



Ituaruchiu v Thabari (Sued as the Legal Representative and Administrator of the Estate of Chabari Karigicha) (Environmental and Land Originating Summons 47 of 2019) [2023] KEELC 17751 (KLR) (7 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 47 OF 2019**

CK YANO, J

JUNE 7, 2023

BETWEEN

CHARLES NYOMOO ITUARUCHIU PLAINTIFF

AND

ROBERT MUTHUKU THABARI DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE
ESTATE OF CHABARI KARIGICHA**

RULING

1. The plaintiff/applicant herein moved this court vide an application dated September 23, 2022 seeking for orders that-
 - i. That this application be certified as extremely urgent, and the same heard ex-parte in the first instance.
 - ii. That this Honourable court be pleased to set aside review and or vary the withdrawal order of the plaintiff's suit dated 26th July, 2022 and any other subsequent orders thereof upon such terms as are just for the interest of justice.
 - iii. That this Honourable court be pleased to order the reinstatement of the plaintiff's suit for further hearing on its full merits.
 - iv. That this Honourable court be pleased to make such further orders as may be necessary for the interest of justice.
 - v. That the costs of the application be costs in the cause.
2. The application is based on the following grounds-;



- a. That the plaintiff's suit came up for hearing on the July 26, 2022,
 - b. That the plaintiff came to the court on the said date however, he developed an emergency health issue and was rushed to the hospital for immediate medical attention.
 - c. That after the file was placed aside pending the plaintiff's attendance the plaintiff's advocate requested for the same to be withdrawn after the plaintiff took so long to get back to the court.
 - d. That the plaintiff has fully complied with order 11 and has all along been eager to prosecute his case and he wishes it to be heard to conclusion on its full merits.
 - e. That the plaintiff absence in court was not deliberate or through negligence and he intends to make good his absence if he can.
 - f. That the application has been made timeously without any inordinate unreasonable delay.
 - g. That this Honourable court has wide unfettered discretion to set aside and vary the withdrawal order dated July 26, 2022 and it is fair and just that the same be set aside ex debito justiae.
 - h. That no prejudice will be occasioned on the defendant/respondent if the plaintiff's suit is reinstated for hearing on its full merits.
 - i. That it is only tenable and for the wider interest of justice that the orders sought be granted as the court has jurisdiction to grant the same.
 - j. That great hardship and injustice will be occasioned to the plaintiff should the application be denied based on account of an excusable mistake on part of the plaintiff's counsel.
3. The application is supported by the affidavit of Charles Nyomoo Ituaruchiu, the applicant sworn on September 23, 2022. He reiterated the above grounds and further stated that the matter was withdrawn without his consent and or knowledge.
 4. The applicant stated that he has been hospitalized on several occasions during the pendency of the suit making it difficult for him to diligently prosecute his case and he annexed discharge summaries marked CN 11 CN 12 CN 13 respectively.
 5. The applicant further stated that in fact as a result of his frequent illness, he intends to appoint a guardian to proceed with the matter on his behalf to avoid any further delays and or adjournments for its expeditious disposition.
 6. The applicant avers that he has an arguable case against the respondent and if the withdrawal notice dated July 22, 2022 is not withdrawn he stands to suffer irreparable loss and damage. That it is in the wider interest of justice that the notice of withdrawal and other subsequent orders be reviewed and have the matter proceed for hearing and determination expeditiously.
 7. The applicant states that he has not been indolent in the prosecution of the matter and that he has brought the application expeditiously after he learnt of the unfortunate dismissal of his case.
 8. The applicant further states that he is advised by his advocate Mr. Kiogora Arithi that the Honourable court has not downed its tools and can still proceed to exercise its unfettered discretion in his favour and set aside the withdrawal orders herein. That further the respondent herein will not be prejudiced in any way that cannot be remedied by costs should the suit be reinstated for hearing on its full merits.
 9. The applicant avers that he is ready and willing to abide by terms and conditions that the Honourable court imposes on him in exercise of its discretion.



