



**Thathini Development Company Limited v Mombasa Water & Sewage Company & another  
(Environment & Land Case 371 of 2016) [2023] KEELC 641 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 371 OF 2016  
LL NAIKUNI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**THATHINI DEVELOPMENT COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MOMBASA WATER & SEWAGE COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**MOMBASA WATER SERVICE BOARD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. What is before this honorable court is a notice of motion application dated June 9, 2022 and filed on the same day, by Thathini Development Company Limited, the plaintiff/applicant. The application was brought before this honorable court for its determination under the provision of sections 1A, IB and 3A of *Civil Procedure Act*, 2010, cap. 21 of the Laws of Kenya.

**II. The Plaintiff/Applicants case.**

2. The plaintiff/applicant sought for the following orders:-
  - a. Spent.
  - b. That the erroneous notice of withdrawal of suit dated March 28, 2022 and filled on March 31, 2022 be expunged from the court records.
  - c. That the case against the 1<sup>st</sup> Defendant be marked as withdrawn and the case against the 2<sup>nd</sup> Defendant be reinstated for hearing.
3. The said application was based on the grounds in the schedule and the seven (7) paragraphed supporting affidavit of Mwaniki Gitahi an Advocate of the High Court of Kenya and who is in



conduct of this proceedings thus competent to swear this affidavit dated 9<sup>th</sup> June, 2021 but without any annexures. He averred on grounds to be adduced at the hearing hereof.

- a. That pursuant to the Court leave/directions the plaintiff prepared a Notice of Withdrawal of suit against the 1<sup>st</sup> defendant who had never participated in this matter.
  - b. That the plaintiff did prepare the said notice of withdrawal on March 28, 2022 and filled it on March 31, 2022.
  - c. That the said Notice indicated the suit was being withdrawn against the 2<sup>nd</sup> defendant instead of the 1<sup>st</sup> defendant.
  - d. That the said typing error was inadvertent and an oversight on the Secretary and the counsel who signed it.
  - e. That the 2<sup>nd</sup> defendant has filled all their papers ready for trial and has always participated in this matter and engaged in negotiations on how to settle the matter.
  - f. That the said typing error in the face of record in the notice of withdrawal was not deliberate hence the same is excusable.
4. Specifically, he deponed that: -
- i. That he is the Counsel in conduct of this matter on behalf of the plaintiff/applicant hence competent to swear this affidavit.
  - ii. That on March 22, 2022 he sought the leave of Court to withdraw the suit against the 1<sup>st</sup> defendant. He was granted 7 days' time to do so.
  - iii. That he did prepare a Notice of Withdrawal and filled the said notice on 31<sup>st</sup> March 2022.
  - iv. That the said notice contained a typing error which showed the case was being Withdrawn against the 2<sup>nd</sup> defendant instead of the 1<sup>st</sup> defendant.
  - v. That after he realized the mistake he called the firm of Muturi Gakuo Advocates in a bid to rectify the same and he was informed the Counsel handling this matter had proceeded to maternity thereby necessitating this formal application.
  - vi. That he swore this affidavit to state that the mistake/typing error was inadvertent hence the same is excusable.
  - vii. That what he has stated herein was true and correct to the best of his knowledge, information and belief.

### **III. The 2<sup>nd</sup> Respondent's response**

5. The application was opposed through a five (5) Paragraphed Grounds of opposition dated July 22, 2022. It was on the following grounds:-
- a. That the Plaintiff's Application was seriously misconceived, frivolous, vexatious and nothing but an utter abuse of Court process and must therefore fail in its entirety.
  - b. That the plaintiff's reasons for reinstatement of this suit against the 2<sup>nd</sup> defendant herein was unsatisfactory and totally unfounded since the 2<sup>nd</sup> defendant was led to believe that the suit against them was withdrawn.



