



Kasanga v Ongwesa & another; Kasanga & another (Interested Parties) (Environment & Land Case 113 of 2015) [2023] KEELC 18113 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 113 OF 2015
MD MWANGI, J
JUNE 21, 2023**

BETWEEN

CATHERINE NAISINOI KASANGA PLAINTIFF

AND

JOASH NYAMACHE ONGWESA 1ST DEFENDANT

THE DIRSTRIC LAND REGISTRAR – NGONG 2ND DEFENDANT

AND

TERESIA KASANGA INTERESTED PARTY

CHRISTINE STICKER INTERESTED PARTY

(Arising out of the Notice of withdrawal of suit filed by the Plaintiff herein under order 25 rule 1 of the Civil Procedure Rules seeking to withdraw the suit without costs)

RULING

Background

1. This case came up for mention on June 20, 2023 for purposes of confirming the filing of the formal notice of withdrawal of the suit by the Plaintiff. Earlier on, the Plaintiff's Advocate had informed the court that he was in consultation with his client about her intention to withdraw the suit. On the material date the Plaintiff's Advocate, Mr Eredi confirmed that he had indeed filed the notice of withdrawal of the suit dated June 8, 2023. He requested the court to mark the suit as withdrawn but with no orders as to costs. He further informed the court that his client had gone ahead to file a fresh suit in Kajiado Environment and Land Court.
2. On his part, the Advocate for the 1st Defendant, Mr Omanga pointed out that the Plaintiff's notice of withdrawal of the suit was brought under the wrong provisions of the law since this is suit that



had already been set down for hearing. He submitted that a withdrawal under Order 25 rule 1 of the Civil Procedure Rules would apply to a suit that was yet to be set down for hearing. Nevertheless, the Advocate for the 1st Defendant submitted that should the court be inclined to allow the withdrawal of the suit, his client, the 1st Defendant ought to be awarded costs. The suit was filed in court way back in the year 2015. Further, The Advocate urged the court to stay any further proceedings in respect of the same subject matter by the same parties until the costs, so awarded are paid to the 1st Defendant by the Plaintiff.

3. In reply, Mr Eredi reiterated that his client had already filed a fresh suit in the Kajiado Environment and Land Court. Staying further proceedings as prayed for by the 1st Defendant would amount to interfering with a matter before a court of equal jurisdiction as this court. It would also amount to a violation of the Plaintiff's rights to access justice. On the issue of costs, Mr Eredi urged the court to allow the withdrawal without costs since the 1st Defendant had contributed to the adjournment of the case on many occasions wherever the Plaintiff set down the case for hearing.

Issues for Determination.

4. The issues that the court must then determine is firstly whether the Plaintiff's notice of withdrawal of suit is defective and secondly, if the Plaintiff should be allowed to withdraw the suit with or without costs.

Analysis and Determination.

5. In the case of *Khakame Vs Kimathi & 2 others* (Environment & Land Case E044 of 2022) KEELC 13434 (KLR), this court cited the court of Appeal decision in the case of *Industrial Designing and Researching Institute Vs Lagoon Development Ltd* (2015) eKLR, where the court set down the 3 scenarios where suits may be discontinued or withdrawn.
6. Scenario 1 is where a suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, at any time to discontinue the suit or withdraw the claim or any part thereof. All that the Plaintiff is required to do is to give notice in writing and serve it upon all the parties in the suit.
7. Scenario 2 is when the suit has been set down for hearing. In such a case, the suit may be discontinued or withdrawn either wholly or in part by all the parties signing and filing a written consent.
8. Scenario 3 is also when the suit has been set down for hearing but the parties have not reached a consent on discontinuance or withdrawal of the suit or any part of the claim thereof. The Plaintiff must obtain leave of the court. Such leave is to be granted upon such terms as are just.
9. In this case, scenario 3 (above) applies. This matter had been certified ready for hearing and indeed set down for hearing. It was on the hearing date that the Plaintiff's Advocate sought to stand down his witness after realizing that the OS that had been filed in court was defective as it was neither dated nor signed. The supporting affidavit too was defective.
10. The 1st Defendant's Advocate is therefore right that the notice of withdrawal of the suit should not have been brought under the provisions of order 25 rule 1 rather should have been premised on rule 2(2).
11. The intentions of the Plaintiff are however clear. The Plaintiff intends to withdraw the suit before this court in its entirety. As the Plaintiff's Advocate stated, the Plaintiff has gone ahead and filed a fresh suit in Kajiado hence the move to withdraw this suit. He accordingly sought leave of the court to have the suit withdrawn.



12. The court in granting such leave is obligated under Order 25 rule 2(2) of the *Civil Procedure Rules* to determine the terms as to the payment of costs and to do justice.
13. In a bid to make a determination on costs and to do justice, I have keenly perused the court record. This case was filed way back in the year 2015. The Respondents then filed their joint reply to the OS in the year 2016. The matter was mentioned severally in court before eventually being set down for hearing. On a number of instances, adjournments were occasioned by the 1st Defendant. In fact, on November 14, 2022, the court noted that the 1st Defendant had not been keen to proceed with the case.
14. Be that as it may, the 1st Defendant is entitled to some reasonable costs. Taking into account the particular circumstances of this case, the court assesses the all-inclusive costs at the sum of Kshs 50,000/-. Therefore, the court will allow the Plaintiff to withdraw this suit in its entirety with costs to the 1st Defendant assessed at Kshs 50,000/-. The same should be paid in the next sixty (60) days from the date of this ruling failing which the 1st Defendant would be at liberty to execute against the Plaintiff.
15. The court disallows the prayer to stay any further proceedings between the parties. It would not be in the interest of justice to make such an order considering the circumstances that led to the withdrawal of this matter by the Plaintiff.

Final disposition.

16. The conclusion is that the Plaintiff's suit is hereby marked as withdrawn with costs to the 1st Defendant assessed at Kshs 50,000/- and payable in the next 60 days failing which the 1st Defendant will be at liberty to execute.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Ongweso holding brief for Omanga for the 1st Defendant.

Mr. Eredi for the Plaintiff.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

