



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**LAND & ENVIRONMENTAL DIVISION**

**ELC NO. 31 OF 2012**

**ATTORNEY GENERAL.....1<sup>ST</sup> PLAINTIFF**

**BUSIA DAIRY FARMERS CO-OPERATIVE SOCIETY.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAMES NDIRANGU NG'ANG'A ..... DEFENDANT**

**BENSON NG'ANG'A NDIRANGU ..... INTERESTED PARTY**

**RULING**

1. The application before me is a Notice of Motion dated 16/5/2017 and filed on the same date. It was filed by the 2<sup>nd</sup> Plaintiff **BUSIA DAIRY FARMERS CO-OPERATIVE SOCIETY** - essentially against the 1<sup>st</sup> Plaintiff - **ATTORNEY GENERAL** - because the 1<sup>st</sup> Plaintiff has intimated intention to withdraw the suit. The 2<sup>nd</sup> Plaintiff is opposed to such withdrawal, hence this application. The other parties in the suit have joined the fray and this is because of actual or perceived benefits that the proposed withdrawal brings to them. The other parties are JAMES NDIRANGU NG'ANG'A (Defendant) and BENSON NG'ANG'A NDIRANGU (Interested Party).

2. The prayers in the 2<sup>nd</sup> Plaintiffs application are as follows:

Prayer 1: Notice of withdrawal of suit against the Defendant dated 22/3/2017 and all consequential orders be set aside.

Prayer 2: The costs of the application be provided for.

3. According to the 2<sup>nd</sup> Plaintiff, the proposed withdrawal is irregular as leave for withdrawal was not sought first. It would appear to be the position of the Plaintiff that as the case is part-heard, Order 25 Rules 1 and 2(2) of Civil Procedure Rules, 2010, would require that such leave be sought first. The 2<sup>nd</sup> Plaintiff complains that no explanation has been given for the sudden withdrawal of the case. It was averred too that the withdrawal jeopardises the 2<sup>nd</sup> Plaintiff's case.

4. The 1<sup>st</sup> Plaintiff responded vide replying affidavit filed on 19/4/2017. The 1<sup>st</sup> Plaintiff asserted that the case was filed on behalf of the government and its various agencies. The 2<sup>nd</sup> Plaintiff is not one such agency. It was averred that the 2<sup>nd</sup> Plaintiff applied to join the suit and was allowed. After that, the 2<sup>nd</sup> Plaintiff was supposed to file pleadings but did not. The 2<sup>nd</sup> Plaintiff was said to have failed to do so

because the principle of RES-JUDICATA would be an obstacle to it. That is why it has been litigating through the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff said that no brief is held for 2<sup>nd</sup> Plaintiff.

5. As pointed out earlier, the Defendant and the Interested Party also joined the fray. The Defendant first filed grounds of opposition on 16/5/2017 and later filed a replying affidavit on 19/5/2017. His position is that the application is an abuse of the Court process. He pointed out that it is the right of the 1<sup>st</sup> Plaintiff to seek to withdraw the matter. In any case, the Defendant further said, the 2<sup>nd</sup> Plaintiff was given a chance to file a case against him but failed to do so. And previous litigation between the Defendant and 2<sup>nd</sup> Plaintiff had led to eviction of 2<sup>nd</sup> Plaintiff from the suit land.

6. On his part, the Interested Party filed a replying affidavit on 16/5/2017. His response is in general agreement with that of 1<sup>st</sup> Plaintiff and Defendant.

7. The application was canvassed by way of written submissions. The 2<sup>nd</sup> Plaintiff's submissions were filed on 23/5/2017. It was reiterated that the 1<sup>st</sup> Plaintiff could not withdraw the suit without seeking leave. The 2<sup>nd</sup> Plaintiff submitted however that should the Court find otherwise, then the suit should be allowed to proceed to its conclusion between itself and the Defendant. This position is taken because the suit is said to be a joint one.

8. The 1<sup>st</sup> Plaintiff's submissions were filed on 19/4/2017. According to the Plaintiff, the application is defective and incompetent. The application was also said to be aimed at vexing the other parties and inordinately prolong an already concluded matter. The rest of the 1<sup>st</sup> Plaintiff's submissions is actually a re-statement of what the replying affidavit contains.

9. The Defendant submissions were filed on 19/5/2017. It was pointed out that the 2<sup>nd</sup> Plaintiff is not a proper party in this suit. The Court was urged to dismiss the suit. The Interested Party also asked for dismissal. His submissions were filed on 18/5/2017. According to the Interested Party, the application herein is only meant to circumvent the cause of justice by delaying the conclusion of the suit.

10. I have considered the application, the various responses made, and the submissions of all parties. It is clear that the 2<sup>nd</sup> Plaintiff would wish the 1<sup>st</sup> Plaintiff to proceed with the case against the 1<sup>st</sup> Plaintiff's wish. When a plaintiff comes to court to agitate for his rights, he decides and designs the scope of his case. No one else can do that for the Plaintiff. If such plaintiff decides not to pursue his rights, no one, not even a court of law, can force him to pursue them.

11. In our Civil Procedure Act and/or rules, there is no provision enjoining the Court to refuse permission to withdraw a suit. There is no provision too to compel a plaintiff to proceed with a suit. And the principle underlying this position is simple: **INVITO BENEFECIUM NON DATUR**, which is legal lingo for the position that the law confers upon a man no rights or benefits which he does not desire.

12. The 1<sup>st</sup> Plaintiff clearly does not desire to pursue the case. The 2<sup>nd</sup> Plaintiff obviously wants the 1<sup>st</sup> Plaintiff to continue with the case. The fact of the matter is that the position of the 2<sup>nd</sup> Plaintiff is misplaced in law. The correct position in law is that no court can revoke a withdrawal.

13. It appears to me that the 2<sup>nd</sup> Plaintiff was not sure of the correctness of its position and that is why it urged the Court to allow it to continue with its case in case it allows the application. This request is again misplaced. Such a prayer is in the first place not included in the application; it only comes in the submissions. Then secondly, it is not for the court to decide for the 2<sup>nd</sup> Plaintiff what to do. It is upon the 2<sup>nd</sup> Plaintiff to weigh up its options and decide what to do. It is as simple as that. Besides, the 2<sup>nd</sup> Plaintiff has been proceeding with the case and has not been disallowed to do so. The request is therefore un-necessary.

14. The various parties in this case made wide ranging remarks both in their responses and submissions.

Most of these remarks were un-necessary. The facts on which the application was premised were simple. And the law is also simple as I have stated in this ruling. That is why I have avoided responding to some of the remarks.

15. The upshot, in light of the foregoing, is that the application herein is misplaced and unmeritorious. I therefore dismiss it with costs.

**Dated, signed and delivered at Busia this 26<sup>th</sup> day of July, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: .....

2<sup>nd</sup> Plaintiff: .....

Defendant: .....

Interested Party: .....

Counsel: .....