- c. That the grounds or issues raised in the Plaintiffs Application were misguided and predicated on a wrong premise and cannot be given audience by this Court.
- d. That the plaintiff's application was a waste of the court's precious time and a perfect candidate for dismissal.
- e. That the plaintiff's application and the entire suit herein was fatally defective, bad in law and could therefore not stand in Law.
- f. The 2<sup>nd</sup> Defendant prayed that the Plaintiff's Application dated 9<sup>th</sup> June, 2022 and the entire suit herein be struck out and/or dismissed with costs.

#### IV. Submissions

6. On June 14, 2022 while in the presence of all parties, the Honorable Court directed that the application dated June 9, 2022 be canvassed by way of written submissions. Pursuant to that all parties fully complied. Thus, the Court reserved a day to deliver the ruling accordingly.

##### A. The Written Submissions by the Plaintiff/Applicant

7. On July 26, 2022, the learned counsel for the plaintiff, the Law firm of Messrs. Mwaniki Gitahi and Company Advocates filed their written Submissions dated July 20, 2022. Mr. Mwaniki Advocate commenced by providing the basis of this application. He submitted that they relied on the affidavit in support of the application sworn by Mwaniki Gitahi who is an advocate on record. In the said supporting affidavit, Mr. Mwaniki clearly explained that the withdrawal of the suit against the 1<sup>st</sup> Defendant was a mistake by the Advocate occasioned by a typing error. He held that it was on record that the applicant through Mr. Mwaniki had sought leave to withdraw the suit against the 2<sup>nd</sup> Defendant. This was after Mr. Mwaniki had sought the leave and the same was allowed by the court.
8. The learned counsel submitted that the mistake of an Advocate should not be visited on an innocent litigant. To buttress his point he invited the Court to be guided by the decision of the Court in the case of:- *Belinda Muras & Ors v Amos Wainaina* (1978) KLR, quoted the case of *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Company Limited & 2 others* [2017] eKLR in which the court rendered that:-
 

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”
9. The learned counsel submitted that similarly in the case of:- *Philip Chemwolo & anor v Augustine Kubede* (quoted in the Bank of Africa case above) the court states that:
 

‘blunder will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of having his case heard on merit’
10. The Learned Counsel concluded by submitting that the plaintiff deserved to have a case against the 2<sup>nd</sup> defendant heard on merit. He averred that the suit against the 1<sup>st</sup> defendant could be marked as withdrawn as the subject matter herein is against the 2<sup>nd</sup> defendant. By so doing, he argued the defendants would suffer no prejudice should the orders sought herein be granted as prayed.



## B. Written Submissions by the Defendant/Respondent

11. On July 26, 2022, the learned counsel for the Defendant/Respondent the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written submissions dated July 25, 2022. M/s. Nzisa Advocate commenced by giving a brief background to the filed application whereby she submitted that the plaintiff/applicant lodged the Application dated June 9, 2022 seeking for *inter alia*, orders that the suit herein be reinstated. The application was opposed by the 2<sup>nd</sup> defendant/respondent through the grounds of opposition dated July 22, 2022. They made reliance on these documents while making these submissions.
12. The learned counsel submitted that the main issue for determination before this honorable court was whether the suit herein should be reinstated against 2<sup>nd</sup> defendant, which should be analyzed as herein below.
13. The learned counsel submitted that the factors to consider in an Application for reinstatement against a Defendant were highlighted in the Court of Appeal case. She held that withdrawal of suits are guided by the provision of order 25 *Civil Procedure Rules, 2010*. Order 25 rule 2 provides as follows:
  - “1. At any time before the setting down of all 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. 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.
  - (1) (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.”
14. The 2<sup>nd</sup> defendant/applicant submitted that the application dated June 9, 2022 was a contravention of the respondent’s rights under article 50 to a fair trial. She argued that Justice cuts both ways and the respondent should also have a right to speedy resolution of the dispute pending before the Court and therefore the Court should and there should be an end to litigation.
15. The learned counsel submitted that the 2<sup>nd</sup> defendant acknowledged that the reinstatement of a suit was at the discretion of the court, but which discretion ought to be exercised in a just manner, as was held in the case of:- “*Bilha Ngonyo Isaac v Kembu Farm Limited & another* [2018], which echoed the decision of the court in “*Shah v Mbogo & another* (1967) EA 116 (Harris J.), where the court stated on the matter of discretion:

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”
16. The learned counsel submitted that the 2<sup>nd</sup> defendant/respondent was led to believe that the suit against them was withdrawn by the plaintiff herein *vide* notice to withdraw dated March 28, 2022. It would herein be unjust to reinstate the suit against them.



