



**Ohas & another v Gachagua & 5 others (Environment & Land Case E019 of 2021) [2023] KEELC 18939 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18939 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E019 OF 2021**

**AA OMOLLO, J  
JULY 20, 2023**

**BETWEEN**

**JOHN MICHEAL OHAS ..... 1<sup>ST</sup> PLAINTIFF  
COLUMBUS TWO THOUSAND LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**RIGATHI GACHAGUA ..... 1<sup>ST</sup> DEFENDANT  
DORCAS GACHAGUA ..... 2<sup>ND</sup> DEFENDANT  
KARANDI FARM LIMITED ..... 3<sup>RD</sup> DEFENDANT  
PETER NDUATI MBUGUA ..... 4<sup>TH</sup> DEFENDANT  
PAULINE MULINGE ..... 5<sup>TH</sup> DEFENDANT  
WAMUNYORO INVESTMENTS LIMITED AND 7 OTHERS .. 6<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed a notice of motion dated September 24, 2022 to which the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 6<sup>th</sup> Respondents filed a preliminary objection. These Respondents stated that an order for re-instatement of a withdrawn suit does not lie in law and in the circumstances the application is fatally and incurably defective and should be dismissed.
2. I will proceed to consider the merits or otherwise of the preliminary objection which will decide whether the application should proceed. The parties herein filed two sets of submissions – for the PO and the application respectively. The 1<sup>st</sup> to 6<sup>th</sup> Respondents filed the submissions to their PO dated December 5, 2022 and submitted inter alia that once the suit was marked as withdrawn in June 2022, there is no provision under Order 25 where the withdrawal can be rescinded or revoked. In support of



this submission, the 1<sup>st</sup> to 6<sup>th</sup> Respondents cited several case law *inter alia*, [Charles Kiptarbei Birech vs Paul Waweru Mbugua](#) (2021)Eklr where Nyagaka J observed thus;

19. Of importance to note is that the Rules that provide for the discontinuance or withdrawal of a suit do not provide for the revocation of withdrawal notice or the setting aside of the suit. And once a suit is discontinued in whichever manner howsoever, it ceases to exist. A party cannot breathe life into it by whichever means, not even by a consent setting aside the orders of withdrawal. This is because, once a suit is withdrawn there is no party that exists in relation to that suit. The existence of a suit can be equated to the existence of light from a bulb: it only exists if there is an electric current and the gadget known as “bulb”. Once the either the light or the bulb cease to be in contact, the light goes out and in its place is darkness. The only way to get light again in that bulb is to supply current to it. The light that comes into existence again is not the continuation of the one that went out: it is new.

20. In regard to the Procedure relevant to the facts of this case, then, the only recourse an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her. The withdrawal does not activate the bar of *res judicata*. In [Antony Kayaya Juma v Humprey Ekesa Khaunya & Another](#) [2004] e KLR, the court held:

”It is my humble view that a suit which has been withdrawn pursuant to Order XXIV of the Civil Procedure Rules cannot be reinstated... the law under this Order does not envisage a litigant to seek for an order of reinstatement.”

21. In [Priscilla Nyambura Njue v Geovhem Middle East Ltd](#); Kenya Bureau of Standards (Interested Party) [2021] eKLR, Justice Mativo observed:

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.”

3. On the question whether reinstating a withdrawn suit lies in law, the Plaintiffs submitted that parameters for consideration in setting aside an order for withdrawal of a suit was laid out in [Westward Properties Limited v Chezer Investments Limited](#) [2016]eKLR by Justice Fred Ochieng to be; fraud, collusion, mistake or misrepresentation and that this is the decision that persuaded the Court in [Monica A Otieno & 32 others v Jaramogi Oginga Odinga University of Science and Technology & another](#) [2018]Eklr to reinstate a suit which had been withdrawn by the Applicant’s erstwhile counsel.

4. From the record, on June 21, 2022, the Plaintiffs’ advocate a Mr Nganga informed the court that they had filed a notice withdrawing the suit. Since the Defendants did not object, the withdrawal was endorsed as an order of the court. The question is whether a withdrawn suit can be re-instated. The Defendants argue that order 25 does not provide for such and that the only option is for the Plaintiff to file a fresh suit. They cited case law referenced above in support of the preliminary objection. I have considered the two case law cited by the Plaintiff in opposing the P.O.



5. For instance, the case of Westward Properties Limited supra is persuasive and the grounds of fraud, mistake and or misrepresentation to be used as a guide for setting aside an order refers to the principles for setting aside a consent order. In this case, the notice of withdrawal of the suit was an initiative of the Plaintiffs therefore the principles for setting aside a consent order cannot be invoked.
6. In the second case of MonicaAtieno & 32 others vs Jaramogi Oginga University supra, equally persuasive followed the decision in Westward Properties Ltd case. In the Monica Atieno case, the Judge made reference to case law cited by the Respondents *inter alia*, [Beth Njoroge -v- Simon Njoroge & Another](#) [2015] eKLR in which the court stated

“...Order 25 does not make provisions for reinstatement of a suit. However, this court has inherent powers under Section 31 of the [Civil Procedure Act](#) to make such Orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Nevertheless, this inherent power must be invoked judicially. The sole purpose for reinstatement of the suit is to deal with the issue of costs of the suit...”
7. Section 31 of the [Civil Procedure Act](#) deals with transfer of decrees therefore, the court in the case cited above may have referred to section 3 which provides for the inherent powers of the court. Mativo J (as he then was) in the case of Priscillah Nyambura Njue vs Geoyhem Middle East supra stated thus;

“33. The inherent jurisdiction of the high court has long been acknowledged and applied by courts. However, a court’s inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In National Union of Metal Workers of South Africa & others v Fry’s Metal (Pty) Ltd it was held: -

“While it is true that this Court’s inherent power to protect and regulate its own process is not unlimited – it does not, for instance, “extend to the assumption of jurisdiction not conferred upon it by statute. . .”
8. In my opinion and I so hold that Order 25 of the [Civil Procedure Rules](#) gives the party withdrawing the claim liberty to file a fresh suit no-wonder it went on to state that such discontinuance or withdrawal shall not be a defence to any subsequent action. Thus, I find merit in the preliminary objection that re-instatement of a withdrawn suit does not lie in law. It follows that having allowed the preliminary objection, the application dated October 18, 2022 is struck out with no order as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JULY 2023**

**A. OMOLLO**

**JUDGE**

**In the presence of**

Mr Nyachoti adv. For 1<sup>st</sup> to 3<sup>rd</sup> and 6<sup>th</sup> Defendants

Miss Akoth h/b for Owuor adv. for Plaintiff

CA: Valentine

