



**Odhiambo v Sule (Environment & Land Case 29 of 2018)
[2023] KEELC 15948 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15948 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 29 OF 2018**

E ASATI, J

MARCH 2, 2023

BETWEEN

GILBERT ODHIAMBO PLAINTIFF

AND

JARED NYAGWETH SULE DEFENDANT

RULING

1. In this suit, the parties tendered their evidence and closed their respective cases. By consent, Counsel appearing agreed to file written submissions on the case within set timelines. When the matter came up for mention on January 30, 2023 to confirm filing of written submissions and for the court to give a date for judgement, Counsel for the plaintiff informed the court that he had instructions to withdraw the suit. Miss Awuor advocate then holding brief for Mr Omollo for the defendant informed the court that her instructions were limited and requested that the matter be mentioned on another date when Mr Omollo would be present. The matter was stood over to 16/2/2023 for mention for withdrawal of the suit. Thereafter a Notice of withdrawal of suit dated February 2, 2023 was filed on behalf of the Plaintiff indicating that the plaintiff had “wholly withdrawn the suit with no order as to costs.”
2. On February 16, 2023 when the matter came up for mention Counsel for the Defendant referred the court to Order 25 Rule 1 of the *Civil Procedure Rules* and submitted that a suit can be withdrawn before it is fixed for hearing. That under Rule 2 if the suit has been set down for hearing it can only be withdrawn by consent or on an application if leave is granted. That the notice of withdrawal filed does not state the law under which it is brought. He stated that the hearing had been concluded and the matter is awaiting Judgement. That the defendant had even filed final submissions on the case. That the notice of withdrawal of the suit is out of context and an abuse of the court process. He prayed for the notice of withdrawal to be struck out and date for judgement be given.
3. Counsel for the plaintiff submitted that a party’s right to withdraw suit cannot be taken away by the court. That all that the court can do is order for costs. He stated that Order 25 of the *Civil Procedure*



Rules has a third scenario where if there is no consent then the court gives leave for the party to withdraw the suit. Relying on the provisions of Order 25 Rule 2(2) Counsel submitted that the only outstanding issue is costs and that the Plaintiff has not been served with any submissions. That there will be no prejudice on the Defendant if the suit is withdrawn and that there is no suit after a notice of withdrawal is filed.

4. I have considered the rival submissions made orally by Counsel for the parties and the notice of withdrawal of suit filed in the light of the provisions of Order 25 of the Civil Procedure Rules and decided cases. 5. In the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others, Supreme Court Application No 16 of 2014, the Supreme Court stated as follows;

“a party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”

In Beijing Industrial Designing & Research Institute v Lagoon Development Ltd (2015)eKLR, the court commenting on the above provision, distilled the three circumstances contemplated under the above rule. It stated: -

“The above provision presents three clear scenarios regarding discontinuance of suits 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 at liberty, any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of 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 filling 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 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”.

5. It is true in the present suit each party had closed their case. Matter was awaiting date for judgement. The parties had invested a lot in prosecuting and defending the suit. The defendant had filed his final submissions. Nonetheless, the plaintiff has a right to withdraw his suit. The law does not require the court to inquire into the reasons for the withdrawal but empowers the court to grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon terms.
6. Taking into account the provisions of order 25 of the Civil Procedure Rules, the authorities cited and all the circumstances of the case I allow the plaintiff’s application. The suit is hereby marked as withdrawn. I award costs of the suit to the defendant.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, DELIVERED VIRTUALLY THIS 2ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.



In the presence of:

Maureen: Court Assistant.

Omondi advocate h/b for Aziz Advocate for the Plaintiff

No appearance for the Defendant.

