



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Abuga County Surveyor, Nyamira & 3 others; Motuka
(Exparte Applicant) (Environment and Land Judicial Review Case
E001 of 2022) [2023] KEELC 17251 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17251 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2022**

JM KAMAU, J

MAY 4, 2023

**IN THE MATTER OF AN APPLICATION BY GIDEON MOCHERE
MOTUKA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF KEROKA ELC NO. 15 OF 2021

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 3 OF 2012

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

**IN THE MATTER OF LAND PARCEL NUMBER
EAST KITUTU MWAMANGERA/1907 AND 4557**

EX PARTE

BETWEEN

REPUBLIC APPLICANT

AND

HENRY ABUGA COUNTY SURVEYOR, NYAMIRA ... 1ST INTERESTED PARTY

WILDFRED GEKONGE NGERESA 2ND INTERESTED PARTY

**PRINCIPAL MAGISTRATE, KEROKA LAW COURTS 3RD INTERESTED
PARTY**

ATTORNEY GENERAL 4TH INTERESTED PARTY

AND



RULING

Order 25 Rule 1 of the Civil Procedure Rules should be revisited and possibly amended.

A party against who a suit or claim is being withdrawn ought to be afforded an opportunity to express his opposition or acquiescence to the withdrawal.

It is not enough to just file a Notice of withdrawal of a suit or claim.

To be complete, the withdrawal of a suit ought to be endorsed by the Court.

Once a suit is withdrawn against a party but the suit continues against other parties, all issues relating to the withdrawn party are deemed to be withdrawn.

1. By an Application dated November 7, 2022 the *Ex-parte* Applicant prays for an Order of *Certiorari* to remove into this Court for purposes of being quashed the Order of Keroka Principal Magistrate dated July 26, 2022 in Keroka PMCC ELC Case No 15 of 2021. The Order whose quashing is being sought reads: -
 - 1) The County Surveyor, Nyamira, do provide a National Mutation, within two weeks to be signed by the Executive Officer – Keroka Law Courts to enable the amendment of the Registry Index Map (RIM). To reflect the access road as it appears on the ground between parcel number 4557 and 1907 through to the main road to be precise Keroka – Sotik Road.
 - 2) Once the Mutation is signed, the County Surveyor to provide a registration number to the sub-division on land parcel number 4557 for purposes of issuance of a title deed by the land registrar.
 - 3) Any previous mutation issued be cancelled.
 - 4) Once the Mutation is signed and presented for registration, the issuance of registration number for purposes of registration be done within 21 days.
 - 5) The Plaintiff to cater for registration fees.
 - 6) The matter be mentioned on August 23, 2022 to confirm compliance.
2. The grounds upon which the Order is sought are that the same was granted by the Court without the hearing of the case yet the Order is final and that the same was an adoption of a Consent between the 1st, 2nd and 4th Interested Parties without the participation of the *Ex-parte* Applicant yet its effect was to take away the Applicant's property hence violating the Applicant's property rights under the Constitution of Kenya, 2010. It also violates the principle of Natural Justice that one should not be condemned unheard. He also avers that the Court was void of jurisdiction to grant the Order it did.
3. In his Verifying Affidavit, the *Ex-parte* Applicant has attached a copy of a certificate of official search in respect of LR NO East Kitutu/ Mwamangera /1907 showing that the said land belongs to him. He was the Defendant in Keroka PMCC NO ELC Case No 15 of 2021 where the 2nd Interested Party herein was the Plaintiff and the 1st Interested Parties the 1st Defendant. The case has never been heard. The 2nd Interested Party filed a Notice of withdrawal of suit dated July 9, 2022 against the Applicant and on July 26, 2022 a Consent was recorded as detailed above. The effect and purport of the said Consent Order was: -



