



**Mutisya & 8 others v Mulemba (Environment & Land Case
114 of 2019) [2023] KEELC 21177 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 114 OF 2019
CA OCHIENG, J
NOVEMBER 1, 2023**

BETWEEN

**JOHNBOSCO KISOME MUTISYA 1ST PLAINTIFF
FRANCIS MAKAU MUTISYA 2ND PLAINTIFF
WILLIAM MULEMBA MUTISYA 3RD PLAINTIFF
GRACE NTHAMBA MASWII 4TH PLAINTIFF
MARTHA MBULA MUTISYA 5TH PLAINTIFF
ELIZABETH MUTINDI PAUL MUINDI 6TH PLAINTIFF
RAPHAEL KYENGE MUTISYA 7TH PLAINTIFF
JOSEPH MUTHINI MUTISYA 8TH PLAINTIFF
COLLECTOR MUENI MUTISYA 9TH PLAINTIFF**

AND

GABRIEL MULEMBA DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the 29th March, 2023 brought pursuant to Order 51 Rule 1, Order 2 Rule 15(c) and (d), Order 25 Rule 4 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3A and 63E of the Civil Procedures Act as well as Article 159(2) of *the Constitution*. The Defendant seeks the following Orders:

1. Spent.



2. That this Honourable Court be pleased to strike out, arrest or suspend the Notice of Withdrawal of the suit dated 15th February, 2023 filed by the firm of M. Mutinda & Associates on behalf of the Plaintiffs.
 3. That this Honourable Court be pleased to order that there be no subsequent proceedings or suit that may be brought upon the same or substantially the same cause of action before payment of the costs of this suit as envisaged under 25 Rule 4 of the Civil Procedure Rules, 2010.
 4. That the Costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Gabriel Mulemba where he explains that the Plaintiffs herein filed the Originating Summons on October, 2019 seeking reliefs over land parcel number Matuu/Ikaatini/676 hereinafter referred to as the 'suit land'. He confirms that they have substantially complied with Order 11 of the Civil Procedure Rules, 2010 but the Plaintiffs have failed to set down the Originating Summons for hearing. Further, that the Plaintiffs' are trying to interfere with the status quo of the suit land as they first tried to encroach on it and started digging including making bricks for purposes of constructing but he obtained orders restraining them from doing so. He contends that the Court had previously issued injunctive orders which orders are in force and the Notice to Withdraw Suit dated the 15th February, 2023 is aimed at defeating the Orders of the Court. He argues that the Notice to Withdraw suit dated the 15th February, 2023 has been filed to purposely defeat the Application dated the 13th December, 2022 which in effect will pave way for proceedings in Kithimani Principal Magistrate's Court ELC Misc. No. 7 of 2022 which suit was filed during the pendency of this suit. He insists that it is suspicious and sceptical on the Plaintiffs' urge to prosecute their suit before the Principal Magistrate at Kithimani who issued an ex-parte order that is in conflict with the earlier orders of this Honourable Court. He avers that there has been serious disregard of the Orders of this Honourable Court and filing of a new suit at Kithimani Court raising exactly the same issues as those in the suit herein which the Plaintiffs have applied to discontinue and is meant to defeat the pending Applications where there has been disregard of the Court's Orders and deprive him of the fruits of the earlier Rulings. He claims that the right to withdraw a suit is being used by the Plaintiffs to obtain a collateral advantage to his detriment as the move to withdraw the suit herein and pave way for the newly filed suit at Kithimani is meant to defeat justice. He reiterates that withdrawing this suit during the pendency of an Application seeking to stay proceedings in the newly filed suit is an open abuse of the process of the Court. Further, that since the filing of the Originating Summons dated the 22nd October, 2019, he retained legal services of his advocates where he has expended a lot of resources in defending this suit, in which the subject value of the suit land is Kshs. 18,500,000 and allowing withdrawal of the suit herein under Order 25 Rule 1 of the Civil Procedure Rules, 2010 without setting any conditions as required under Order 25 Rule 4 of the Civil Procedure Rules, 2010 will be highly prejudicial to him. He reiterates that it is imperative that Plaintiffs be restrained from withdrawing this suit that was earlier filed, when there is a new suit on the same subject matter and the same cause of action and similar parties.
3. The Plaintiffs opposed the instant Application by filing a Relying Affidavit sworn by John Bosco Kisome Mutisya and Grounds of Objection dated the 3rd May, 2023. They stated that subsequent court proceedings after the Notice to Withdraw the Suit was filed and served upon the Defendant on 1st March, 2023, including the instant Notice of Motion dated the 29th March, 2023, is void ab initio. They contend that by dint of the Ruling of the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 others, Supreme Court Application No. 16 of 2014, where it stated that, "a party's right to withdraw a matter before court cannot be taken away. A court cannot bar a party



