



Cheptoo & 3 others v Rono & 4 others (Environment & Land Case 236 of 2016) [2023] KEELC 19090 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19090 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 236 OF 2016**

**EO OBAGA, J
JULY 27, 2023**

BETWEEN

**JOHN MALAKWEN CHEPTOO 1ST PLAINTIFF
ANDREW KIBIWOTT KULEI 2ND PLAINTIFF
LUKE KIPKOGEI KIPKULEI 3RD PLAINTIFF
MARIA CCHEKONGA TIREITO 4TH PLAINTIFF**

AND

**FRANCIS RONO 1ST DEFENDANT
JONATHAN CHELIMO 2ND DEFENDANT
HENRY KAPTUGEN 3RD DEFENDANT
KIPTALAM RUTTO 4TH DEFENDANT
LAND REGISTRAR, UASIN GISHU 5TH DEFENDANT**

RULING

1. This is a ruling in respect of an application dated April 11, 2023 in which the Plaintiffs/Applicants seek the following orders:-
 - a. The notice of withdrawal of suit dated August 19, 2010 be marked as withdrawn from the court record.
 - b. The suit dated December 22, 2006 be and is hereby reinstated and same be fixed for defence hearing.
 - c. Costs in the cause.



Background;

2. The suit herein was initially filed before the Chief Magistrate on December 22, 2006. It was subsequently amended twice. The Applicants subsequently filed a notice of withdrawal on August 19, 2010 after the same had been set down for hearing on May 5, 2020.
3. On November 19, 2010, the Defendants/Respondents applied for dismissal of the Applicants' suit for want of prosecution. In opposition to the application for dismissal of the suit, the Applicants swore that when the suit came up for hearing on May 5, 2010, the trial magistrate adjourned it on grounds that he had no jurisdiction.
4. It would appear that what transpired on May 5, 2010 may have informed the Applicant's lawyer to file withdrawal of the suit. However, the lack of jurisdiction is not supported by the record of proceedings of that day and in a ruling delivered on April 15, 2011, the trial magistrate denied ever saying that he did not have jurisdiction as alleged in the Applicants' replying affidavit in opposition to the application for dismissal of the suit for want of prosecution.
5. On September 7, 2012, the Respondents' counsel filed a bill for assessment; an indication that he was aware of the notice to withdrawal of the suit. The assessment was however not pursued as the withdrawal notice had not complied with order 25 Rule 2(1) and (2). The parties went ahead to transfer the suit to the Environment & Land Court vide Misc Application No 13 of 2016.
6. On February 2, 2021, when the matter was set for hearing before Lady Justice (Dr) Odeny, the Applicants' counsel applied for adjournment and indicated to court that after looking at the plaint and the prayers sought, he was of the opinion that this is a matter they were likely to withdraw. He sought for time to go and consult her senior who is now deceased but the counsel for the 1st to 4th Defendants and the 5th and 6th Defendants opposed the application. Hearing then commenced when evidence of one of the Plaintiffs was taken.
7. The hearing then resumed before me when four more witnesses testified and the plaintiffs closed their case. It is on February 10, 2023 when defence hearing was due to start that I noticed that there was a notice to withdraw the suit which had been filed on August 19, 2010. At this time, I had noticed that the withdrawal notice had not complied with order 25 Rule 2(1) and (2) as the suit had been set down for hearing. I brought this to the attention of the Advocates.

Applicants' Application;

8. The Applicants contend that they did not instruct their advocate Ms Kigen & Co Advocates to withdraw the suit and that after the withdrawal without their consent, the Advocate continued to receive money from them and even continued to attend court and file pleadings. They therefore contend that a mistake of an Advocate should not be visited upon an innocent litigant and that a litigant should not be driven from seat of justice.
9. The Applicants further contend that the Respondents will not suffer any prejudice.

The 1st to 4th Respondents contention;

10. The 1st to 4th Respondents opposed the Applicants' application based on a replying affidavit sworn on May 4, 2023. The 1st to 4th Respondents contend that a suit which has been withdrawn cannot be reinstated. Only a fresh suit can be filed subject to the Law of Limitation Act. The 1st to 4th Respondents further contend that the Applicants ceased to be Plaintiffs when the suit was withdrawn and cannot



purport to rescind the withdrawal. They further state that an Advocate has general authority to compromise or discontinue cases.

The 5th and 6th Respondents' contention;

11. The 5th and 6th Respondents opposed the Applicants' application based on grounds of opposition dated May 12, 2023 and filed in court on May 16, 2023. The 5th and 6th Respondents contend that the notice of motion by the Applicants is a non starter and offends order 25 of the Civil Procedure Rules.

Analysis and determination;

12. I have considered the Applicants' application as well as the opposition to the same by the Respondent. I have also considered the oral submissions by the Applicants and the 1st to 4th Respondents. The only issue for determination is whether a court can set aside withdrawal notice of a suit which is done by the Plaintiff wholly withdrawing their suit against the Defendants.
13. In the instant case, the suit had been set down for hearing on May 5, 2010 when it could not proceed. The withdrawal notice was filed on August 19, 2010. The notice was therefore filed pursuant to order 25 Rule 2(1) and (2) of the Civil Procedure Rules which states as follows: -
 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.'
14. A reading of order 25 Rule 2(1) shows that for any withdrawal of a suit to take effect after the same has been set down for hearing, the withdrawal must be upon filing a written consent which is signed by all parties.
15. Further a reading of order 25 Rule 2 (2) shows that where a suit has been set down for hearing, the court may grant leave to the Plaintiff to withdraw the suit upon such terms as to costs, the filing of any other suit and otherwise as are just. This therefore means that the court has control over a suit being sought to be withdrawn where the withdrawal is sought after the suit has been set down for hearing.
16. In the instant case, there was no written consent to withdraw filed and signed by all parties and the court did not sanction the withdrawal. This explains why even after the Respondents filed their bill of costs for assessment, they did not pursue the assessment. The case has now gone upto defence level with full participation of all counsel for the parties.

Disposition;

17. From the above analysis, it is clear that the withdrawal notice filed on August 19, 2010 did not go through the procedure under order 25 Rule 2(1) and (2). The withdrawal notice remained just that; an intention to withdraw which is stale. There is therefore no need to seek setting aside something which is still born. I therefore decline to allow the notice of motion dated April 11, 2023 and direct that parties do take a date for defence hearing. Each to bear their own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF JULY, 2023.

E. O. OBAGA



JUDGE

In the virtual presence of;
Mr. Ndege for Plaintiff/Applicants.

Court Assistant –Laban

E. O. OBAGA

JUDGE

27TH JULY, 2023

