



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**ELC JR NO. 3 OF 2017**

**FORMERLY MACHAKOS MISC. CIVIL APPLICATION NO. 141 OF 2011**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW PROCEEDINGS FOR  
ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF THE LAND DISPUTES TRIBUNAL ACT. NO. 18 OF 1990 AND LAND  
PARCEL NO. KAJIADO/OLCHORO - ONYORE/1327**

**AND**

**IN THE MATTER OF THE DECISION OF THE KAJIADO LAND DISPUTES TRIBUNAL  
MADE ON THE 1ST MARCH 2011 OR THEREABOUTS IN CASE NO. TC/224/10/2010 AND  
LAND DISPUTE TRIBUNAL NO. 36 OF 2011 OF THE RESIDENT MAGISTRATE'S COURT  
AT KAJIADO**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE CHAIRMAN LAND DISPUTES TRIBUNAL AT KAJIADO....FIRST RESPONDENT**

**THE RESIDENT MAGISTRATE'S COURT AT KAJIADO.....SECOND RESPONDENT**

**THE ATTORNEY GENERAL.....THIRD RESPONDENT**

**DR. MUNYUA WAIYAKI.....FIRST INTERESTED PARTY**

**WILLIAM MONIREI.....SECOND INTERESTED PARTY**

**DAVID MONIREI.....THIRD INTERESTED PARTY**

**EX -PARTE APPLICANT.....DAN AMEYO**

**RULING**

By motion dated 10th October 2012 the 2nd and 3rd interested parties seek the following prayers:

- 1) **That** this application be certified urgent and service hereof be dispensed with in the first instance.
- 2) **That** pending the hearing and determination of this application *inter partes*, the Honourable Court be pleased to temporarily stay and/or set aside the Notice of Withdrawal of suit dated 17th August, 2012 and filed in court on 23rd August 2012 by the ex parte applicant.
- 3) **That** the Notice of Withdrawal of suit dated 17th August 2012 and filed in court on 23rd August 2012 by the Ex parte applicant be discharged and/or set aside.

The application is based on the following grounds:

- a) **That** the notice of withdrawal of suit filed by the ex-parte applicant is contrary to law, an abuse of the process of the court and the same has been filed *malafides* and/ or for improper motives.
- b) **That** the notice of withdrawal of suit was filed by the ex parte applicant without the express consent and/or participation of the 2nd and 3rd interested parties herein who are directly affected by the purported withdrawal of suit bearing in mind that the suit herein is based on the decision of the Lands Disputes Tribunal at Kajiado which decision was subsequently adopted as order of the court by the Resident Magistrates Court Kajiado and now a subject of the suit herein.
- c) **That** the Deputy Registrar of this honourable court has no powers to endorse and or to accept the Notice of Withdrawal of suit in the circumstances and in nature of the Judicial Review proceedings herein.
- d) **The** suit property in question of the Judicial Review proceedings herein, that is Land Parcel Number Kajiado/Olchoro-Onyore/1327 is occupied by the 2nd and 3rd interested parties together with their siblings and was originally owned by their deceased father one Lekiremu Ole Monirei thus the purported withdrawal of the suit adversely affects their status of ownership and occupation of the suit property aforesaid
- e) **That** in light of the foregoing, any decision that is likely to be made in this matter will directly affect the 2nd and 3rd interested parties herein.
- f) **That** this application is made in good faith and in the best interests of justice least the 2nd and 3rd interested parties suffer prejudice if the notice of withdrawal aforesaid is endorsed as an order of the court.

