



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E258 OF 2020**

**ELINA MWAYITSI NAKAYA.....1<sup>ST</sup> PLAINTIFF**

**SAMSON MASABA MUNIKA.....2<sup>ND</sup> PLAINTIFF**

**=VERSUS=**

**NANCY WANJIRU WANGAI.....DEFENDANT**

**EPHRAIM MIANO THAMANI.....1<sup>ST</sup> INTERESTED PARTY**

**PATRICK KANGERI NYAMU.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This Ruling determines four applications and a notice of preliminary objection. The first application is the Plaintiffs' application dated 7<sup>th</sup> December 2020, the second one is another Plaintiffs' application dated 23<sup>rd</sup> December 2020, the third one is the 1<sup>st</sup> and 2<sup>nd</sup> Interested parties application dated 2<sup>nd</sup> July 2021 and the fourth one is the first Plaintiff's application dated 20<sup>th</sup> September 2021 and also the Notice of Preliminary Objection by the Defendant dated 23<sup>rd</sup> December 2020.

2. **Samson Masaba Munikah and Elina Mwayitsi Nakaya** the Plaintiff herein commenced this suit vide a plaint dated 22<sup>nd</sup> October 2021 seeking for various reliefs and upon service of the said their pleadings, various applications and notice of preliminary objection were Contemporaneously to the filing of the plaint they also filed a Notice of Motion application where she sought a temporary stay of the decree and judgment delivered in Nairobi ELC No. 554 of 2008.

3. The Application is premised on the grounds on the face of it and was supported by the Affidavit sworn by **Samson Masaba Munika the 2<sup>nd</sup> Plaintiff** herein.

4. The Plaintiffs application dated 23<sup>rd</sup> December 2020 seeks for injunctive restraining orders against the Defendant from evicting, taking possession and demolishing the structures located at suit property Nairobi/Block 97/2347 pending the determination of the suit. The application based on the grounds on its face and is equally supported by the affidavit of the 2<sup>nd</sup> Plaintiff sworn on the same day.

5. The 1<sup>st</sup> and 2<sup>nd</sup> interested party subsequently moved this court vide their application dated 2<sup>nd</sup> July 2021 where they sought to be enjoined to the proceedings and temporary injunctive orders against the defendant pending the hearing and determination of this suit. On 9<sup>th</sup> November 2021, this court allowed them to be joined to the proceedings and the issue for temporary injunctive orders was reserved for determination together with the other pending applications that were on record.

6. The 1<sup>st</sup> Plaintiff, **Elina Mwayitsi Nakaya** separately filed an application dated 20<sup>th</sup> September 2021 wherein she sought inter alia for dismissal of the suit for having been filed without proper and valid instructions. The application was based on the grounds that she had not given any instructions to the 2<sup>nd</sup> Plaintiff to file the said suit on behalf of the estate of the late Alfred Josse Nakaya. The application was also supported by her own affidavit sworn on **20<sup>th</sup> September 2021**.

7. The Defendant's preliminary objection sought to have the suit stuck out on the grounds that the same lacked a verifying affidavit from the **1<sup>st</sup> Plaintiff Elina Mwayitsi Nakaya** and hence it was a nullity as was held in the case of ***Mohamed Bwana Obo Athman & 24 Others v Kenya Airport Authority [2014] eKLR and Embu Nyangi Ndiiri Proposed Society v Daniel Nganga & Anor [2014] eKLR***

8. The court's directions were issued on 9<sup>th</sup> and 29<sup>th</sup> November 2021 directing all the four applications and the notice of preliminary objection to be canvassed by way of written submissions and a ruling to be issued in respect to the same.

