



**Ndovu Rock Limited v Weindaba & 3 others (Environment & Land Case E004 of 2022) [2023] KEELC 20217 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20217 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E004 OF 2022  
LL NAIKUNI, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**NDOVU ROCK LIMITED ..... PLAINTIFF**

**AND**

**JAMES MUTELE WEINDABA ..... 1<sup>ST</sup> DEFENDANT**

**SAHARE KISUPI MWICHAMBE ..... 2<sup>ND</sup> DEFENDANT**

**WILLIE MAHUGU NDABI ..... 3<sup>RD</sup> DEFENDANT**

**DAVID WAGURA MATHAI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. The Plaintiff/ Applicant herein, Ndovu Rock Limited moved this Honorable Court for the hearing and determination of their Notice of Withdrawal application dated 30<sup>th</sup> May, 2023 brought under the dint of the provisions of Order 25 Rule 1 of the Civil Procedure Rules, 2010.
2. Upon service, the 2<sup>nd</sup> Defendant objected to the Notice of withdrawal of the suit dated 12<sup>th</sup> June, 2023 to which the Plaintiff filed a preliminary objection dated 13<sup>th</sup> June, 2023.

**II. The Plaintiff/ Applicant's case**

3. The Plaintiff sought for the following orders:-

That pursuant to Order 25 Rule 1 of the Civil Procedure Rules 2010, the Plaintiff has withdrawn the whole of suit herein being; the Plaint dated 18<sup>th</sup> January 2022, together with the Notice of Motion Application under Certificate of Urgency, dated 18<sup>th</sup> January 2022.



### III. Submissions

4. On 6<sup>th</sup> July, 2023 while all the parties were present in Court, they were directed to have the Notice of withdrawal application dated 30<sup>th</sup> May, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that all the parties obliged and on 13<sup>th</sup> July, 2023 a ruling date was reserved on Notice by Court accordingly.

#### A. The Written Submissions by the Plaintiff/Applicant

5. The Plaintiff through the Law firm of Messrs. Namasaka & Kariuki Advocates filed their submissions dated 7<sup>th</sup> July, 2023. Mr. Ayisi Advocate commenced his submission by stating that on 31<sup>st</sup> May, 2023, the Plaintiff through a Notice of Withdrawal dated 30<sup>th</sup> May, 2023, sought to discontinue this suit against all the Defendants. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had no objection against the withdrawal and thus the suit against them stands as withdrawn with no order as to costs. However, the advocate “allegedly” representing the 2<sup>nd</sup> Defendant objected to the withdrawal of the suit. The court then directed the advocate to file a formal application, objecting to the withdrawal be filed.
6. In breach of the court’s directions and the provisions of the *Civil Procedure Rules*, 2010 to wit Order 51, the law firm of Messrs. Marende Necheza Advocates filed a document called “Notice of Objection to the Notice of Withdrawal dated 30<sup>th</sup> May, 2023”. The Learned Counsel submitted that this is an unknown pleading within the definition of an Application as provided for under Order 51 Rule 1. In response to the said Notice of Objection, the Plaintiff filed a Preliminary Objection dated 13<sup>th</sup> June, 2023 advancing the following grounds;
  - a. The Notice of Objection dated 12<sup>th</sup> June 2023 is incompetent, fatally defective and abuse of Court process as it is made and filed contrary to the Orders of this Court, issued on 31<sup>st</sup> May 2023, as it is not an application contemplated within the provisions of Order 51 of the *Civil Procedure Rules* as ordered by Court.
  - b. The Notice of Objection dated 12<sup>th</sup> June 2023 is incompetent and fatally defective and an abuse of Court process having been filed by counsel who is not properly on record and therefore lacks audience before this Honourable Court.
  - c. This Honourable Court lacks jurisdiction to entertain the matter further, having been rendered functus officio subsequent to the filing of the Plaintiff’s Notice of Withdrawal of suit dated 29<sup>th</sup> May, 2023.
  - d. The Plaintiff’s right to withdraw the suit cannot be curtailed, taken away neither can a Court of Law, bar the Plaintiff’s exercise of such right to withdraw.
  - e. The Notice of Objection dated 12<sup>th</sup> June 2023 is thus frivolous, vexatious, filed in bad faith and a total and classic example of abuse of the court process and ought to be dismissed in the strongest terms.
7. On the issue of determination, the Learned Counsel referred the Honourable Court to address the following issues:-
  - a. Whether the suit should be withdrawn as per the Notice of Withdrawal dated 30<sup>th</sup> May, 2023.
  - b. Who should bear the costs.
8. The Learned Counsel submitted to the Court that the Notice of Withdrawal dated 30<sup>th</sup> May, 2023 should be allowed for the reason that Order 25 Rule 1 of the Civil Procedure Rules, 2010 allows the



