



**WEMA Foundation Trust Company Limited v County Government  
of Nairobi & another (Environment & Land Case 356 of 2017)  
[2022] KEELC 13306 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 356 OF 2017  
JA MOGENI, J  
SEPTEMBER 20, 2022**

**BETWEEN**

**WEMA FOUNDATION TRUST COMPANY LIMITED ..... APPLICANT**

**AND**

**COUNTY GOVERNMENT OF NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications before me. On February 15, 2022, a Notice of Discontinuance of Suit was filed under the provisions of Order 25 Rule 1. It was dated February 15, 2022. The said notice was filed by MM & Co Advocates, the Advocates on record for the applicant/plaintiff. It would appear, however, that the applicant was not happy about the Notice of Discontinuance of the suit. He filed the application now before me brought by way of Notice of Motion dated March 2, 2022 brought under Order 51 Rule 1, Order 25 Rule 2 of the [Civil Procedure Rules 2010](#), Sections 3, 3A and 63(c) of [Civil Procedure Act](#). The Plaintiff/applicant seeks orders:
  - a. That suit against the Ministry of Transport, Infrastructure, Housing and Urban Development who are represented by the Honorable Attorney General be and is hereby discontinued.
  - b. That the Honourable Court be pleased to issue any other and further orders that it considers appropriate.
2. The application is based on the grounds on the face of the motion and supported by the supporting affidavit of Abdikadir Sheikh Mumin. He deponed that the main claim in the suit is the breach of contract dated August 17, 2011 by the 1<sup>st</sup> defendant. That in the plaint the plaintiff also sought injunctive orders against the 1<sup>st</sup> defendant jointly with the Ministry of Transport, Infrastructure, Housing and Urban Development



3. That the construction of the said market is now complete rendering the prayer for injunctive orders nugatory and inconsequential and therefore the Plaintiff now wants to pursue the claim for breach of contract and to discontinue its suit against the Ministry of Transport, Infrastructure, Housing and Urban Development represented by the 2<sup>nd</sup> Defendant.
4. The Applicant in the body of the affidavit states that they filed the notice of discontinuation in error what they now want to pursue is the breach of contract against the 1<sup>st</sup> defendant and not discontinuation of the suit which had already been set down for hearing.
5. The application is opposed by the 2<sup>nd</sup> defendant who filed a replying affidavit sworn by Charles M Hinga Principal Secretary State Department for Housing and Urban Development, the applicant sworn on May 26, 2022. The 2<sup>nd</sup> defendant avers that the Construction of Mwariro market was undertaken by the Nairobi Metropolitan Services Improvement Project (NamSIP) whose financing is jointly between the Government of Kenya and International Development Association (IDA) and the World Bank. The County Government of Nairobi was able to ascertain that the land where the market was build belonged to the County Government which was a condition that had to be fulfilled to ensure that the project was on County land which is unencumbered.
6. That the County Government advertised for bids and the winning contractor took over the site on February 1, 2018 after emerging as the lowest bidder. That at no time did the County Government of Nairobi disclose that there was a public-private partnership for construction of a market between the plaintiff and the 1<sup>st</sup> defendant.
7. That since the suit property is owned by the government then disposal can only be done for the benefit of the residents of Nairobi. Further that the consent entered into between the plaintiff and the 1<sup>st</sup> defendant is misplaced since the project was undertaken by funds from the World Bank and there is no basis for compensating the plaintiff Ksh 700,000 for a National project.
8. That the application to withdraw the suit against the 2<sup>nd</sup> defendant is not brought in good faith. That Article 156 (6) states that the Attorney General shall promote, protect and uphold rule of law and defend the public interest. Further that the County Government had even filed a counter-claim challenging the purported lease agreement dated August 17, 2011. That the matter should be set down for hearing to protect the public interest demonstrated in the matter.
9. I have considered the application the affidavits and the submissions made. The main issue for determination is whether the court should allow the application for withdrawal of suit made pursuant to the notice of withdrawal dated March 2, 2022.
10. Order 25 of the Civil Procedure Rules deals with withdrawal, discontinuance and adjustment of suits. Rules 1 and 2 thereof 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 the 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 plaintiffs 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.'