17. The learned counsel submitted that the principle of natural justice was well reiterated in the case of “*Wachira Karani v Bildad Wachira* Civil Suit No. 101 of 2011 (2016) eKLR where it was found that:
- “Court exists to serve substantive justice for all to a dispute before it. Both parties deserve justice and their legitimate expectation is that they will each be allowed a proper opportunity to advance their respective cases upon merits of the matter. This is the fundamental principle of natural justice.”
18. The learned counsel asserted that reinstatement of the suit would prejudice them as the Plaintiff had failed to prosecute its suit since it was filed before this court. They brought to the attention of the court that even prior to the institution of this application, the plaintiff/applicant had been reluctant in pursuing this suit, hence the issuance to a notice to show cause by this honourable court. To support her point here, the Counsel relied on the decision made in the case of: *Nilan v Patel & others* (1969) EA reveals plaintiff’s responsibility clearly, thus;
- “It is only too trite to say that as in every civil suit, it is the Plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of laches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by their applying for its dismissal or settling down the suit for hearing.”
19. The Learned Counsel also relied on the case of *Utalii Transport Company Limited & 3 others v NIC Bank & another* [2014] eKLR, where the court held that it was the primary duty of the Plaintiffs to take steps to progress their case since they were the ones who dragged the Defendant to court. They find that the delay was prolonged and inexcusable.
20. The Counsel submitted that the defendant/respondent would suffer great prejudice if the suit was reinstated. This was because they were dragged through prolonged litigation by the plaintiff/applicant since the institution of this suit. It had caused the 2<sup>nd</sup> defendant/respondent to incur unnecessary expenses in terms of legal fees and other incidental expenses; and unless the Court dismissed this application, the 2<sup>nd</sup> defendant/ respondent should continue to incur these expenses.
21. The learned counsel submitted that the suit was not meritorious and ought not be reinstated as the 2<sup>nd</sup> defendant/respondent was prejudiced by the continued pendency of this suit. Though the court had the right to exercise its discretion, then such discretion ought to be exercised in a judicious manner in such a way that the rights of the 2<sup>nd</sup> defendant/respondent were also considered. They relied on the case of *Ronald Mackenzie v Damaris Kiarie* [2021] eKLR where the court noted as follows:
- “...On the issue of whether justice can be done despite the delay, it is trite that justice is justice for both the Plaintiff and the Defendant and the Plaintiff having dragged the Defendant to Court, he ought to have expedited the prosecution of the matter. The Court notes that when the matter was last in court before it was listed for notice to show cause, there was no appearance on the part of the Plaintiff or his Advocate, yet the date was fixed by counsel for the Plaintiff...”
22. The learned counsel concluded by urging the court to dismiss the plaintiff/applicant’s application dated June 9, 2022 with costs to the 2<sup>nd</sup> defendant/respondent.



## V. Analysis and Determination

23. The honorable court has considered the said filed application, the annexures thereof, the written and oral submissions, the myriad cited authorities in support and opposition of the application. In order for the court to reach an informed, just and reasonable decision, the following three (3) issues fall for determination in the application:
- a. Whether the application by the plaintiff/applicant has merit to wit was the suit against the 1<sup>st</sup> defendant properly withdrawn;
  - b. Whether the applicant had made out a case for reinstatement of its suit against the 2<sup>nd</sup> defendant?
  - c. Who pays the costs of the application?