The application is further supported by the affidavit of WILLIAM MONIREI who is the 2nd interested party. He avers that his deceased father was the owner of Land Parcel Number Kajiado/Olchoro - Onyore/1327; and that sometime in October in the years 2010 and 2011 jointly with the 3rd interested party who is his brother, they instituted a case at the Kajiado Land Disputes Tribunal Case Number 224 of 2010 against the 1st Interested Party Dr. Munyua Waiyaki . Further that the said tribunal had ruled in favour of the 1st interested party. That the ex parte applicant took out Judicial Review proceedings challenging the said decision and by an order of the court dated 18th July, 2012 the 2nd and 3rd interested parties were enjoined in the said proceedings. That the 2nd and 3rd Interested parties thereafter filed a replying affidavit on 23rd August, 2012. That the ex parte applicant filed a notice of withdrawal of the suit on the 23rd August 2012 and served the same upon the 2nd and 3rd Respondents' advocates on the 12th September, 2012. The 2nd interested party further avers that the withdrawal of this suit will affect him and the 3rd interested party as they were adversely affected by the decisions of the Kajiado Land Disputes Tribunal and the Resident Magistrates' Court at Kajiado respectively. The 2nd interested party states that together with the 3rd interested party and their siblings they are in imminent danger of being dispossessed /deprived of the suit property as a result of the withdrawal of the suit.

The 1st interested party filed a replying affidavit and grounds of opposition in response to the application by the 2nd and 3rd interested parties. He averred that he purchased the suit property Kajiado/Olchoro - Onyore/1327 from one Mr. Lekiroremu Ole Monirei (deceased) who is the father of the 2nd and 3rd

interested parties. He paid Kshs. Nine Hundred and Twenty Thousand (Kshs. 920,000) to the late Mr. Lekiroremu Ole Monirei and was given actual possession of the suit property. He reiterates that at no point did the 2nd and 3rd interested parties raise any objection to the transaction during their father's lifetime. He states that the 2nd and 3rd interested parties lodged a claim against him at the Kajiado Land Disputes Tribunal over the suit property vide Kajiado North Land Disputes Tribunal Case Number 224/10/2010. Further that the 2nd and 3rd interested parties acknowledged that he had purchased the suit property and only disputed that he had paid for 100 acres instead of the 230 acres. Further, that during the hearing of the dispute at the said Tribunal, the wife to the late Monirei who is the mother to the 2nd and 3rd interested parties confirmed that he had purchased the suit property and paid for it. There was a site visit conducted by officials from the tribunal in the company of the 1st, 2nd and 3rd interested parties after which the said tribunal declared him as the absolute registered proprietor with indefeasible right title and interest in the property known as Kajiado/Olchoro - Onyore/1327 measuring 230 acres. The ruling from the said tribunal was subsequently adopted as a judgment of the court by the Senior Magistrate's Court on the 10th May, 2011. The 1st interested party further avers that the 2nd and 3rd interested parties thereafter appealed at the Provincial Land Disputes Appeal Committee at Nakuru in Tribunal Appeal No. 34 of 2011 but the said appeal was abandoned. That the ex parte applicant erroneously applied for leave to institute Judicial Review on 6th June 2011 believing that the award by the 1st Respondent on 18th March 2011 relating to Kajiado/Olchoro - Onyore/1327 affected Kajiado/Olchoro - Onyore/3673 where the ex parte applicant operated a petrol station. That the ex parte applicant subsequently instituted Judicial Review proceedings on 8th August 2011.

Both the 1st, 2nd and 3rd Interested parties filed written submissions in respect of the said application. The submissions were highlighted by their counsels Ms Bullut and Mr. Masika respectively.

Mr. Masika argued that the notice to withdraw the Judicial Review was an abuse of the court process. Judicial Review is not an ordinary civil suit and that the Civil Procedure Rules do not apply to it. He provided a litany of authorities to support this point. He relied on the case of **Welamondi Vs. The Chairman Electoral Commission of Kenya (2002) 1KLR** Where Ringera J held that '**Judicial Review proceedings under Order 53 of the Civil Procedure Rules are a special procedure: which are invoked whenever orders of certiorari, mandamus or prohibition are sought in either criminal or civil proceedings. In exercising power under order 53, the court is exercising neither civil nor a criminal jurisdiction in the strict sense of the word. It is exercising jurisdiction sui generis. It therefore follows that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure Rules and Section 42,79 and 80.....'**

He emphasized that it is incompetent to invoke the Civil Procedure Rules and thus the Notice of Withdrawal of the Judicial Review is defective under the Law. He further reiterated that even though the Notice of Withdrawal is defective under the law, there was no Judge who endorsed the order; further that the Deputy Registrar did not have capacity to do so. He supported his argument with the Case of **Republic Vs. Attorney General and Another (2012) eKLR** where Justice Githua ruled at page 3 that withdrawal is not formally effected if there is no court order marking suit as withdrawn.

