



REPUBLIC OF KENYA



KENYA LAW
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**Jadiel v Karithi & another (Civil Appeal 109 of 2019)
[2022] KEHC 15862 (KLR) (29 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL 109 OF 2019
EM MURIITHI, J
NOVEMBER 29, 2022**

BETWEEN

FRIDAH KAGWIRIA JADIEL APPELLANT

AND

JADIEL KARITHI 1ST RESPONDENT

NATIONAL BANK OF KENYA LIMITED 2ND RESPONDENT

RULING

1. The appellant has expressed his desire to wholly withdraw her entire appeal against the respondents with no orders as to costs *vide* a notice of withdrawal dated 30/9/2021.
2. The 2nd respondent's opposition to the said withdrawal, as can be deduced from its submissions filed on 19/1/2022, is only limited to reimbursement for the expenses incurred. It relies on *Justus Simiyu Masinde v Domitilla Icha Masinde* (2012) eKLR, *Council of Governors v Senate & another* (2014) eKLR and *Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others* (2017) eKLR to fortify its submissions.
3. The appellant lodged a memorandum of appeal in this court on 9/9/2019. The record of appeal was not filed and before directions could be taken on how the appeal was to be heard, the appellant filed the notice to withdraw the same on 30/9/2021. This court notes that the 2nd respondent did not file any submissions in respect to the appeal. The genesis of the appeal now sought to be withdrawn is the dismissal of the application dated 14/6/2019 by the trial court in favour of the 2nd respondent, the 2nd defendant in those proceedings. The trial court *vide* its ruling dated 1/8/2019 rendered itself thus, "This suit is vexatious and an abuse of the court processes and is hereby struck out with costs to the 2nd defendant."
4. As a general rule, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. Those sentiments were echoed by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat*



v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where it was reiterated that: “A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”

5. Since the 2nd respondent is not opposed to the withdrawal of the appeal, the sole issue for determination is whether it should be awarded costs as a result of the said withdrawal.
6. The record shows that counsel for the 2nd respondent made several appearances in court on November 27, 2019, October 14, 2021 and November 15, 2021 after the notice of withdrawal had been filed. The Court of Appeal in *Canyon Properties Limited & 3 others v Eliud Kipchirchir Bett & 2 others* (2017) eKLR, was of the view that:

While appreciating that the main suit had not been listed for hearing, the learned judge ought to have considered the fact that there were appearances and actual prosecution of some applications in court which must have involved preparations on the part of counsel. In any event, the costs awarded would only cover the work already done up to the point of withdrawal of the suit. Those are relevant, pertinent issues that the learned judge failed to consider when declining to award costs to the appellants.”

7. It is not in doubt that the 2nd respondent had incurred some expenses up to the time when the notice of withdrawal of the appeal was filed, and is entitled to some costs.

Orders

8. Accordingly, for the reasons set out above, the memorandum of appeal filed on 9/9/2019 is marked as withdrawn with costs to the 2nd respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF NOVEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kaberi Arimba & Co. Advocates for the Appellant.

M/S Mutegi Mugambi & Co. Advocates for the 1st Respondent.

M/S Wambugu & Muriuki Advocates for the 2nd Respondent.