Plaintiff to withdraw a suit any time before the same is set down for hearing. All that the Plaintiff is required to do is to file a written notice and serve it upon all the defendants. The Plaintiff complied with this provision by filing a Notice of Withdrawal dated 30<sup>th</sup> May, 2023. The provision of Order 25 Rule 1 provide:

“At any time before the setting down of the suit for hearing the Plaintiff may be notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

9. Upon filing a notice of withdrawal of a suit, the Plaintiff ceases to be a Plaintiff. In other words, the suit no longer exists and consequently the court lacks jurisdiction to handle a matter that has been withdrawn. A party’s right to withdraw a suit cannot be taken away and the same can be exercised even on an appeal. The Supreme Court in the case of: “[\*Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 7 Others, SC App. No. 16 of 2014\*](#)”, while addressing the right of a party to withdraw an appeal stated:-

“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.”

10. The corollary is that a court cannot compel a party who no longer wishes to prosecute a suit to continue with the same. As stated by the Supreme Court in the case of:- “Nicholas Kiptoo Arap Korir Salat (Supra), the court can only make an order for award of costs, where appropriate, once a party expresses a wish to withdraw a suit. Similarly, the court in the case of:- “[\*Beijing Industrial Designing & Researching Institute – Versus - Lagoon Development Limited \[2015\]\*](#) eKLR” and “[\*Charles Kiptarbei Birech vs Paul Waweru Mbugua & another \[2021\]\*](#) eKLR” held a similar view that a party’s right to withdraw a suit cannot be barred nor curtailed by court. Likewise, there is no reasonable ground why the plaintiff herein should be prevented from withdrawing its suit.

11. Further the Learned Counsel submitted that the notice of objection dated 12<sup>th</sup> June, 2023 is incompetent and fatally defective. He said so because the same was filed by an advocate who is not properly on record. The Law firm of Messrs. Marende Necheza have neither entered appearance nor file a notice of appointment on behalf of the 2<sup>nd</sup> Defendant. Without a proper appearance, any pleading filed by the said firm of advocates is invalid, defective and incompetent for the reason that locus standi goes to the root of the suit. Indeed, Mr. Shimaka who allegedly appeared for the 2<sup>nd</sup> Defendant should never have been granted audience before this Honorable court. In “[\*Lalji Bhimji Shangani Builders & Contractors – Versus - City Council of Nairobi \(2012\)\*](#) eKLR” the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

12. Furthermore, the notice of objection was an unknown pleading under the civil procedure rules. Parties should not be allowed to invent their own pleadings which are not recognized under the law. In this matter, Order 51 of the Civil Procedure Rules, 2010 stipulates the mode of instituting applications. It is either a notice of motion or a chamber summons.



13. On the issue of costs, the Learned Counsel submitted that even though the court has the discretion to determine whether or not to award costs, such discretion must be judiciously exercised. In this case, the settled principle that costs follow an event has no application in this matter since the Law firm of Messrs. Marende Necheza was a stranger in this suit having not regularized their appearance as at the time the Plaintiff moved the court to withdraw the suit. They are therefore not entitled to be awarded any costs.
14. The Notice of Objection filed was also a stranger to the procedures before this Court and in their humble submissions, such a gross failure to follow the laid down procedures is enough to warrant the 2<sup>nd</sup> Defendant to be denied costs and the Plaintiff to be awarded costs for going through the trouble of defending the said Notice of Objection. On the contrary, the Plaintiff ought to be awarded costs for being unnecessarily kept in these proceedings by a party not on record. He relied on the case of: - "*Stephen Mwandware Ndighila – Versus - Steel Makers Limited [2022]* eKLR", Lady Justice Maureen Onyango, J held that the bill of costs filed by a firm of Advocates that was not properly on record was irregular as it was filed by a stranger. It was therefore null and void.
15. As a consequence, the Learned Counsel respectfully submitted that the Notice of Objection dated 12<sup>th</sup> June, 2023 was misplaced, incompetent and defective, and the same should be dismissed with costs. He thus urged the court to arrive at the inescapable conclusion that the Plaintiff's Notice of Withdrawal of Suit dated 30<sup>th</sup> May, 2023 should be granted.

