



**Nzuve v Waema (Environment & Land Case 286 of 2017)
[2022] KEELC 2987 (KLR) (22 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 286 OF 2017**

**TW MURIGI, J
JUNE 22, 2022**

BETWEEN

PAUL MULINGE NZUVE APPLICANT

AND

JOSEPHAT MUTUA WAEMA RESPONDENT

RULING

1. Before me is a Notice of Motion dated 6th of December 2021 brought pursuant to the provisions of Section 3A of the [Civil Procedure Act](#) and Order 10 Rule 11 of the Civil Procedure Rules and all other enabling provisions of the law, wherein the Applicant is seeking for the following orders: -
 - 1) Spent.
 - 2) The orders of the Court issued on 23rd of November 2020 marking the Originating Summons herein dated 23rd of May 2017 as withdrawn be set aside.
 - 3) That the Originating Summons herein dated 23rd of November 2017 be reinstated for hearing and determination.
 - 4) Cost of this application be provided for.
2. The application is premised on the supporting affidavit of the Applicant sworn on the even date. The Applicant averred that on 4th of December 2019, this matter proceeded for hearing when he gave his evidence in support of the application. That thereafter, the matter was fixed for mention to confirm the filing of submissions and to fix of a Judgment date. The Applicant averred that his Advocate did not call him to seek for instructions on the filing of submissions nor did he instruct his Advocate to withdraw his suit which was done maliciously and unprofessionally. He argued that he was desirous of getting a verdict and urged the Court to set aside the orders marking the originating summons as withdrawn.



3. Although the Respondent was duly served, he did not file a response to the application.
4. The application was canvassed by way of written submissions.
5. The Applicant's written submissions were filed on 20th of January 2022 which I have duly considered.

Analysis and Determination

6. Having considered the application and the written submissions thereto, I find that the issues for determination are;
 - i) Whether the firm of P M Mutuku and Company Advocates had instructions to act for the Applicant in the matter.
 - ii) Whether the Order made on 23rd November 2020 withdrawing the Applicant's Originating Summons should be set aside and the Originating Summons reinstated for hearing and determination.
7. The Applicant has sought to set aside the orders issued on 23rd of November 2020.
8. The Applicant Vide the Originating Summons filed on 23rd of May 2017 sought for the following orders: -
 - 1) That the Plaintiff/Applicant be entitled to ownership of land measuring 14 hectares registered in Nzau/ Kithumbea/367 by virtue of adverse possession against the Defendant.
 2. That the costs of the Originating Summons be provided for.
9. Although the Defendant/Respondent was duly served with the Originating Summons, he failed to file his response as required. On 20th of June 2018, the Court having established that service was effected upon the Respondent directed that the matter would proceed as an undefended suit.
10. The formal proof hearing of the suit proceeded on 4th of December 2019 and upon closing his case, the Applicant was granted 30 days to file and serve his submissions. The Court proceeded to fix the matter for mention on 14th of October 2020 to confirm the filing of submissions and to fix a Judgment date.
11. On 14th of October 2020, when the matter came up for mention to confirm the filing of submissions, Ms. Kaloki learned Counsel appearing for the Applicant informed the Court that she was yet to file the submissions as she had not received instructions from their client due to the pandemic. She requested for 21 days to enable her to file the submissions. The Court granted the request and fixed the matter for mention on 23rd of November 2020.
12. On 23rd of November 2020, when the matter came up for mention to confirm the filing of submissions, Ms Kaloki learned Counsel appearing for the Applicant applied to withdraw the matter with no orders as to costs. The Court granted the application as prayed.
13. At common law, a Plaintiff has an absolute right to discontinue his suit at any stage of the proceedings prior to a verdict.
14. The Supreme Court in Nicholas Kiptoo arap Korir Salat v IEBC & 7 others [2014] eKLR held that;

“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.”



15. The law and the procedure governing the withdrawal, discontinuance and adjustment of suits is found in Order 25 of the Civil Procedure Rules which provides 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.

