which has not been withdrawn.
  - (b) That the notice of withdrawal of application dated March 10, 2022 and filed in court on March 15, 2023 offends the mandatory provisions of Order 25 rule 1 and 2 of the [Civil Procedure Rules](#) and is of no effect and should be struck out.
  - (c) The application dated March 14, 2023 is an abuse of the court process.
2. The parties were directed to file their written submissions which they have complied and the court has perused the same with the cited authorities.
3. What is before this court is clear. There are two sets of applications. The first application dated July 22, 2022 seeks the respondents to purge their contempt after failing to comply with the ruling of this court dated March 24, 2022 in which it inter alia compelled the respondents to settle some of the unsettled traders.



4. This application for some reasons was not determined. The applicants vide a notice of withdrawal dated March 10, 2023 and filed on March 15, 2023 withdrew the same and filed a fresh application dated March 14, 2023. The said application is almost word for word with the application dated July 10, 2022 save that the same involved the new elected officials of the defendant namely the new Governor Hon Susan Kihika and her new County Executives.
5. This prompted the defendants to file the preliminary objection above.
6. The question raised and submitted to by the defendants is whether the same offends the provisions of Order 25 rules 1 and 2 of the Civil procedure rules. The same states as hereunder:
  - “(1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.
  - (2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.
  - (3) The provisions of this rule and rule 1 shall apply to counterclaims.”
7. My simple understanding of the above portion of the law is that any notice to withdraw the suit must be served on the other side. The same must be in writing.
8. The rider under Rule 2(2) however is that where the suit has been set down for hearing the court may grant the plaintiff leave to do so subject to the questions of costs. I understand this to mean that it is only appropriate that in situations where parties have prepared themselves for hearing it becomes untidy for the plaintiff to withdraw the suit as that would show a semblance of bad faith as it has let the defendant expend time, resources and energy to prepare for the case. The court thus comes in to correct such inappropriate action by the plaintiff. The defendant in most cases is compensated by way of costs.
9. Looking at the matter at hand, the issue before the court is not the entire petition but an interim application. The suit has not been set down for hearing. It may be true as submitted by the defendant that the application had not been argued despite being set down for hearing severally. The reasons for not disposing the application must be within the knowledge of both sides. If anything, the defendants should have applied for its dismissal and or setting it down for hearing.
10. I do not think in this case the matter is subjudice as submitted by the defendants. It was never determined at all.
11. Although the new application seeks similar orders the parties are plainly different. The original supposed contemnors have since left the County Government and new ones elected or nominated. The action survived them and I find that it was appropriate for the plaintiffs to file the new application.
12. The only issue as rightly found in most of the cited authorities is to compensate the defendants by way of costs noting that they had prepared to respond to the withdrawn application.
13. In the premises I do not find the preliminary objection merited and it is dismissed with costs to the plaintiffs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**H K CHEMITEI**

**JUDGE**