- a) to have the Executive Officer, Keroka Law Courts sign mutation forms to enable the amendment of the Registry Index Map (RIM) between LR NO East Kitutu/ Mwamangera /1907 and LR NO East Kitutu/ Mwamangera /4557 to reflect an access road between the 2 parcels through to the main road to be precise Keroka – Sotik Road.
 - b) the County Surveyor to provide a registration number to the sub-divisions on land parcel number LR NO East Kitutu/ Mwamangera /4557 for purposes of issuance of a Title Deeds by the land registrar to the said sub-divisions.
 - c) to cancel the previous mutation(s) issued in respect to parcel numbers LR NO East Kitutu/ Mwamangera /4557 and LR NO East Kitutu/ Mwamangera /1907.
 - d) once the new mutation is signed and presented for registration, the issuance of registration number for purposes of registration be carried out within 21 days.
3. This, the Applicant argues amounted to him being denied proprietary rights of his property LR NO East Kitutu/Mwamangera/1907. Without proper hearing yet what was before Court for determination in the suit in the lower Court was mainly the rectification of the Registry Index Map to effect the sub divisions on parcel No LR NO East Kitutu/Mwamangera/4557 registration of new numbers for purposes of issuance of Title Deeds to which the *Ex-parte* Applicant was opposed.
 4. On their part, the 1st, 2nd and 4th Interested Parties through their Grounds of Opposition dated March 3, 2023 and filed in Court on March 7, 2023 opposed the Motion arguing that the Applicant had since ceased to be a party in the suit by virtue of the Notice of withdrawal of the suit by the 2nd Interested Party, that the Application challenges the legality of a valid Court Order and not the merits of the decision-making process. They also argue that the Applicant did not oppose the withdrawal of the suit against him before the 3rd Interested Party and that the Order can only be quashed, reviewed or set aside on account of fraud, mistake or misrepresentation. They finally argued that the Applicant was not privy to the Consent recorded in Court and therefore he has no locus standi to challenge its legality or otherwise.
 4. I invited all the parties to make submissions in support of rival positions but none rose to the occasion and I had no choice but to write this Ruling.
 5. There seems to have an orchestrated scheme here right from the time of filing of the suit in Keroka. And the same was properly hatched, executed and so meticulously that the desired results were finally achieved as schemed. First, a suit is filed by the 2nd Interested Party against the *Ex-parte* Applicant on April 5, 2021 as well as the 1st Interested Party, Henry Abuga, the County Surveyor, Nyamira in his private capacity. In the Plaintiff, the 2nd Interested Party claims to be the registered owner of East Kitutu/ Mwamangera/ 4557 and that he entered into an agreement to sell a portion thereof to one Vincent Mochama Nyaberi. But, as he claims, the access road to his aforesaid land on the ground “appears to be blocked on the Registry Index Map” by parcel Number East Kitutu/ Mwamangera / 1907 belonging to the *Ex-parte* Applicant.
 6. As a consequence, registration numbers to the sub-divisions of his parcel of land East Kitutu/ Mwamangera/4557 cannot be issued until the Registry Index Map is rectified. And to do this, the *Ex-parte* Applicant has to sign the Mutation forms, to be provided by the 1st Interested Party. The Applicant has always denied the existence of the access road. Whereas the 2nd Interested Party avers in the Plaintiff that it is only the Applicant who has stood between him and the provision of the Mutation forms, he goes ahead to accuse the 1st Interested Party, the County Surveyor, of all manner of ills from



- abuse of office such as extortion for a bribe, threatening to recall his Title Deed upto denying him audience.
7. The 2nd Interested Party then prays for an Order that the 1st Interested Party be compelled to issue the 2nd Interested Party with a Mutation form for the latter to sign so that the Registry Index Map can be rectified to effect the sub divisions of parcel number East Kitutu/Mwamangera/4557. Consequently, this would enable the issuance of numbers and Title Deeds to the new sub-divisions. The *Ex-parte* Applicant on May 9, 2022 denied all the above averments and specifically that he has ever interfered with the Registry Index Map to block the road of access. He further states that the 2nd Interested Party's land is a resultant sub-division of East Kitutu/Mwamangera/1905. East Kitutu/ Mwamangera/1905, 1906 and 1907 were hived off East Kitutu/MwamangerA/851 belonging to the late Selemani Ngare who sold the 3 to different new owners and whoever bought East Kitutu/Mwamangera/1905 sub-divided it further as a result of which East Kitut/ Mwamangera/4557 was born and the 2nd Interested Party bought it. He claims that the 2nd Interested Party is a new comer who may not have the history of the land. He avers that signing the Mutation forms to create an access road would amount to ceding part of his land parcel number East Kitutu/Mwamangera/1907. He further avers that he has never done anything to amend the Registry Index Map.
 8. No Reply to Defence either to join issues with these averments or to admit them was ever filed. The 1st Interested Party never filed any Defence. Hardly 3 months from the fling of the above Defence and to be specific on July 25, 2022, the 2nd Interested Party's Advocates Wonchuru & Associates wrote to the Executive Officer of the Court, asking the said officer to place the matter before the trial magistrate for purposes of recording a Consent.
 9. On the same day the letter reached the Court, the same Advocates filed a withdrawal of the suit against the *Ex-parte* Applicant which withdrawal had been executed much earlier than the Consent, on July 9, 2022. And for sure, a Consent executed on July 25, 2022 when the Applicant is still a party in the suit is filed in Court contemporaneously with the Notice of withdrawal of the suit. The same (Consent) is executed between the 2 Interested Parties but the *Ex-parte* Applicant is left out. According to the Consent, the Executive Officer of Keroka Law Courts is to sign the Mutation forms (certainly on behalf of the *Ex-parte* Applicant) to enable the amendment of the Registry Index Map (RIM) to reflect the access road between land parcels numbers East Kitutu/Mwamangera/4557 and 1907 respectively all the way through to the main road.
 10. Subsequently, the 1st Interested Party would have to provide a registration number to the sub-divisions on East Kitutu/Mwamangera/4557 for purposes of issuance of a Title Deed by the Land Registrar. The Consent also outlaws any previous Mutations issued and orders them cancelled. And to the excitement of the 2nd Interested Party and to the chagrin of the *Ex parte* Applicant, the suit comes to an end. All the prayers sought by the 2nd Interested Party in the Plaint are granted by a stroke of a pen, courtesy of the Litigation Officer representing the Honourable Attorney General for Henry Abuga who had been sued in his private and personal capacity. When endorsing the Consent Order, the Court never made any reference or mention to the *Ex-parte* Applicant (the second Defendant in the case) nor anything about the withdrawal of the suit against the said Second Defendant in the absence of which the *Ex-parte* Applicant remains a party in the suit contrary to what the 2nd Interested Party says in his Grounds of opposition that the latter had ceased to be a party in the suit pursuant to the Notice of withdrawal of the suit filed on July 26, 2022.
 11. His argument that the Applicant did not oppose the withdrawal of the suit against him is so ignominious, to say the least. The suit against the 2nd Defendant is yet to be withdrawn. It is also so disgraceful for the 2nd Interested Party to be heard to say that the Consent Order recorded by the