#### **IV. Analysis & Determination.**

16. I have carefully read and considered the pleadings herein by the Plaintiff and the 2<sup>nd</sup> Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
17. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
  - a. Whether in the circumstances of this case, the Plaintiff's Notice of Withdrawal of the Plaintiff's suit filed on 19<sup>th</sup> January, 2022?
  - b. Whether the Plaintiff's withdrawal of the suit should be subjected to payment of costs to the 2<sup>nd</sup> Defendant.

#### **a). Whether in the circumstances of this case, the Plaintiff's Notice of Withdrawal of the Plaintiff's suit filed on 19<sup>th</sup> January, 2022**

18. Under this Sub – heading, the Court wishes to extrapolate the provision of Order 25 (1) & (2) of the Civil Procedure Rules, 2010. It provides for withdrawal of suits as follows;
  - “(1) At any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

(2)



- (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.”
19. Primarily, it is noteworthy that there is a major distinction in terms of the legal import with regard to the interpretation of Order 25 (1) and (2). This is as far as the leave of Court and costs implication is concerned. To begin with, the right to withdraw a suit under the provision of Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. No leave of Court is required. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.
20. In the case of “*Nicholas Kiptoo Arap Korir Salat* (Supra), the Supreme Court stated as follows:-
- “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.”
21. In the case of “*Beijing Industrial Designing & Researching Institute* (Supra), the court of appeal stated as follows;
- “As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others SC 154/2002* identified those circumstances to include where;
- i. A Plaintiff realizes the weakness of his claim in the light of the defence put up by the Defendant.
  - ii. A Plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,
  - iii. Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
  - iv. A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.”
22. As acknowledged by the above cited decisions, the right provided under Order 25 Rules 1 & 2 (1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his sweet will at any time before the judgment is delivered. In the case of “*Allah Baksh – Versus - Niamat Ali 1892 All WN 53 (1)*”. the court described the right as “absolute” and capable of being exercised “without any permission from the court”. However, under the third category, withdrawal requires permission of the court but the plaintiff does not need consent of the defendant.



23. In the instant case, and from the record its not in dispute that the suit had not been set down for hearing. The Plaintiff and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had recorded a consent and the suit between them was marked as settled. Therefore, the Plaintiff does not need to seek leave of court to withdraw his suit. Even in circumstances where a party needs leave of court to withdraw their suit, the court would allow the application subject to just terms. It will however be noted that under Order 25 Rule 1, the Notice of Withdrawal takes effect upon service of the same on all parties in the suit. In this case, the Plaintiff served the parties but the 2<sup>nd</sup> Defendant objected to the withdrawal.
24. The wisdom flowing from the above references is; what can the High Court do, in exercise of its inherent jurisdiction, to achieve the desirable justice and practicality in the prayers sought in an application which the law does not specifically provide for? In this respect, it must be mentioned at the outset the inherent powers of the court are not an open licence for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation. As stated above, Order 25 provides in clear terms three circumstances upon which a Plaintiff can withdraw his suit. Had Parliament desired a reinstatement, it could have provided so in clear terms.

**b). Whether the Plaintiff's withdrawal of the suit should be subjected to payment of costs to the 2<sup>nd</sup> Defendant.**

25. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh vs Tarchalan Singh eKLR (2014)" and "Cecilia Karuru Ngayo vs Barclays Bank of Kenya Limited, eKLR (2014)". In this case, as Court finds that the costs of the application shall be in the cause.
26. Having filed the suit, served the same to the 2<sup>nd</sup> Defendant who retained the services of an advocate who subsequently appeared before court but was inclined to reaching a consent to settle the matter out of court but filed documents in the suit, appeared in court upon listing of the matter for mention, whereby ideally the Plaintiff ought to be caused to paying costs. However, be that as it may, taking that the suit had not been set down for hearing at the time of the withdrawal it is just fair, reasonable and equitable each party to bear their own costs..

**V. Conclusion & Disposition**

27. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-
- a. That the Notice of Withdrawal application dated 30<sup>th</sup> May, 2023 is found to have merit and is hereby allowed in its entirety.
  - b. That the suit by the Plaintiff filed via a Plaint dated 18<sup>th</sup> January, 2022 and filed on 19<sup>th</sup> January, 2022 herein be and is hereby marked as withdrawn. Thus the matter is closed.
  - c. That each party to bear their own costs.



**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT  
MOMBASA THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**HON. JUSTICE L. L. NAIKUNI**

**JUDGE**