10. The applicant further states that disallowing the application will permanently send him away from the seat of justice unheard with the consequent effect of losing his share of the suit lands.
11. The respondent filed his replying dated November 10, 2022 where he states that he knew of a personal knowledge that the suit came for hearing on July 26, 2022 when both parties, and their advocates were present and the same was confirmed for hearing after the call over.
12. The respondent states that on the aforesaid hearing date, the Hon. Judge called the matter to proceed after the call over. However, the plaintiff's advocates informed the court that she had called the plaintiff who informed her that he had gone home. That the plaintiff's advocates made an application to the court to withdraw the suit instead of the same being dismissed by the court for non- attendance by the plaintiff and the same was duly ordered by the court to be marked as withdrawn with costs to the respondent.
13. The respondent states that by his conduct of going home after the suit had been confirmed for hearing in his presence, it is manifestly clear that the plaintiff had no interest in the suit with the result that his advocates had no option but to apply to withdraw the same or otherwise the same would have been dismissed by the court for non-attendance by the plaintiff and that the plaintiff should therefore live with the consequences of his actions of going home before his suit was heard on the material day. It is the respondent's contention that the suit was properly withdrawn and therefore the application should fail for the reasons given including the delay over two months in bringing the application. The respondent urged the court to dismiss the application with costs.
14. With the consent of the parties, on November 14, 2022, the court directed that the application be canvassed by way of written submissions. The applicant filed his submissions on January 19, 2023 through the firm of Kiogora Arithi & Associates Advocates while the defendant filed his on February 13, 2023 through the firm of John Muthomi & Co. Advocates, both of which I have read and considered.
15. I have considered the application, the affidavits in support and against as well as the rival submissions made and the authorities relied on. The only issue for determination is whether the plaintiff/applicant has satisfied the court to set aside the order of withdrawal of the suit and for it to be reinstated.
16. This suit was before court for hearing on July 26, 2022 when Ms. Mukaburu advocate appeared for the plaintiff while Mr. Muthomi advocate was present for the defendant. When the matter was called out, both parties were also present and both their advocates informed the court that they were ready to proceed with the hearing and requested for time allocation. The court directed that the matter be heard at 11.10 a.m.
17. When the matter was called out at 11.10 a.m. both the plaintiff's counsel and the defendant's counsel indicated that they were ready to proceed with the hearing. At that juncture, counsel for the plaintiff walked out of the court room to call the plaintiff but returned and informed the court that the plaintiff informed her that he had already left for home. There was no indication that the plaintiff's absence at the time the matter was called out the second time was due to illness as alleged by the applicant. Whereas counsel for the applicant applied for an adjournment, the court was not satisfied with the reason given for the adjournment and declined to grant the application. The plaintiff's counsel applied to withdraw the case with no order as to costs. However, counsel for the defendant, though not opposed to the withdrawal, prayed for costs. The court then marked the plaintiff's case as withdrawn with costs to the defendant.
18. I have perused the annexures attached to the plaintiff's application herein, especially the discharge summaries. I note that there is no document indicating that the applicant was hospitalized around July



26, 2022. Indeed the plaintiff admits that he was present in court when the case was first called out and fixed for hearing at 11.10 a.m. If indeed the plaintiff was unwell as stated, one would have expected to inform his advocate of the alleged illness when he was called and not simply state that he was already home. Whereas the applicant alleges that the suit was withdrawn without his consent, it is trite law that a duly instructed advocate has an implied authority to compromise and settle the action. In this case, I am of the view that the suit was properly withdrawn and the applicant has not persuaded this court to have orders set aside and reinstate the suit. Moreover, the explanation given is not adding up. I must also say that it is clear from the record that the applicant has not been keen in prosecuting his case which is an old case. I further note that the suit had been dismissed on November 29, 2021 for non – attendance, but it was later reinstated. In this case, the court cannot exercise its discretion once again to reinstate the suit which was duly withdrawn by the plaintiff's agent. In my view, the overriding objective of the court would not come to the aid of the plaintiff.

19. In the result, I find no merit in the notice of motion dated September 23, 2022 and I dismiss it with costs to the respondent.

20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF JUNE 2023.

In the presence of

Miss Mukaburu Advocate present plaintiff

J. Muthomi advocate present for defendant

Court Assistant V. Kiragu

C.K YANO

JUDGE