from withdrawing his matter...” it validates the Notice to Withdraw and the court cannot entertain any or any further proceedings. Further, that the Court of Appeal having equally pronounced itself in the case of Beijing Industrial Designing Company & Research Institute vs. Logan Development Ltd (2015) eKLR where it stated that; “As a general proposition, the right to discontinue a suit or withdraw his claim cannot be questioned...” makes any further proceedings sustained in this suit with the acquiescence of the court, a strange precedent unknown in the law and procedure. They insist that this Court has no jurisdiction to preside over a suit which does not exist.

The Application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, Grounds of Objection and submissions, the only issue for determination is whether the Notice to Withdraw Suit dated the 15th February, 2023 should be struck off or not.
5. The Defendant in his submissions reiterated his averments as per the Supporting Affidavit and insisted that the Notice to Withdraw Suit dated the 15th February, 2023 is an abuse of the court process. Further, that the said notice is an action of bad faith and an effort to defeat the ends of justice and the Plaintiffs should be restrained from relying on provisions of Order 25 Rule 1 in the said notice vis-a-vis provisions of Order 25 Rule 4 of the Civil Procedure Rules, 2010. He argued that the Plaintiffs’ move purporting to withdraw the instant proceedings is a clear calculated attempt to compromise and steal a match on his Application dated the 13th December, 2022 where he seeks to stay proceedings in Kithimani Principal Magistrate’s Court ELC Misc. No. 7 of 2022 pending hearing and determination of this suit. He further submits that one Benedetta Makenye Muvinda and Catherine Nthamba Willy, the 3rd and 4th Plaintiffs in the Kithimani case, filed a Notice of Motion Application dated the 1st July, 2022 through the firm of M. Mutinda & Associates seeking to amend the Originating Summons in effect to replace all the Plaintiffs with them, while the Application was awaiting determination the same Applicants including other parties, moved to Kithimani Lower Court, instructed a different law firm and filed a similar suit, while the suit herein is pending. He reiterates that the Plaintiffs are on a fishing expedition and/or forum searching to find a judicial officer who can give them a favourable Judgment to his detriment. He further submits that the Plaintiffs’ Notice to Withdraw Suit dated the 15th February, 2023, premised under Order 25 Rule 1, is a dishonest reaction, where they seek to defeat the court orders which are in place. He further submits that the withdrawal of this suit will be prejudicial to him since the Plaintiffs’ objective is to replace a suit in another forum and deprive him of the fruits of the Ruling by three different Judges and the existing orders on stay of proceedings. To buttress his averments, he relied on the following decisions: Malindi Court of Appeal Civil Appeal No. 52 of 2015: Harry John Paul Arigi & 2 Others Vs. The Board, Kenya Ports Authority & 2 Others; Castanho V. Brown & Root (UK) Ltd & Another (1981) 1 All ER 143 quoted in Nairobi Court of Appeal Civil Appeal No. 1 of 2015: Beijing Industrial Designing & Research Institute Vs. Lagoon Development Limited; Nairobi Environment and Land Court ELC Misc. Application No. 66 of 2020: Republic Vs. The Chief Land Registrar & 2 Others; Mombasa High Court Environment and Land Court ELC No. 203 of 2017: Karisa Chengo Nguma Vs. Kache Ruwa Kalama Shida Ali Nguma; Mombasa Court of Appeal Civil Appeal No. 96 of 2016: Canyon Properties Limited & 3 Others Vs. Eliud Kipchirchir Bett & 2 Others and Thika Environment and Land Court Constitutional Petition No. 6 of 2018: Stephen Mbugua Mwagiru Vs. The Chief Land Registrar & 7 Others.

The Plaintiffs opted not to file submissions to canvass the instant Application.

