



Kimele v Kiswili & another (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 5209 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5209 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023**

LG KIMANI, J

JULY 11, 2024

BETWEEN

FESTUS TITUS KIMELE PLAINTIFF

AND

PIUS NGUI KISWILI 1ST DEFENDANT

KITUI COUNTY COUNCIL 2ND DEFENDANT

RULING

1. The Applicant herein withdrew this suit on 13th December 2023 by filing a document titled “Withdrawal of the case: ELC E001 of 2023” The said withdrawal was endorsed by the Court on the same date and the suit was marked as withdrawn with costs to the 1st Respondent.
2. The Applicant has now filed an application under originating summons dated 22nd December 2023 seeking reinstatement of the suit, stating that the 1st Respondent’s representative had refused to bear his costs while the 2nd Respondent had agreed to bear his cost of the suit. The applicant further states that the suit was withdrawn upon the agreement that the dispute would be settled out of court but the representative of the 1st respondent had insisted on being paid the costs of the suit.
3. He therefore requests the court to reinstate the case and allow it to proceed from where it had reached before the withdrawal was filed on 13th December 2023.
4. The Applicant made a further application dated 2nd March 2024 praying that the matter be referred to Court annexed mediation, requesting the venue to be at Kitui West DCC's office since it is within walking distance to both parties. He deposed in the supporting affidavit that he had a sale agreement with the 1st Respondent which was witnessed by elders and should be honoured.



The 1st Respondent's replying affidavit

5. The 1st Respondent made a response to the application through Meshack Mutinda who has been granted a special power of attorney. He contends that the applications are far-fetched and unsustainable and only meant to waste this court's time. The matter was settled on 13th December 2023 and no party can breathe life into it by any means.
6. He also denied the existence of an agreement for the sale of land between the Applicant and 1st Respondent over the suit property and noted that the Land Parcel Mutonguni/Kauwi/4694 did not exist at the time in 1985 when the alleged agreement was made.
7. His view therefore is that the applications are null and void and the orders sought should not be granted.

The Applicant's supplementary Affidavit

8. The Applicant filed an affidavit in response to the 1st Respondent's replying affidavit and deposed that the 1st Respondent filed the replying affidavit late as he was meant to file it on 7/3/2024 when the application was scheduled for directions. He also attached a copy of the impugned agreement of sale between himself and the 1st respondent.
9. The applicant further noted that the replying affidavit has not been signed by a Commissioner for oaths and is therefore invalid.

Hearing of the application.

10. The application proceeded for hearing when the applicant relied on the documents filed and also sought orders that the matter be referred to court-annexed mediation.
11. Meshack Mutinda, representing the 1st Respondent stated that the application is not signed and the signatories on the Originating Summons dated 1/1/2023 that was received on 5/1/2023 are different. He stated that the unsigned document is not legal and cannot be relied upon.
12. He also noted that the applicant is engaging the Court with new issues when the case was already withdrawn. His view is that the plaintiff is only left with a defence on the quantum of costs and nothing else. He pointed out that parties had already earlier gone through mediation but nothing came out of it.
13. The 2nd defendant who appeared in person stated that he prayed that the case returned to mediation since he was one of the witnesses to the agreement of sale but the other witnesses were not present.
14. The Applicant therefore prayed that the case be reinstated and referred to mediation and dismissed the 1st Defendant's points as irrelevant.

Analysis and Determination

15. The Court has considered the application herein dated 22nd December 2023 and the Notice of Motion dated 2nd March 2024, the replying affidavit and submissions of the parties. The Applicant herein withdrew his suit on 13th December 2023 and the said withdrawal was endorsed by the Court on the same date. He now wishes for the matter to be reinstated and for the same to be referred to mediation.
16. The Court notes that the two applications have not been drafted in the proper form as the application for reinstatement is drawn as an originating summons, the same is dated 22nd December 2023 but it is unsigned. For the reason that the said application is unsigned, the court finds that the same is



not properly before this court. On the other hand, the Notice of Motion to have the suit referred to mediation has been executed using a different signature from the signature on the supporting affidavit. The Court further notes that the replying affidavit by Meshack Mutinda Mwema is not witnessed by a commissioner for oaths as required by the law and the same is thus not properly before this court.

17. The court thus directs that the originating summons dated 22nd December 2023 and the replying affidavit filed by Meshack Mutinda Mwema be and are hereby struck out for not being properly before the court.
18. However, in the event that the documents referred to are not for striking out and may be considered as properly before the court and for the reason that the applicant and the respondent are representing themselves and the fact that in prosecuting the two applications the parties appeared in person and owned the said two applications and the responses, the court will proceed to consider the merits of the two applications.
19. Order 25 Rule 1 of the *Civil Procedure Rules* (2010) provides that:

“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.”
20. In the case of *Agot v Agot* (Environment and Land Appeal E004 of 2022) [2023] KEELC 16305 (KLR) (16 March 2023) (Ruling) the court held that:

“A clear reading of this provision of law does not envisage a situation where a withdrawn appeal or a suit can be reinstated. Once a notice of withdrawal was filed by the appellant, it terminated all proceedings against the respondent from the date it was served upon the respondent’s counsel.”
21. Similarly, in the case *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR, Justice Mativo J (as he then was) observed:

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.”
22. The court of appeal in making their decision in the case of *Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 others* [2018] eKLR noted as follows:

“When the application to withdraw the petition was granted all the applications which had been filed in the petition were also withdrawn. Withdrawal of the petition destroyed the substratum of the matter before the election Court with respect to the appellant and he could not revisit applications that had been filed or rulings delivered as he had compromised



everything when the application to withdraw the petition was allowed..... The appellant here prayed, in the motion to withdraw the petition, that he should be granted leave to withdraw the petition and all applications filed in the petition. Once that motion succeeded the appellant did not retain any other rights at all. He could not go back to rulings made at interlocutory stage of the hearing of the petition. In so far as the appellant was concerned the petition and applications made in the petition and rulings made thereon were no more. There was nothing left that the appellant could pursue. The only pending issue was taxation of costs.”

23. Guided by the above decisions, the Court agrees with the 1st respondent that once the applicant willingly withdrew his suit, he cannot reinstate the proceedings as the suit is now terminated and neither can he file further applications as there is no subsisting suit. The only issue that remains for determination is the pending costs to the 1st Respondent as ordered by the court on 13th December 2023.
24. From the foregoing, the court finds that the applications dated 22nd December 2023 and 2nd March 2024 lack merit and the same are hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 11TH DAY OF JULY, 2024.

HON. L. G. KIMANI

ENVIRONMENT & LAND COURT JUDGE - KITUI

The ruling read in open court and virtually in the presence of:-

Musyoki Court Assistant

Festus Titus Kimele present in person

Meshack Mutinda Mwema Attorney for 1st Respondent

N/A for 2nd Respondent

