

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Case 10 of 2007

THOMAS WAMALWA.....PLAINTIFF

VS

NICODEMUS WAKABILI KUNIKINA.....DEFENDANT

RULING

The Plaintiff Thomas Wamalwa on 24/5/2010 filed a notice of withdrawal of suit dated 21st May, 2010 which he has served on the Defendant. At the time the notice was filed, this case was pending for a ruling on the Defendant's application dated 9/11/2009 seeking for several orders. Among them is a prayer for injunction to restrain the Plaintiff from encroaching on the disputed premises L.R. E. BUKUSU/N.KANDUYI/4977 and 4979 pending hearing and determination of the application. The other prayer is for revocation of all sub-divisions on the same land done by the Plaintiff. The application was dealt with in way of filing written submissions. The Defendant/Applicant filed his submissions on 17/5/2010 within the time given by the court of seven (7) days. The Plaintiff requested for extension of time to file his submissions. The case was coming for mention on 25/5/2010 for the purpose of receiving the Plaintiff's submissions. The Plaintiff before this date, had filed and served the notice of withdrawal. During the mention, the Plaintiff's counsel Mr. Murunga drew the attention of the court to the notice and indicated the Plaintiff was withdrawing with costs to the Defendant. Mr. Sichangi for the Defendant objected to withdrawal arguing that the application must be finalized before a notice of withdrawal can be entertained. The issue for determination here is whether the Plaintiff is entitled to withdraw the suit at this stage.

The provisions of Order XXIV Rule 1 deal with this subject and read:

“At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing 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.”

The provision gives the Plaintiff the right to withdraw the suit before it is fixed for hearing without any conditions whatsoever. The case before me has not been fixed for hearing yet. It was pending hearing of an application which had only been partly heard since the Plaintiff was yet to file his submissions. The orders sought in the application are interlocutory in nature pending the hearing and determination of the suit. If the court decides to go ahead and give the ruling, the Plaintiff is still entitled to withdraw the suit after the ruling. The Defendant has not filed a counterclaim herein and nothing will be lost for him if the suit is withdrawn. The Defendant has other avenues to pursue his legal rights if any.

I find that the Plaintiff has the entitlement to exercise his right under Order XXIV Rule 1 at this stage. I therefore allow the withdrawal of the suit with costs to the Defendant. The suit is hereby marked as withdrawn.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered on the 26th day of May, 2010 in open court in the presence of Mr. Makali for Murunga for Plaintiff and Mr. Milimo holding his brief for Mr. Sichangi for Defendant.

F. N. MUCHEMI
JUDGE