“parties in the subordinate Court, can only be quashed, reviewed and/or set aside on account of fraud, mistake and/or misrepresentation.” The Consent Order recorded in Court is itself a product of fraud, misrepresentation, deception, scam and a rip-off and had the *Ex-parte* Applicant not moved this Court, the suit in the lower Court had already been granted without hearing the *Ex-parte* Applicant. The Consent was so mischievously constructed.

12. The Applicant’s rights have been violated and part of what is registered as his land taken away without him being heard. This amounts to a back alley Judgment. What was so difficult in setting down the case for Hearing?
13. Under Article 40 (3) of the [Constitution](#) of Kenya, 2010:
14. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
 - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—
 - (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law. (Emphasis mine).
15. In [Dr Joseph Arap Ngok Vs Justice Moiwo Ole Keiwua & 5 Others](#), Nai Civil Appeal No 60 of 1997 the Court declared that: -

“Section 25 and 26 of the [Land Registration Act](#) gives an absolute and indefeasible title to the owner of the property. The Title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of Title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of Title. In fact the Act is meant to give such sanctity of Title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

16. What does the law provide upon the filing of a suit such as the one in question in the subordinate Court? All the parties in the suit must be provided an opportunity to be heard and even when an Applicant seeks that the Defence should be struck out for disclosing no reasonable Defence, the Defendant has still to be provided an opportunity to show the contrary under Order 2 Rule 15 of the [Civil Procedure Rules](#). Likewise, in the case of summary Judgment under Order 36 Rule 2, the Defendant has still to be provided an opportunity to:

“.....show either by Affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.”

17. I also wish to say something on the withdrawal of a Suit. Under Order 25 Rule 1 of the [Civil Procedure Rules](#), the Plaintiff has a right to withdraw a suit against all or any of the Defendants without leave of Court any time before the suit is set down for hearing. But the said Notice has to be served on all the parties. He may even withdraw only part of the claim. He does not require the consent of any of the parties. It is highly unlikely that the “withdrawal of the suit against the 2nd Defendant” dated July 9, 2022 and filed in Court on July 26, 2022 was ever served upon the Applicant. There is



no such indication. The Order of that day talks of a Defendant and not Defendants. The Consent recorded that day is between the 1st, 2nd and 4th Interested Parties herein. The *Ex-parte* Applicant was not present in Court. Even assuming that he was served the same day before the case commenced, did he have enough time to reflect on the withdrawal? Certainly not. Even if the withdrawal was lawful, which is not the case, the remaining parties went ahead to prosecute the matter relating to the interests of the Applicant and had a Decision arrived at that infringed on the latter's interests. He was therefore condemned unheard and as a result he was denied his constitutionally protected property in an unlawfully constituted and paneled Consent.