11. The question about a Notice to withdraw under Order 25 Rule 1 and 2 has been considered by the courts. In the Court of Appeal case of *Pil Kenya Ltd -v- Joseph Oppong (2001) eKLR* Bosire JA expressed this opinion:

' 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 judgment. After judgment, however, the leave of the court was necessary.' (my emphasis)

12. In the case of *Beijing Industrial Designing & Research Institute -v- Lagoon Development Ltd (2015) eKLR*, before focusing on the import of Rule 1 of Order 25, the Court of Appeal set out the three scenarios regarding discontinuance of suits or withdrawal of claims and held:

' The above provision presents three clear scenarios regarding discontinuance of suit 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 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 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 the 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' (my emphasis)

13. From the two decisions of the Court of Appeal (which needless to say are binding on this court) the law can be stated that as a general proposition the right of the 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 right. Also, again, as a general proposition, it takes effect upon the filing of the Notice. No leave of court is required nor a court endorsement necessary to give effect to this withdrawal.
14. However, under Order 25 Rule 2 (that is where the suit has been set down for hearing), the Plaintiff's right to withdraw or discontinue ought to be fettered or is curtailed. A plaintiff wishing to invoke the right to discontinue a suit or withdraw a claim must seek the sanction and endorsement of the court. The court may reject it altogether or allow it on terms. In those circumstances a responsible plaintiff ought to move court for leave or endorsement. Where the party fails to act responsibly then the offended party or the court can recall the withdrawal for review and setting aside as the Court of Appeal did in the Beijing Case (supra).



15. The situation here is a bit complicated because the plaintiff filed a notice of discontinuance of suit on February 15, 2022 which when filed took effect immediately. In case the suit had not been set down for hearing this would have meant that the suit ceased to exist. But as already stated above this suit had already been set down for hearing on several occasions although the hearing never took off.
16. It is sufficing to say that where the suit has been set down for hearing the applicable procedure is now Order 25 Rule 2 which what the plaintiff quoted in the Notice of Motion dated March 2, 2022.
17. The plaintiff in this matter is making a claim against the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant is enjoined by virtue of the fact that the Ministry of Transport, Housing and Infrastructure is the one which purports to have undertaken the construction of the Mwariro market. Both parties agree that the market was constructed the point of contention is about who did the job. The plaintiff claims to be the one and the 2<sup>nd</sup> defendant claims it is public funds that constructed the market supported by the World Bank.
18. The plaintiff's intention to want to withdraw the suit against the 2<sup>nd</sup> defendant will mean that it will not be possible to establish who exactly constructed this market.
19. That Beijing case (supra) illustrates that a Court will not allow a Plaintiff to use the Right to Discontinue or Withdraw so as to abuse the process of Court or to defeat the ends of justice.
20. The above decision in the Beijing(supra) case also teaches a further lesson in my view, that where in a pending suit, the Defendant has acquired a right or is protected by an order, a Plaintiff wishing to invoke the right to Discontinue a Suit or Withdraw a Claim under Order 25 rule 1 must seek the sanction and endorsement of Court. As already stated, the Court may reject it altogether or allow it on terms. In those circumstances a responsible Plaintiff ought to move Court for leave or endorsement. Where the party fails to act responsibly then the offended party or the court can recall the withdrawal for review and setting aside as the Court of Appeal did in the Beijing matter (Supra).
21. The situation in the instant suit is that the matter had been fixed for hearing on December 14, 2021. However, on the date when the matter was to be heard, the parties notified the court that there was a Notice of Motion Application dated December 6, 2021 filed by the plaintiff. When the parties appeared in court for the hearing of the suit on January 18, 2022 the plaintiff through its advocate Ms Karumba notified the court that the parties had entered into a consent. The 2<sup>nd</sup> defendant however opposed the consent noting that they had not been served with the consent despite being parties to the suit and sought time to study the consent.
22. At the next appearance in court on January 20, 2022 the advocate for the 2<sup>nd</sup> defendant Ms Fatma opposed the consent entered into by the plaintiff and the 1<sup>st</sup> defendant arguing that the suit property is public land and the consent involved huge sums of public funds and therefore they wanted the matter set down for hearing. Following the oral application, the court rendered its ruling on February 22, 2022 dismissing the consent and setting down the suit for hearing.
23. When the parties appeared in court on February 22, 2022 for hearing the plaintiff alerted the court that they had filed a Notice of Discontinuance of suit against the 2<sup>nd</sup> defendant the Notice of Discontinuance was filed on February 15, 2022. The Advocate for the 2<sup>nd</sup> Defendant a Mr Eredi holding brief for Ms Fatma opposed the application and asked the court to direct that the plaintiff serves the 2<sup>nd</sup> defendant with the notice of discontinuance since they had not been served. The court directed the plaintiff to serve the parties and the 2<sup>nd</sup> defendant and the parties agreed to argue the Notice of Discontinuance by way of written submissions and all parties were to attend court on May 30, 2022 to confirm compliance and filing of submissions.