Masika averred that the Notice of Withdrawal was purposely tailored for the benefit of the ex parte applicant and 1st interested party to the detriment of the 2nd and 3rd interested parties without any courts determination. He emphasized that it would be unfair to lock out the 2nd and 3rd interested parties without granting them an opportunity of being heard.

Masika argued that the Deputy Registrar has no power to endorse and accept Notice of Withdrawal of suit in the nature of a Judicial Review and referred the court to the **Case of Justus Nyangaya, Dr. Boro, Dave Mumbi and the Social Democratic Party Vs. The Societies Act and the Registrar of Societies (Nairobi HC Misc. Application No. 1133 of 2002) at Page 24 where the court observed that ' I further find and hold that the consent judgment/order was a nullity since the Deputy Registrar did not have powers to enter it - it being not a ministerial act.'**

He said the Deputy Registrar cannot make such a substantive order that will make the 2nd and 3rd interested parties leave the suit parcel of land. If the Notice of Withdrawal of Suit is permitted then the

ruling by the Kajiado Land Disputes Tribunal will be considered good as it was adopted by the Kajiado Magistrate Court. Masika however confirmed that there is a pending case Kajiado ELC No. 205/2007 where the 2nd and 3rd Interested parties are contesting ownership of the suit land. He emphasized that the 2nd and 3rd Interested parties have a substantive interest in the Judicial Review. That the Notice of Withdrawal of the suit bars the court from making a proper determination of the matter. Masika argued that the letter by the District Surveyor that was attached by the ex parte applicant came after the Judicial Review had been filed. He reiterated that the withdrawal is for ulterior motives between the ex parte applicant and the 1st interested party; and that filing of Notice of Withdrawal is not synonymous with the withdrawal being given effect. He said Notice of Withdrawal occasions an injustice to the 2nd and 3rd interested parties.

Ms Bullut for the 1st interested party opposed the 2nd and 3rd Interested parties application and stated that the ex parte application seeking leave to file the Judicial Review was filed under the erroneous belief that the Tribunal Award made on Land Parcel Number Kajiado/Olchoro - Onyore/1327 also affected Kajiado / Olchoro - Onyore/3673 where the ex applicant's petrol station was situated. It was because of this that the ex parte applicant's advocate(Waruhiu & Co. Advocates) sought clarity from the District Surveyor Kajiado regarding the boundary of Kajiado/Olchoro - Onyore/1327 and on 15th September 2011 the said Surveyor confirmed that the boundaries of the Petrol Station fell outside the suit property. Based on this information, the ex parte applicant sought to withdraw the judicial review as guided by order 25 rule 1 of the Civil Procedure Rules. The provisions of order 25 rule 1 is clear that a suit that has not been set for hearing may be withdrawn and parties are free to withdraw a suit before it is set down for hearing and serve notice upon all the parties. This is what was done by the ex parte applicant. She argued that the 2nd and 3rd interested parties have no basis to oppose the withdrawal of the suit. On the issue raised by the 2nd and 3rd interested parties that the Notice to withdraw the judicial review cannot fall under the provisions of Civil Procedure Rules, she relied on the case of **Republic Vs. District Land Registrar Uasin Gishu & Another (2014) eKLR** where Justice Fred Ochieng ruled at Page 9 and 10 that .....**It is an offence for the applicant to proceed with a matter that is not tenable because the cause of action has collapsed.**

Ms. Bullut reiterated that the 2nd and 3rd interested parties are insistent on flogging a dead horse. She further argued that the 2nd and 3rd interested parties do not meet the threshold of the role of an interested party in a judicial review. She relied on the case of **Republic Vs. Director of Public Prosecutions & 2 others Ex parte Peter Mulwa Mbithi (2012) eKLR** where an interested party was defined as '**any person who has sufficient interest in the outcome of the judicial review proceedings must be served as an interested party.**'

The issues for determination:

- Whether the Notice of Withdrawal of the Judicial Review is an abuse of the court process
- Whether endorsement of a Notice of Withdrawal of Suit by a Deputy Registrar renders it ineffective.
- Whether this Judicial Review is tenable after the collapse of the cause of action.