18. Should a Party decide to withdraw a claim against another party, the Court and the withdrawing party must thereafter completely stay clear of anything that the withdrawn party had an interest in, in that suit. It should no longer be decided upon by the Court. By withdrawing a claim against a party, the withdrawing party is in other words saying that he foregoes any claim that he had against the withdrawn party. Any other way of looking at it is completely absurd. You cannot withdraw a claim against a party and then proceed with the same claim and obtain Judgment over it. And I must point out here that although the withdrawal of suit before the same is set down for hearing is a right given to the party withdrawing, the same is not to be abused and Courts must be sharp-sighted to protect the other party against mischief such as is manifested in this characteristic case of deceit. I must also add that Order 25 Rule 1 provides that the Notice of withdrawal must be in writing. A Notice does not amount to a withdrawal and being a Notice, it remains so until it is endorsed by the trial Court. Otherwise it would be subject to abuse and misuse. The abuse is so manifest in this suit that one does not need to overemphasize this point.
19. One of the Rules of National Justice demands that no one should be condemned unheard.
20. Since there is no wrong without a remedy, what is the Remedy for the *Ex Parte* Applicant? It was held in *Pastoli vs Kabale District Local Government Council and Others* [2008] 2 EA 300 that:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”
21. The Consent recorded in Court on July 26, 2022 is indeed tainted with procedural impropriety which makes it illegal and irrational. The same is also punctuated by non-observance of one of the Rules of Natural Justice by condemning the Applicant unheard after craftily trying to remove him from the suit and then deciding to reduce the size of his property. The *Ex-parte* Applicant was negatively affected by the Consent Order recorded in Court on July 26, 2022 and should have been heard on why part of his property was taken away.
22. In *Republic versus The Honourable The Chief Justice of Kenya & Others Ex Parte Moiyo Mataiya Ole Keiwua*, Nairobi HCMCA No 1298 of 2004 it was held as follows:

“The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/ likely action must be afforded an opportunity of being heard as to why that action should not be taken.”



23. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, Halsbury's Laws of England, 5th Edition Vol 61 page 545 at para 640 states:

“The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet.Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case.....

24. Even in the absence of express procedural requirements in the Civil Procedure Rules that the Applicant should have been heard on the withdrawal of the suit against him under Order 25 Rule 1 of the Civil Procedure Rule, fairness still dictated that he ought to have been given prior Notice of the Consent recorded by the parties as long as the said Order touched on his interests and Halsbury's Laws of England, 5th Edn Vol 61 (*supra*) summarises this point as follows:

“Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded.”

25. Situations such as prevail in this suit will always be occasioned by inconsiderate withdrawals. A Party may want to withdraw a suit for mischievous reasons such as where the Court has placed upon him certain conditions and/or sanctions and to avoid fulfilling them he withdraws the suit and since the withdrawal is not a bar to filing a similar suit subsequent to the withdrawal, the Party then files a fresh suit.

26. On the deficiency in Order 25 Rule 1 of the Civil Procedure Rules, this Court recommends that the same be revisited for purposes of making it mandatory that before the Notice of withdrawal is acted upon, all the parties in the suit are invited and heard on the withdrawal of any of the claims or the entire suit and if there be no objection, then the withdrawal should be endorsed as an Order of the Court. In any case, nothing becomes an Order of the Court unless it is endorsed by the Court. Not even where the parties are all in agreement. It would be unfair for a party who has incurred expenses and resources including, but not limited to hiring Advocates, compiling voluminous documents and filing them in Court at exorbitant costs, at times hiring expert witnesses to prepare documents for the case and has also taken a lot of time to prepare for the case to come to Court one morning only to be told, “We have got good news for you this morning. The case against you has been withdrawn. Go home and pray that the Plaintiff will not re-file the case”.

27. Having said this, I hereby make the following Orders: -

1. An Order of Certiorari be and is hereby issued to remove into this Court for purposes of being quashed the Order of Keroka Principal Magistrate dated July 26, 2022 in Keroka PMCC ELC, Case No 15 of 2021.
2. The Notice of withdrawal dated 07/07/20 by the 2nd Interested Parties in Keroka PMCC ELC Case No 15 of 2021 is hereby set aside.
3. This case shall be taken back to Keroka Principal Magistrate's Court to be heard afresh to its conclusion before another Court/Magistrate.



4. The *Ex-parte* Applicant is hereby granted the costs of this Judicial Review against all the Interested Parties jointly and severally.

These are the Orders of this Court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 4TH DAY OF MAY 2023.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Applicant: N/A

Respondents: N/A