16. Commenting on the above provisions, the Court of Appeal in the case of Beijing Industrial Designing & Researching Institute Lagoon Development Limited stated that;

“The above provisions presents three clear scenarios regarding the 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 filing a written consent of all 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 the 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 leave of the court. That such leave is granted on terms suggests that is not a mere formality.”

17. In *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited and Another* [1998] eKLR the Court of Appeal cited a passage in the *Supreme Court Practice 1976* (vol. 2) stated as follows;

“Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative directions: and it would seem that a solicitor acting as agent for the principal solicitor has the same power (*Re Newen* (1903 1 ch pp 817, 818 *Little Vs Speedbury* (1901) 2 kb638). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice.”

18. The Court of Appeal in *M & E Consulting Engineers Limited v Lake Basin Development Authority & another* [2015] eKLR held that;

“A duly instructed Advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his Advocate unless such limitation was brought to the notice of the other side. The court also held that that an Advocate has general authority to compromise on behalf of his client



as long as he is acting bona fide and not contrary to express negative direction in the absence of proof of any express negative direction, the order shall be binding.”

19. Similarly, in *Kinuthia Eston Maina & 3 others v Coffee Board of Kenya* [2015] eKLR the Court held that;

“A duly instructed Advocate has an implied general authority to compromise and settle a suit. A client cannot avail himself of any limitation by him of the implied authority unless such limitation was brought to the notice of the other party.”

20. The Applicant argued that the Originating Summons was withdrawn without his consent. It is not in dispute that the Applicant had instructed the firm of P M Mutuku and Company Advocates to act for him. The Applicant filed this Originating Summons through the firm of P M Mutuku and Company Advocates. The firm of P M Mutuku and Company Advocates therefore had authority to act for the Applicant. The Applicant did not deny the fact that he instructed the said firm to act for him.

21. The Applicant by his Advocates, orally withdrew the Originating Summons with no orders as to costs. Having found that the Applicant had instructed the firm of P M Mutuku to act for him, I find that Counsel had the implied and ostensible authority to withdraw the suit so long as they were acting bonafide and not contrary to instructions issued by the Applicant.

22. Whether they informed the Applicant the action they were undertaking with regards to the withdrawal of the application is difficult to tell suffice to say that once an Advocate has been instructed by a party such Advocate becomes possessed with the ostensible authority. Moreover, the Applicant has not shown any evidence that Counsel made the application for withdrawal without his instructions.

23. It therefore follows that the firm of P M Mutuku and Company Advocates was clothed with the ostensible and general authority to withdraw the Originating Summons.

24. Any decision taken or made by the Applicant through his Advocate is binding on the Applicant unless fraud or collusion has been proved. In this case, none has been alleged let alone proved. I find that the actions of the Plaintiff's Advocate who was duly instructed are binding on the Applicant.

25. The right of the Plaintiff to withdraw his suit is expressly conferred upon him by Order 25 of the Civil Procedure Rules. There is no provision conferring the right to revoke or rescind the withdrawal. The withdrawal is complete as soon as it takes place. Withdrawal of the suit brings the suit to an end. However, a party can file a fresh suit if the law permits him.

26. In *Antony Kayaya Juma v Humphrey Ekesa Khaunya & another* [2004] eKLR the Court held that;

“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.”

27. In *Priscilla Nyambura Njue v Geohem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2011] eKLR the Court observed that;

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing



so in the rule and not by courts. In the same vein, the rules do not confer the court with the power to reinstate a suit once withdrawn.”

28. It therefore follows that a party who withdraws his case cannot seek to reinstate the same but has an option of instituting a fresh action as per the provisions of Order 25 Rule 4 of the Civil Procedure Rules. Being guided by the above decisions I find that the Court cannot set aside the orders issued on 23rd of November 2020 as no basis has been laid to set aside the orders and I decline to do so.
29. The upshot of the foregoing is that the application dated 6th December 2021 is devoid of merit and the same is dismissed.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF JUNE, 2022.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Mr. Mutisya for the Applicant.