### **ISSUE No. a). Whether the application by the Plaintiff/Applicant has merit to wit was the suit against the 1<sup>st</sup> Defendant properly withdrawn;**

24. Under this sub heading, it is instructive to note that the applicant's advocate on record, filed a notice of withdrawal of the suit dated March 28, 2022 which suit was meant to be withdrawn against the 1<sup>st</sup> defendant who have never participated in this suit but by mistake, the counsel or the applicant filed and served a notice of withdrawal of suit against the 2<sup>nd</sup> defendant.
25. The provision for withdrawal of suits is contained in order 25 rule 1 of the [Civil Procedure Rules, 2010](#) which provides 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 discontinuance or withdrawal shall not be a defence to any subsequent action”.

26. The above Rule leaves room for a subsequent action to be lodged despite the withdrawal or discontinuance of a suit. That position was well stated in the case of:- *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR, where the court was faced with a similar application like the instant one in a suit that had been withdrawn, and declined to allow it. The court expressed itself as follows;

“Withdrawal of a suit is itself its end. The right of a Plaintiff to withdraw his suit ..... is expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. .... The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by Courts. In the same vein, the rules do not confer the court with the power to reinstate a suit once withdrawn.”

27. That the court agree with the reasoning and finding in the above decision. The Applicant has urged the Court to do justice to the parties by allowing their application claiming that the withdrawal was erroneous. That whereas I am sympathetic to the Applicants' situation, I cannot help but notice that



the alleged mistake of their advocate goes beyond erroneously withdrawing the suit. Order 25 rule 5 of the *Civil Procedure Rules* provides that:-

- (1) “Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.”
- (2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.” (emphasis mine)

28. The above provision requires that where there is a whole or part compromise in a suit, the same is then recorded and Judgment entered in the terms thereof. In this case and this being a Court of record, it is imperative to re – cap on the exact proceedings of the Court in order to appreciate where the application by the Applicant is coming from. It is imperative to take notice of the exact proceedings of the Court that took place on the particular time when this issue of the withdrawal of the parties took place. From the records, the material date was on 20<sup>th</sup> January, 2022 whereby this was recorded verbatim:-

29. ”Mr. Mwaniki:- Initially the firm of Messrs. Momanyi & Company Advocates were on record representing the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. There was a notice of Change filed by Messrs. Muturi Gakuo & Kibara Company Advocates for both the defendants. We shall withdraw the case against the 1<sup>st</sup> defendant from the proceedings within the next three (3) days.....the purpose of the mention is to confirm whether the 2<sup>nd</sup> defendant had filed their submissions in relation to our notice of motion application dated September 13, 2021. This is the fifth (5<sup>th</sup>) time we are mentioning the matter for this purpose.....

M/s. Oruta:- I concur that indeed this is the fifth (5<sup>th</sup>) time we are seeking to file our submissions. We have been waiting for instruction from our client. However, we are now in the process of filing our written submissions by the close of business.

Court:- a). the Notice of Motion application dated September 13, 2021 shall be ruled on March 10, 2022 with or without the submissions by the 2<sup>nd</sup> defendant.

b). The Plaintiff is directed to file a notice of withdrawal against the 1<sup>st</sup> Defendant under the provision of order 25 (1) and (2) of the *Civil Procedure Rules*, 2010 within the next three (3) days from this date hereof.....”

30. Pursuant to the able direction, on March 31, 2022 the Plaintiff proceeded to file the following notice of withdrawal re – produced herein verbatim:-

“NOTICE OF WITHDRAWAL

Take Notice that the Plaintiff do hereby withdraw (sic) his case/claim against the 2<sup>nd</sup> Defendant....”