Order 25 rule 1 stipulates that '**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**'. In this instance the Judicial Review had not been set down for hearing when the ex parte applicant filed and served all parties with the Notice of Withdrawal. It is the contention of the 2nd and 3rd Interested parties that the Notice of Withdrawal of Suit was ineffective as it was recorded by the Deputy Registrar and not the Judge. The ex parte applicant filed and served the Notice of Withdrawal of Suit in accordance with order 25 Rule 1. Further, Order 49 Rule 7 (b) (xi) grants the Registrar powers to hear and determine an application made under Order 25. It is my finding that the said Notice of Withdrawal does not amount to an abuse of the process. I read no malice by the ex parte applicant in lodging the notice of withdrawal of the said Judicial Review as the substratum of the said Judicial Review had already collapsed before the same had been set for hearing. From the proceedings, it is clear, he was a victim of the erroneous ruling of Kajiado Land

Disputes Tribunal which indicated that the land where his petrol station was situated was part of the suit land. This position was however later clarified by the District Surveyor. Any right thinking member of the society would obviously move to court to safeguard his rights. As per the proceedings before me, it is evident that 2nd and 3rd Interested parties persist to flog a dead horse because the cause of action for the Judicial Review had collapsed. Further, there will be no prejudice suffered by the 2nd and 3rd interested parties if this Judicial Review is withdrawn as they still have a pending suit Kajiado ELC No. 205/2007 before this honourable court between themselves and the 1st interested party. They have had other opportunities where they claimed ownership of the suit land and even appealed against the decision of the Kajiado Land Disputes Tribunal to the Rift Valley Land Disputes Tribunal. They have not informed the court of the outcome of the said appeal.

It is not in doubt that Judicial Review is a special procedure governed by the Constitution. The Constitution itself does not provide the procedure for instituting or withdrawing Judicial Review but stipulates that justice should be administered without undue regard to procedural technicalities. It is only within the Civil Procedure Rules under Order 53 that provides for the procedure of instituting Judicial Review. There is however no express provision in the Civil Procedure Rules stipulating how Judicial Review should be withdrawn. However any party who institutes a suit has capacity to withdraw the same if he/she does not intend to proceed with it. In this instance the ex parte applicant relied on Order 25 rule 1 of the Civil Procedure Rules to file the Notice of Withdrawal of the Judicial Review and the said Notice was endorsed by the Deputy Registrar. I must say the 2nd and 3rd interested parties seek to rely on matters of technicality, which offends the provisions of article 159 (2) (d) of the Constitution which stipulate that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. The reason for the Deputy Registrar endorsing the Notice of Withdrawal is anchored within the Civil Procedure Rules and the 2nd and 3rd Interested parties cannot rely on technicalities to oppose the said Notice. This position is affirmed in the case of Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR where Justice Ochieng held that .. **to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities. '**

Further that Order 25 rule 1 does not make any provisions indicating that if the Notice of Withdrawal of the Suit was not endorsed by a Judicial Officer, it is deemed ineffective. In the matter at hand, what we need to ask is whether the Notice of Withdrawal of Suit formed part of a court record. In the case of **R Vs. Welamondi**, it was clear that there was no evidence of the Notice of Withdrawal of Suit forming part of the court record. However in the case at hand, there is a duly filed Notice of Withdrawal of the Suit within the court file. One question that the 2nd and 3rd interested parties ought to ponder is whether the Judicial Review they are insisting upon will withstand the test of time now that the ex parte applicant has filed a notice to withdraw it.

I consequently disallow the Notice of Motion application dated the 10th October, 2012 by the 2nd and 3rd Interested parties and do endorse the Notice of Withdrawal of the Suit dated the 17th August, 2012 and filed on 23rd August, 2012 to be properly on record.

Order accordingly.

**Dated and delivered at Kajiado this 19<sup>th</sup> day of April 2017**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION.**

Masika for applicant/2<sup>nd</sup> & 3<sup>rd</sup> Interested parties.

Bullut for 1<sup>st</sup> interested party.

Mpoye Court Clerk.