



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Case 277 of 1995**

**ANDREW OYUGI alias ANDEREA KIRIAMA OKEYO**

**2. PETER OMBIRO MOGIRE..... PLAINTIFFS**

**VERSUS**

**1. PETER EVANS OKEIGA**

**2. HEZRON KEBATI OKEIGA**

**3. WILSON OMAE OKEIGA.....DEFENDANTS**

**RULING**

On 24<sup>th</sup> April 2008 the defendants' application for dismissal of the suit for want of prosecution came up for hearing. The application was argued by Mr. Minda for the defendant and was opposed by Mr. Moracha for the plaintiff. The court declined to dismiss the suit but directed that the same be set down for hearing on priority basis within three months from the aforesaid date.

The suit was fixed for hearing by consent on 25<sup>th</sup> November 2008. On that date the defendants raised a preliminary objection before the commencement of the hearing. They stated that the suit is bad in law, incurably defective and therefore unmaintainable. They asked the court to dismiss it with costs.

Mr. Moracha for the plaintiffs made an oral application seeking to withdraw the suit with costs to the defendants. The application was not opposed by the defendants' advocate and the court proceeded to allow the plaintiffs' application. Consequently the suit was marked as withdrawn with costs to the defendants.

On 1<sup>st</sup> December 2008 the plaintiffs through Mose Murugu and Rigoro advocates filed an application seeking to set aside the orders made on 28<sup>th</sup> November 2008. The application was supported by an affidavit sworn by the 1<sup>st</sup> plaintiff who stated that on 28<sup>th</sup> November 2008 they attended court and were advised by their advocate, Mr. Moracha, to wait for the matter to be called out. Shortly before lunch time their advocate left without informing them anything only, to realize later that their suit had been withdrawn without their awareness. He said that they had not given such instructions to their advocate.

The application was opposed by the defendants. Mr. Minda for the defendants submitted that the order for withdrawal of the case was made by consent. He further pointed out that there was no affidavit sworn by Mr. Moracha to verify that he had no instructions to do so.

I agree with Mr. Minda that Mr. Moracha had ostensible authority to withdraw the suit if in his own view or according to the instructions of Mr. Orina of Orina & Company Advocates, the instructing principals, it was felt that the suit was indeed bad in law. The court was not told why the suit was withdrawn. Neither Mr. Orina nor Mr. Moracha has sworn any affidavit.

In the circumstances, there is no good reason as to why the orders made on 28<sup>th</sup> November 2008 should be vacated. I dismiss the application with costs.

**DATED,SIGNED AND DELIVERED AT KISII THIS 22<sup>nd</sup> DAY OF July, 2009.**

**D. MUSINGA**

**JUDGE.**

**22/7/2009**

Before D. Musinga, J.

Mobisa – cc

N/A for the Plaintiffs.

Mr. Minda for the Defendants.

**COURT:** Ruling delivered in open court on 22<sup>nd</sup> July, 2009.

**D. MUSINGA**

**JUDGE.**