Clearly the above notice bears a glaring error on the party it intended to withdraw the case against. Instead of reading 1<sup>st</sup> Defendant the notice referred to the 2<sup>nd</sup> Defendant. I discern and as expressed by the Learned Counsel for the Plaintiff, that definitely must have occurred



out of a typographical error as all along and from the above proceedings of the 20<sup>th</sup> January, 2022 the intention had been to withdraw the case against the 1<sup>st</sup> and not the 2<sup>nd</sup> Defendant. In any case, by this time round the Plaintiff had been pushing for the 2<sup>nd</sup> Defendant to file their submissions in response to the ending application dated 13<sup>th</sup> September, 2021. Although the of this notice from the face value is that there has been withdrawal of the case against the 2<sup>nd</sup> Defendant. The Court is still to establish as to the reason the Applicant failed to indicate the actual citation, whether it was Order 25 (1) or (2) of the [Civil Procedure Rules, 2010](#) which had major implication in law particularly on Costs.

To this end, on realizing the error, the Applicant never took chances. He quickly steps on alerting the Counsel for the 2<sup>nd</sup> Defendant but on finding that she was on maternity leave decided to move Court through this Application. The Applicant urges the Court to find this erroneous mistake as just. The Court is persuaded that this is very plausible reason and meritorious application. I feel the 2<sup>nd</sup> defendant while seeking to have the application dismissed and/or struck out was unfair and overstretched the matter too far. I guess they were also trying their chances.

**ISSUE No. b). Whether the Applicant had made out a case for reinstatement of its suit against the 2<sup>nd</sup> Defendant?**

30. That whereas I sincerely feel for the 2<sup>nd</sup> defendant after seeing the above notice and the impression it created. Clearly, the legitimate expectation was that the suit had been withdrawn against them. As for the Advocates, they must have immediately communicated this good and unexpected information to their clients and requested for their professional fees prior to the closure of the matter. It can extremely disheartening to receive all from the applicant to be told of a reverse information. It becomes unprecedented and unacceptable to say the least. The court is definitely sympathetic to the 2<sup>nd</sup> defendant's situation.
31. This notwithstanding, I cannot help but take Judicial notice that indeed a mistake by the offices of the applicant was purely one of typographical nature. That was never their intention all. The only issue to point out is that at all times they ought to exercise grostetque prudence and circumspect by re – checking their documents more keenly before they are forwarded for filing as certain mistakes could cost them a fortune.

**ISSUE No. c). Who will bear the Costs**

32. It is trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action, process and/or proceedings of any litigation. The proviso of the provision of section 27 (1) of the [Civil Procedure Act](#), cap. 21 provides that Costs follow event. By event it means the result of any legal action, process and/or proceedings.
33. In the instant case, the application by the Applicant has been successful. However, taking that the suit is still to proceed for trial and final determination, it is just fair and reasonable that the costs to be in the cause.

**IV. Conclusion & Disposition**

34. Ultimately, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find the notice of motion application dated June 9, 2022 by the applicant has merit and therefore the court proceeds to make the following orders. Specifically, it is ordered:-



- a. That the notice of motion application dated June 9, 2022 by the plaintiff/applicant be and is hereby allowed.
- b. That the notice of withdrawal of suit dated March 28, 2022 and filed on March 31, 2022 be and is hereby deemed to have been made and filed erroneously and hence expunged from records as prayed.
- c. That the case against the 1<sup>st</sup> defendant be and is hereby marked as withdrawn while that against the 2<sup>nd</sup> defendant still subsists.
- d. That for expediency sake, this suit should be heard and determined within the next one hundred and eighty (180) days from this date on May 31, 2023. The matter to be mentioned on March 29, 2023 for purposes of ascertaining full compliance on the provision of order 11 of the *Civil Procedure Rules, 2010* on pre trial conference.
- e. That the costs will be in the cause.

It Is So Ordered Accordingly.

**RULING DELIVERED, SIGNED & DATED AT MOMBASA THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023.**

**HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**In the presence of:**

**a. M/s. Yumna, Court Assistant.**

**b. Mr. Asena holding brief for Mr. Mwaniki Advocate for the Plaintiff/Applicant.**

**c. No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.**

