



REPUBLIC OF KENYA



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In re Estate of the Late Charles Odemba Onyango (Deceased) (Environmental and Land Originating Summons E005 of 2023) [2025] KEELC 1126 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEELC 1126 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2023
AE DENA, J
FEBRUARY 6, 2025

IN THE ENVIRONMENT AND LAND COURT AT KWALE ELCLC E005 OF 2023 (OS)
IN THE MATTER OF THE ESTATE OF THE LATE
CHARLES ODEMBA ONYANGO (DECEASED)

IN THE MATTER FOR CANCELLATION AND RECTIFICATION OF THE
REGISTER IN RESPECT TO PARCEL NO SIAYA/KARAPUL RAMBA/1832

AND

IN THE MATTER OF AN APPLICATION BY AFRED OOKO ONYANGO
(SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR
AD LITEM OF THE ESTATE OF CHARLES ODEMBA ONYANGO)

ALFRED OOKO ONYANGO (SUING AS THE LEGAL REPRESENTATIVE
AND ADMINISTRATOR AD LITEM OF THE ESTATE OF THE LATE

BETWEEN

CHARLES ODEMBA ONYANGO APPLICANT
SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR AD
LITEM OF THE ESTATE OF THE LATE CHARLES ODEMBA ONYANGO

AND

ALEX OGUTU AYATTA 1ST RESPONDENT
FITZ MARKS AYIEKO 2ND RESPONDENT
JANET AWUOR OWADE 3RD RESPONDENT
SIAYA COUNTY LAND REGISTRAR 4TH RESPONDENT
HON ATTORNEY GENERAL 5TH RESPONDENT



RULING

1. This suit was commenced by Originating Summons dated 30/8/23 and filed on 19th September 2023. The suit was fixed for mention before this court on 3/02/25 for case conference. Counsel for the Plaintiff/Applicant informed the court that the applicant had filed a Notice of Discontinuance of Suit dated 28/01/2025. The 1st & 2nd Defendants/Respondents represented by Mr. Odera had no objection to the same. However, they prayed for costs on the basis that they have been in court and filed pleadings in response to the suit.
2. Mr. Omollo Counsel on record for the Plaintiff /Applicant was of the view that the Notice having been filed pursuant to the provisions of Order 25 before the suit is set down for hearing, costs are not available. Mr. Odera took the position that Order 25 Rule 1 does not state that the adverse party is not entitled to costs. That infact Order 25 Rule 3 gives the leeway to award costs.
3. This ruling is therefore for a determination on whether the 1st & 2nd Defendants/Respondents are entitled to costs on the withdrawn suit.

Determination

4. The Notice of Discontinuance of Suit is dated 28/01/2025 and has been filed under the provisions of Order 25 Rule 1 of the Civil Procedure Rules, 2012. Order 25 of the Civil Procedure Rules, which provides:
 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.
 3. The provisions of this rule and rule 1 shall apply to counter claims.
5. The 1st & 2nd Defendants/Respondents rely on the provisions of Order 25 Rule 3 to buttress their position on costs. The provision states; -

Upon request in writing by any defendant the registrar shall sign judgement for the costs of a suit which has been wholly discontinued and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.
6. Let me state that indeed under the provisions of Order 25 Rule 1, it is within a party's discretion to withdraw or discontinue his/her claim before trial. As to costs this has to be dealt with under Order 25 Rule 3. My understanding of order 25 Rule 3 is that where a suit has been wholly discontinued under Order 25 Rule 1 a provision has been made for costs to be recovered by the opposite party.



7. I must observe that the procedure anticipated under Order 25 Rule 3 is for the Defendant to file a request for judgement before the Registrar of the court where the suit is filed, seeking for costs of the suit withdrawn by the Plaintiffs. Upon receipt of the request the registrar appears to have no discretion in respect of the matter, and must enter Judgment since the rule is couched in mandatory obligatory terms. This therefore supports the position that costs are payable to the opposite party. In any event it is now trite that costs follow the event and to me the withdrawal of a suit clearly is subject to payment of costs. In this regard the court is guided by the holding in *Mudhibiri Mohammed & 2 Others v Ahmed Imani & Others* [2009]eKLR.
8. It is however trite that costs are payable at the discretion of the court. The discretion must be exercised judiciously. In the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR, the court had this to say; -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
9. So what then should the court consider in deciding whether to award costs or not. In the case of *Morgan Air Cargo Limited v Everest Enterprises Limited* (*supra*), the court guided that consideration must be had on the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the *Constitution*.
10. Applying the above to the present case, the 1st & 2nd Defendants/Respondents urge that they have been in court and defended the suit. Indeed the record reveals that the summons in this suit were served on 7/12/2023 as evidenced in the Affidavit of service sworn by Moses Omondi Ogada filed on 12/2/2024. The 1st and 2nd Defendants/respondents then instructed the firm of M/S Odhiambo Odera & Associates Advocates to act for them as evidenced by the Notice of Appointment of Advocates dated 5th March 2024 and filed on even date. The firm responded to the OS by way of Replying Affidavit sworn by the 1st Defendant/Respondent which was filed on 15/04/2024 together with List of Documents and List of witnesses. A Notice of Preliminary Objection (PO) was subsequently filed on 5/03/2024. Directions on the disposal of the PO were issued by the court on 20/5/2024 and 19/10/2024 and 14/10/24. On the said 14/10/2024 parties had not filed submissions and the matter was fixed for pre-trial conference on 3/02/2025. Counsel for the 1st and 2nd Defendants/Respondents was present in court on these dates as well as 11/3/24.
11. Based on the foregoing clearly the 1st & 2nd Defendants/Respondents have participated in the proceedings after they were served with summons. I find no reasons for which to deny the 1st and 2nd Defendants/Respondents costs of the withdrawn suit herein. The Plaintiff/Applicant caused the 1st and 2nd Defendants/Respondents to participate in these proceedings. The 1st and 2nd Defendants/Respondents filed a number of pleadings as noted above and attended court as well and therefore, they are entitled to costs.



12. The upshot of the foregoing is the court finds that the 1st and 2nd Defendants/Respondents are entitled to costs of the suit that has been withdrawn. The following orders issue; -

1. This suit is hereby marked as wholly withdrawn pursuant to the Notice of Discontinuance of Suit dated 28/01/2025.
2. Costs of the withdrawn suit are hereby awarded to the 1st and 2nd Defendants/Respondents.
3. Parties are encouraged to negotiate on (2) above and will be at liberty to record any settlement reached before the DR ELC Siaya Hon Mkala.
4. The matter shall be mentioned before the DR ELC Siaya Hon Mkala for further directions on (3) above and or on taxation in the absence of settlement on 5/03/25.

Orders Accordingly

DELIVERED AND DATED AT SIAYA THIS 6TH DAY OF FEBRUARY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

6/02/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Omollo for the Plaintiff/applicant

Mr. Odera for the 1st and 2nd Defendants/Respondents.

Court Assistant: Ishmael Orwa