9. I have considered all the four applications together with the Defendant's Notice of Preliminary Objection, the written submissions and the responses filed thereto. The issues which in my opinion arise for determination and which can dispose of all the applications are summarized as follows: -

*i. Whether the suit filed herein is competent?*

*ii. What are the appropriate orders/remedies that can be issued herein?*

#### **Issue No. 1**

##### **Whether the suit filed herein is competent?**

10. The 1<sup>st</sup> Plaintiff averred that the 2<sup>nd</sup> Plaintiff had filed this instant suit alleging that he was a trustee together with the 1<sup>st</sup> Plaintiff to the estate of the late Alfred Josse Nakaya (deceased). In her supporting affidavit sworn on 30<sup>th</sup> September 2021 together with another affidavit she deposed that she has not issued instructions to Samson Masaba Munika to either file or represent her in this suit and she was only informed of the same by the Defendant.

11. She also deposed that she had instructed the firm of **Aloo Romanus and Company Advocates** to come on record on her behalf and have the suit withdrawn in its entirety. A copy of the duly filed withdrawal notice was also attached to her supporting affidavit.

12. The Defendant equally filed a Notice of Preliminary objection seeking to have the suit struck out for being a nullity for the reasons that there was no verifying affidavit by the 1<sup>st</sup> Plaintiff in support of the Plaintiff.

13. On the issue of the notice of withdrawal of the suit, order 25 Rule 1 of The Civil Procedure Rules:-

***“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”.***

14. The question as to whether a Notice to Withdraw under Order 25 Rule 1 requires the endorsement of Court before becoming effective is now chartered waters. And while there is divided opinion in the High Court, it may have been settled as the Court of Appeal has had its say.

15. Justice Bosire (as he then was) in the Court of Appeal case of ***Pil Kenya Ltd Vs. Joseph Oppong [2001] eKLR*** expressed this opinion:-

***“As regards High Court Civil Case No. 260 of 2000, the Plaintiff was Jeneby Taita with the appellant as Defendant. The Respondent herein was not named as a party. I earlier stated that a notice of withdrawal of suit was filed on 13<sup>th</sup> November, 2000. By that date the Respondent had not been made a party. It was on or about 15<sup>th</sup> November, 2000 that the Respondent brought an Application seeking to be enjoined as a Defendant on the ground that he had an interest in the subject matter of that suit. The application was heard on 15<sup>th</sup> November, 2000 by a Commissioner of Assize, Mrs. Tutui, who granted it and directed that an amended Plaintiff be filed. There is no evidence before this Court that it was ever filed. If, however, the notice of withdrawal was valid such an amendment did not arise as there was no suit in existence respecting which an amended Plaintiff or amended defence could be filed. The order was made ex parte, and later, a Mr. Obura for the Plaintiff lamented that he should have been but was not served with the order enjoining the Respondent herein as Defendant and directing the amendment of the Plaintiff. A Plaintiff could not properly be amended at the instance of a party who was not the Plaintiff. The said Advocate also asserted that the suit had not been withdrawn and any notice to that effect was a forgery. It later transpired, however, that the Plaintiff disappeared. He was not answering his advocate's letters nor did he ever visit him thereafter. The notice of withdrawal was homemade and I infer that it was indeed filed by the Plaintiff personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for Leave to cease acting for him. The Plaintiff in that suit did not need the leave of Court to withdraw his suit nor was a Court order necessary to give effect to the withdrawal. All that was necessary was for the Plaintiff to file a Notice of withdrawal before Judgement. After Judgment, however, the leave of the Court was necessary”.* (my emphasis)**

16. Years later, the Court of Appeal had another opportunity to comment on a similar question. This was in ***Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR***. Before focusing on the import of Rule 1 of Order 25, the Court set out the three scenarios regarding discontinuance of suits or withdrawal of claims and it held:-

***“The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filling a written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of Court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this***

***scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the Court. That such leave is granted on terms suggests that it is not a mere formality".***

17. The situation here is that the suit had not been set down for hearing and the wish of 1<sup>st</sup> Plaintiff as declared in the Notice to withdraw was to wholly withdraw and discontinue the suit against all the parties.

