



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**COMMERCIAL CIVIL CASE 8 OF 2006**

EIDEN ENTERPRISES LIMITED.....1<sup>ST</sup> PLAINTIFF  
YARON ABRAHAM .....2<sup>ND</sup> PLAINTIFF  
YARON YEHUDIT .....3<sup>RD</sup> PLAINTIFF

**VERSUS**

PARADISE MOMBASA MARKETING LIMITED .....1<sup>ST</sup> DEFENDANT  
PARADISE MOMBASA (K) LIMITED.....2<sup>ND</sup> DEFENDANT  
MUSUMARINI LIMITED .....3<sup>RD</sup> DEFENDANT  
HOLIDAY OWNERS (TRUSTEE) LIMITED .....4<sup>TH</sup> DEFENDANT  
PARADISE BEACH RESORT .....5<sup>TH</sup> DEFENDANT

SANDAL WOOD HOTELS &  
RESORTS LIMITED.....INTERESTED PARTY

**R U L I N G**

The Applicant which deems itself to be the 5<sup>th</sup> Defendant which claim is disputed by the Plaintiffs and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a Notice of Motion dated 8<sup>th</sup> June 2010 seeking orders inter alia to set aside an order recorded in the Court file on 2/06/2010 by consent of the said parties namely Plaintiff and 1 – 3 Defendants. The effect of the said consent was to set aside a Consent Judgment entered on 18<sup>th</sup> October 2007.

However, on 15<sup>th</sup> June 2010 the plaintiff filed in this court a Notice of withdrawal of the suit as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

On 17.06.2010, the consequences of the said Notice of withdrawal became contentious before Hon. Justice Ojwang who then directed the matter be placed before me.

The 5<sup>th</sup> Defendant through Mr. Havi argued that the said Notice was an abuse of the court process and should be ignored or not allowed to take effect before its application for setting aside is heard and determined. The 5<sup>th</sup> Defendant is supported in this stand by the intended Interested Party represented by Dr. Khaminwa.

The plaintiff has raised objections to the said submissions and is supported by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. They have raised a jurisdictional issue that in view of the filing of the Notice of withdrawal, therein is no suit pending and the court has no jurisdiction to entertain or consider the 5<sup>th</sup> Defendant's application which itself is allegedly not a party in this suit in the first place.

I have considered the point of law raised and submissions by Counsel.

Order 24, Rule 1 and 2 provide as follows:-

**“1. At any time before the setting down of the suit for hearing the plaintiff may be by notice in writing wholly discontinue his suit against all or any of the Defendants of may withdraw as 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 filing of a written consent signed by all the parties.**

**3. Where a suit has been set down for hearing the court may grant the plaintiff learn 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 suit.”**

I agree that where there is a discontinuance of a suit by a plaintiff or withdrawal of any part of the suit or claim then there are possibilities that jurisdictional issues may arise and which must be resolved at the outset before any step is taken in furtherance of the suit or part of it, if all.

It is my view that there is a distinction in law between a “DISCONTINUANCE OF SUIT” AND “WITHDRAWAL OF A CLAIM” under the provisions of Order 24.

It is my view that a discontinuance of a suit is a termination of the entire suit. It is abandonment and retraction of the suit so that nothing remains of it. The provisions refer to:- Discontinuance of suit and withdrawal of claims.

In the present case, the Notice refers to withdrawal of suit as against, 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I do hold that the term discontinuance was not used but “withdrawal”. However, the term “withdrawal” was used in respect of the “suit” i.e. “..the suit is hereby withdrawn as against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The withdrawal is of the suit and not claims or part of it. My interpretation is that where there is a wholesome withdrawal of all claims in a suit or withdrawal of the suit, the net legal effect is that there is a discontinuance of the suit and against those intended.

I do hold that the Notice dated 14.06.2010 is in effect a withdrawal of the suit as against the said 3 defendants. It amounts to a discontinuance of the entire suits against the said 3 defendants. The suit after setting aside of the judgment and even before, had never been set down for hearing.

So what remains of the suits in this case? I am informed that the suit as against the 4<sup>th</sup> Defendant was withdrawn on 11.06.2008. I confirmed this as the Notice is on record. There is no dispute in this regard.

I have carefully perused the record and do confirm that I have seen and there is Notice of Withdrawal dated 9.10.2007 when withdraws the suit as against the 5<sup>th</sup> Defendant. It is filed by the Plaintiff.

I do hold that with effect from 16.10.2007 what it was filed the suit as against the 5<sup>th</sup> Defendant was wholly withdrawn and became discontinued. The only possible issue remaining would be costs if the summons and any other pleadings were filed and responded to.

The 5<sup>th</sup> Defendant purportedly filed a Notice of Objection on 12.12.07 to an application by the 1 – 4<sup>th</sup> Defendants for setting aside of the consent judgment. It also filed list of authorities. I do find and hold that it was not necessary to do so as it was no longer a party in the suit. The said documents were filed irregularly. In case there is any other application etc which is on record and filed after 16.10.2007, the same were improperly filed.

As both the suits as against the 4<sup>th</sup> and 5<sup>th</sup> Defendants were wholly withdrawn well before the latest withdrawal against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants there remains nothing of the suit. Subject to question of costs, there is no suit pending as all the suits have wholly been discontinued against all the 5 defendants.

The so called Interested Party is not a party and cannot be a party in an action by plaintiff in such capacity. To me there is no legal Creative called “Interested Party” in a suit commenced by Plaintiff or in an action. You have a plaintiff, Defendant, Co-defendants and Third Party is the so-called Interested Party can have no role in such a suit. In any case Sandal Wood Hotels Resorts Ltd is not a party and has never been.

I do hold that despite the allegations of abuse of the court process and the eyebrow-raising setting aside of judgment followed by a quick termination of the suit, this court has no jurisdiction to take a step further in this matter. There is no suit to be prosecuted or defended. A plaintiff essentially belongs to the plaintiff and if he elects to discontinue the suit initiated by it, there is little one can do unless there is a counter-claim. There is none here.

I therefore do hereby uphold the objection by the plaintiff. The court has no jurisdiction. In any case the 5<sup>th</sup> Defendant was not a party when the Notice of Withdrawal was filed for it to be aggrieved. Orders accordingly.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of June 2010.**

**M.K. IBRAHIM**  
**JUDGE**