24. When the parties attended court on May 30, 2022 the plaintiff alerted court that they had now filed a Notice of Motion dated March 2, 2022 under Order 51 Rule 1 and Order 25 Rule 2 and section 63 (c) of the Civil Procedure Act.

### **Analysis and determination**

25. What does the law say on notices to withdraw suits? There is relevant provision on this is Order 25 Rules 1 and 2 of the Civil Procedure Rules, for withdrawal and discontinuance of suits. Order 25 provides for both withdrawal before the setting of a date for hearing and where the suit has been set down for hearing. In the latter the parties may discontinue the suit by consent or the plaintiff may be granted leave by the court to discontinue the suit.
26. The notice dated February 15, 2022 was for withdrawal of the suit before it was fixed for hearing, and therefore the relevant provisions for the purposes of this ruling is Order 25 Rule 1, which states as follows:
- ' 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 discontinuation or withdrawal shall not be a defence to any subsequent action.'
27. I have considered the Plaintiff's application for withdrawal and the opposition to the same by the 2<sup>nd</sup> defendant. Order 25 Rule 2(1) provides as follows:-
- 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'.
28. A suit is defined in Section 2 of the Civil Procedure Act as follows:-
- ' Suit' means all civil proceedings commenced in any manner prescribed
- I understand 'all civil proceedings' to include proceedings commenced by way of a Notice of Motion, such as the present proceedings. Such proceedings are not just an application. They actually constitute a suit.'
29. From the facts of this case the suit was already set down for hearing several times unfortunately it was not able to take off. The 2<sup>nd</sup> defendant in the replying affidavit contend that the suit property was developed by public resources whereas the plaintiff claims that the suit property was developed through a Public-Private partnership and the 2<sup>nd</sup> defendant was not a party to the agreement.
30. I note an element of mischief because the 2<sup>nd</sup> defendant's lawyer claims to have not been served with the Notice of Discontinuance of the suit against themselves when the parties appeared in court. The plaintiff did not indicate whether they sought leave of the Judge in accordance to Order 25 Rule 2 before discontinuing the suit.
31. On perusal of the Plaintiff, I note the suit land and the claim concerns a property which is for the public and the resources purportedly spent to build the public institution which is a market is for the public benefit. Further, I note the 1<sup>st</sup> defendant is not participating in the current application for withdrawal of suit despite the fact that the suit property is said to be owned by the 1<sup>st</sup> defendant.
32. In so far as the plaintiff purport to be have entered into a public-private partnership to build, operate and trustee the market calls for a deeper interrogation of the real circumstances that led to the



construction of the Mwariro market. The issue of who is the one who constructed the market and what funds were used for this purpose can only be determined by the Court after all the evidence is presented.