18. From the two decisions of the Court of Appeal (which needless to say are binding on this Court) the law can be stated to be that as a general proposition the right of a Plaintiff to Discontinue a Suit or Withdraw a Claim under the provisions of order 25 Rule 1 (that is where the suit has not been set down for hearing) is an absolute and untrammelled right. Also, again as a general proposition, it takes effect upon the filing and service of the Notice. No leave of Court is required nor a Court endorsement necessary to give effect to this withdrawal.

19. And it has to be said that unlike some other procedural Rules, The Civil Procedure Rules, in respect to order 25 Rule 1, does not have any provisions requiring the Leave of Court to Discontinue a suit or withdraw a claim.

20. In the instant suit, while its clear there was a notice of withdrawal of the suit filed by the 1<sup>st</sup> Plaintiff, the court was not furnished with any evidence confirming service of the said notice to the parties. As such the same is considered not to have taken any effect and subsequently not binding to the parties.

21. On the other issue of whether or not the suit was filed without instructions of the 1<sup>st</sup> Plaintiff, upon perusing of the pleadings herein it is clear that the suit was filed without the consent and or instructions of the 1<sup>st</sup> Plaintiff which position was also not refuted by the 2<sup>nd</sup> Plaintiff.

22. Counsel for the 1<sup>st</sup> Plaintiff reiterated in his submissions that the 1st Plaintiff had not authorized the filing of the suit. I have anxiously considered the application, the affidavits on record and submissions of counsel. The issue raised in the present application are serious: Whether a suit filed by an advocate in the absence of instructions can be sustained. As a corollary to this issue the question then arises as to the duty an advocate owes the court to ascertain that he is indeed instructed by the party on whose behalf he is filing the suit.

23. In view of the affidavit evidence herein, it is clear that the 1st Plaintiff herein did not personally instruct the 2<sup>nd</sup> Plaintiff's Advocates to file the suit on her behalf. The advocates have not stated that they received instructions from her. One would have expected the advocate to avail to the court the facts and materials that he relied on to reach the conclusion that he had been validly instructed. Failure to avail such evidence can only be construed to mean that there was failure on the part of the advocate to ensure that he had been validly instructed.

24. Under **Section 1A of the Civil Procedure Act**, advocates are under a duty to assist the court to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. Such a duty extends to ascertaining that the advocate is properly instructed by the person on whose behalf he files a suit. He must reasonably be able to ascertain the identity of his client and the client's authority to bring the proceedings.

25. It is the finding of this court that the suit filed herein is indeed incompetent having been instituted without instructions of the 1<sup>st</sup> Plaintiff.

#### ***Issue No. 2***

#### ***What are the appropriate orders/remedies that can be issued herein?***

26. A suit filed without the authority of the litigant does not deserve to remain in the court or to engage more judicial time and I need not address myself on other aspects of the same. It is a bad suit and totally incurable. Having found as such the only orders that can issued herein is for striking out the same for being incompetent.

#### **Disposition**

27. In the end, the Plaintiff's application dated 7<sup>th</sup> December 2020, Plaintiffs application dated 23<sup>rd</sup> December 2020, Interested parties application dated 2<sup>nd</sup> July 2021 and the second Plaintiff's application dated 20<sup>th</sup> September 2021 and also the Notice of Preliminary Objection by the Defendant dated 23<sup>rd</sup> December 2020 are disposed in the following terms;

***i. The entire suit is struck out for being incompetent***

***ii. All previous orders issued herein are discharged.***

***iii. The 2<sup>nd</sup> Plaintiff shall bear costs of the suit which are awarded to the 1<sup>st</sup> Plaintiff and Defendant herein.***

28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the Virtual Presence of:-**

**N/A for the 1<sup>st</sup> Plaintiff.**

**Mr. Simiyu for the 2<sup>nd</sup> Plaintiff.**

**N/A for the Defendant**

**Mr. Amimo for the Interested parties.**

**Court Assistant: Caroline Nafuna.**