



**Ogoyi v Ogwango (Environment & Land Case 57 of 2021)
[2023] KEELC 16250 (KLR) (13 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 57 OF 2021**

GMA ONGONDO, J

MARCH 13, 2023

**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION OF A
PORTION MEASURING 1.6 HA OF CENTRAL KASIPUL/KAMUMA 4969**

BETWEEN

WILSON OCHIENG OGOYI PLAINTIFF

AND

HEZRON OPANDE OGWANGO DEFENDANT

RULING

1. This ruling pertains to the following twinned matter;
 - a. A notice of withdrawal dated of suit dated August 1, 2022 and filed in court on September 8, 2022 (The withdrawal notice herein) by the Applicant, Wilson Ochieng Ogoyi (the plaintiff) through his learned counsel, Jack Omondi Bunde.
 - b. A notice of motion application dated October 12, 2022 and filed herein under, inter alia, sections 3A and 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya (The CPA herein) by the applicant (the defendant) through the firm of JO Otieno and Company Advocates.
2. The withdrawal notice reads;

' Take Notice the plaintiff wishes to wholly withdraw this suit this suit in entirety against the defendant herein.'
3. The gist of the application is that this suit is res judicata having been heard and determined in Kisii HCC No 439 of 1993 between the plaintiff's father, Agwango Ondoro and the defendant's father,



Vitalis Ogoyi Ongeche. That litigation has to come to an end and that this suit be struck out in the interest of justice.

4. The application is anchored on grounds 1, 2 and 3 set out on the face of it alongside the defendant's supporting affidavit of eleven paragraphs and copies of documents namely pleadings, proceedings, award, Kenya Gazette, an application and order marked as 'HOA1 to HOA 3 annexed to the application. Therefore, the orders sought in the application are;
 - a. That the plaintiff's suit filed herein be struck out.
 - b. That the court do issue and eviction order against the respondent, his agents, servants and or any other person claiming under his authority from LR No Central Kasipul/Kamuma/1645(originally LR No CENTRAL KASIPUL/KAMUMA/476) or any part thereof.
 - c. Cost of the application and the suit be awarded to the applicant which application is supported by the annexed affidavit of Hezron Opande Agwango, the annexures and on the following grounds or further grounds to be adduced during the hearing.
5. In his Replying affidavit sworn on November 14, 2022 and filed in court on November 16, 2022, the plaintiff deposed, inter alia, that the application has been overtaken by events since the suit has been withdrawn in entirety. That this was done before the application was generated. That therefore, there exists no suit to be struck out.
6. On October 17, 2022, counsel for the defendant and counsel for the plaintiff sought the hearing of the application and granting of the withdrawal notice respectively. So, this court directed that the two issues be heard by way of written submissions.
7. In the submissions dated November 1, 2022, learned counsel for the plaintiff gave the background of the suit mounted by way of an originating summons, the withdrawal notice alongside the application and the reply thereto. Counsel framed four issues for determination including whether there exists a suit for withdrawal and the merit of the application. In analyzing the issues, counsel relied on Order 25 of the *Civil Procedure Rules, 2010* (The Rules), the case of *Nicholas Kiptoo Arap Korir Salat-vs-IEBC and 7 others (2014) eKLR* and the decision in *Beijing Industrial Designing & Researching Institute-vs-Lagoon Development Limited (2015) eKLR* and urged the court to allow the notice of withdrawal. That since the application lacks merit, the same be dismissed with costs.
8. By the defendant's submissions February 20, 2022 and filed herein on February 21, 2022, his counsel made reference to the application and the withdrawal notice, Order 25 of the Rules and section 7 of the CPA (supra). It was submitted that the suit is still alive and available to be struck out as the withdrawal notice has not been endorsed as an order of the court thus, the same is an abuse of the court process. That the plaintiff continues to be in contempt of court and denies the defendant fruits of justice.
9. In the foregone, it is the duty of this court to determine the issues infra;
 - a. Is withdrawal of suit merited?
 - b. Is eviction sought in the application tenable?
 - c. Who is to bear costs of the application and the suit?



10. It must be borne in mind that withdrawal and discontinuance of suits is provided for under Order 25 Rules 1 and 2 of the Rules. Besides, withdrawal of a suit shall not be a defence to any subsequent action. In case a suit is discontinued, the court has the discretion thereof upon terms such as costs.
11. No doubt, a party's right to withdraw a matter before the court including this suit cannot be taken away as noted in Nicholas Salat case (supra).
12. The application is commenced under, inter alia, Section 3A (supra) which provides;
 - ' Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'
13. Similarly, *Black's Law Dictionary 10th Edition* at page 1604 defines the term 'Res judicata' as an issue that has been definitively settled by judicial decision. It stipulates the essential elements thus;
 - a. An earlier decision on the issue
 - b. A final judgment on the merits, and
 - c. The involvement of the same parties, or parties in privity with the original parties.
14. The defendant, Hezron Opande Agwango and the plaintiff, Wilson Ochieng Ogoyi herein are a son of the defendant and a son of the plaintiff in Kisii HCC No 439 of 1993 respectively. The documents, inter alia, order, application for consent of land control board, letter of consent and transfer of land issued in HCC annexed to application, show that Kisii HCCC No 439 of 1993 was decided on merit. Prayer (b) sought in the plaint dated August 27, 1993 in the said suit was an eviction. To grant the prayer may constitute execution of the decree in Kisii HC CC No 439 of 1993 by a separate suit in violation of section 34 (1) of the CPA
15. In addition, the suit land reference number Central Kasipul/Kamuma/1645 is a sub division of the original land reference number Central Kasipul/Kamuma/476. The other sub division thereof is land reference number Central Kasipul/Kamuma/1646 which was at the heart of Kisii HCCC No 439 of 1993.
16. On that account, I agree with the defendant without any reservation that this suit is res judicata under section 7 of the CPA. The cardinal principle is that litigation has to come to an end; see *Halsbury's Laws of England (4th Edition) Volume 27* page 273.
17. In conclusion. The ends of justice dictate that the plaintiff has the liberty to withdraw this suit which is res judicata by dint of Kisii HCCC No 439 of 1993. The application is partially merited to the extent of res judicata as stated in the body of the application and costs sought therein.
18. Thus, this court renders the following final orders;
 - a. The withdrawal notice 'dated August 1, 2022, is allowed and this suit is marked as withdrawn.
 - b. The application dated October 12, 2022 is partially allowed in terms of costs sought therein but the prayer for eviction is hereby rejected.
 - c. Costs of the application and the entire suit be borne by the plaintiff.



19. Ordered accordingly.

DATED AND DELIVERED AT HOMA BAY THIS 13TH DAY OF MARCH 2023

G.M.A ONG'ONDO

JUDGE