33. In the case of Beijing Industrial Designing & Researching Institute Vs Lagoon Development Limited [2015] eKLR, the Court of Appeal in Malindi held as follows:

' In such eventuality, the plaintiff must obtain leave of the court to discontinue the suit or to 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.

It follows therefore that a literal application of Order 25 Rule 1 in the circumstances of this suit would enable a party who is alleged to have undermined the rule of law to walk away scot-free by simply withdrawing the suit in which the law compels the respondent to file the application for contempt of court. As has consistently been stated by the courts, the law will not countenance a person benefiting from his wrongdoing or alleged wrongdoing. Lord Finlay expressed the principle as follows in *New Zealand Shipping v Societe Des Ateliers Et Chantiers De France (1919) AC 1*, which we agree with:

'The decisions on the point are really illustrations of the very old principle laid down by Lord Coke (Co Litt. 206b) that a man shall not be allowed to take advantage of a condition which he himself brought about.'

Our conclusion that it was inappropriate to allow the respondent, at its sole discretion, to withdraw its suit in the circumstances of this case, finds favour and support from the decision of the House of Lords in *Castanho v Brown & Root (UK) Ltd & Another (1981) 1 ALL ER 143*. In that case the plaintiff commenced proceedings in the UK for damages for personal injuries and obtained an order for interim payment of damages. While the proceedings in the UK were still pending, and in the hope of obtaining a higher award of damages, the plaintiff commenced another action in the USA. The defendant applied for stay of the USA suit upon which the plaintiff served a notice of discontinuance of the suit in the UK. Order 21 Rule 2(1) of the Rules of the Supreme Court allowed the plaintiff to discontinue the same without leave. The High Court struck out the notice of discontinuance on the ground that it was an abuse of the process of court. On appeal, the Court of Appeal reversed the decision and restored the notice of discontinuance.'

34. As held in the above-mentioned Court of Appeal decision, a person should not be allowed to take advantage of a situation so as to defeat a suit. Land matters are very emotive and from the facts as presented it is pertinent for the Court to delve deeper as to why the plaintiff is discontinuing a suit against 2<sup>nd</sup> defendant and not the 1<sup>st</sup> defendant. I further note that the Notice of Discontinuance of suit was filed on February 15, 2022 and soon thereafter a Notice of Motion dated March 2, 2022 seeking withdrawal of suit. This notwithstanding the fact that this matter had already been set down for hearing. All these proceedings by the plaintiff point to some unexplained circumstances which ought to be investigated. Under Order 25 Rule 2, the suit could only be discontinued or the claim or any part thereof withdrawn upon the filing of a written consent signed by all the parties or with the leave of the court. The 1<sup>st</sup> and 2<sup>nd</sup> defendants to this suit had filed their statements of defence. The 1<sup>st</sup> defendant filed their statement of defence and counter-claim dated November 21, 2018 and the 2<sup>nd</sup> defendant filed their statement of defence dated October 2, 2018. The plaintiff is therefore aware that



there is a suit pending which can only be withdrawn with the consent signed by all parties or with the leave of the court

35. In consideration of the foregoing, the upshot is that the Notice of Discontinuance is invalid and incompetent. The same is struck out. Consequently, the Notice of Withdrawal of Suit dated March 2, 2022 also suffers the same fate.
36. Costs in the main cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20<sup>TH</sup> DAY OF SEPTEMBER 2022.**

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**MOGENI J**

**JUDGE**

In the Virtual Presence of :-

Ms.Karumba for Plaintiff/ Applicant

Ms Fatuma Ali for 2<sup>nd</sup> Defendant

None appearance for the 1<sup>st</sup> Respondent

Court Assistant: Mr Vincent Owuor

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**MOGENI J**

**JUDGE**