6. The Plaintiffs herein filed a Notice to Withdraw Suit dated the 15th February, 2023 in accordance with Order 25 Rule 1 of the Civil Procedure Rules, which Notice is opposed by the Defendant. The



Plaintiffs argue that all proceedings after filing the said Notice are void ab initio and this Court should not entertain them. From the court record, the Plaintiffs had initiated this suit through an Originating Summons on 22nd October, 2019 where they sought orders to acquire the suit land through adverse possession. The Defendant filed his Replying Affidavit to oppose the Originating Summons after which the Plaintiffs filed a Further Affidavit in response thereto. On 6th August, 2020 the Defendant filed a Notice of Motion Application dated the 5th August, 2020 seeking injunctive orders restraining the Plaintiffs from the suit land which Application was opposed by the Plaintiffs vide their Replying Affidavit filed on 21st August, 2020. Further, the Court vide its Ruling delivered on the 12th February, 2021 made orders that pending the hearing and determination of this suit, the Plaintiffs were restrained from interfering with the suit land. Further, vide a Notice of Motion dated the 21st June, 2021, the Defendant sought for injunctive orders restraining the Plaintiffs from burying the body of William Mulemba Mutisya on the suit land, which Application was opposed and the Court through its Ruling dated the 18th January, 2022 allowed the said Application for injunction. On 2nd December, 2022, some of the Plaintiffs herein together with other parties proceeded to file Kithimani ELC Misc. No. 7 of 2022 whose fulcrum revolves around the suit land. After the filing of the Kithimani Case wherein the Court granted ex parte orders, the Defendant vide his Application dated the 13th December, 2022 applied to stay the said proceedings but on the 17th February, 2023, the Plaintiffs filed their Notice to Withdraw this suit dated the 15th February, 2023. Further, they did not indicate how they intended to cater for the Defendant's costs in accordance with Order 25 Rule 4 of the Civil Procedure Rules, yet he had defended this suit as well as filed several Applications including Notice of Preliminary Objection and made several court appearances.

7. The legal provisions governing withdrawal or discontinuance of suits is contained in Order 25 of the Civil Procedure Rules which provides as follows:

[Order 25, rule 1.] 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. [Order 25, rule 2.] (1) 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. (2) Where a suit has been set down for hearing the court may grant the plaintiff 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. (3) The provisions of this rule and rule 1 shall apply to counterclaims. [Order 25, rule 4.] If any subsequent suit shall be brought before payment of the costs of a discontinued suit, upon the same, or substantially the same cause of action, the court may order a stay of such subsequent suit until such costs shall have been paid.”

8. In *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR, Makhandia, Ouko & M’Inoti, JJAs while dealing with an Appeal touching on discontinuance of a suit, held that: -

“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. It is in that context that we understand the decisions of the Supreme Court that we have cited above. We understand the apex Court to say that even where leave of the Court is required, subject to considerations such as costs, (terms that are just). The decisions of the Supreme Court cannot be interpreted to mean, as the respondent implied, that a plaintiff has a right to discontinue his suit in sundry and all cases,



even without leave where the law requires such leave. To so hold would be to reduce the requirement for leave to a mere formality, which we do not think is what was intended by the decisions of the Supreme Court or Order 25. From the circumstances surrounding the discontinuation of the suit and the filing by the respondent of a new suit the very next day raising exactly the same issues as those in the suit it had discontinued, the contention by the appellant that the sole purpose of the discontinuation of the suit was to defeat the contempt of court proceedings is not, with respect, an idle complaint. The uncritical application of Order 25 Rule 1 to the facts of this case resulted, in our respectful view, in an anomalous situation where the public interest in the upholding and protection of the rule of law was sacrificed, without the slightest of consideration, at the altar of the respondent's alleged absolute right to withdraw its suit, even when it was alleged to have deliberately undermined the rule of law." Emphasis Mine

9. While in the case of *Harry John Paul Arigi & 2 others v Board, Kenya Ports Authority & 2 others* [2016] eKLR the Court of Appeal stated that:

In *Beijing Industrial Designing Research Institute V Lagoon Development Ltd* (supra), We Held, Citing *Castanho V. Brown & Root (uk) Ltd & Another* (1981) 1 ALL ER 143 that even where a party has a right to withdraw his suit, the court has inherent jurisdiction to stop such withdrawal if it constitutes abuse of the process of court. In the circumstances of this appeal, we are satisfied that the learned judge did not err by setting aside the appellant's purported notice of withdrawal of the petition. To start with, the appellant's reason for the purported withdrawal of the petition was that the learned judge was biased and had violated several of their constitutional rights.' Emphasis mine

10. I note the Plaintiffs heavily relied on the Supreme Court of Kenya Application No. 16 of 2014: *Nicholas Kiptoo Arap Korir Salat Vs. The Independent Electoral and Boundaries Commission & 7 Others*, which I wish to distinguish with the current suit. In the said case, the Supreme Court held that there was no abuse of the court process since there was only one Application before the Court for determination which was withdrawn while in this instance, a similar suit dealing with the same subject matter was filed being *Kithimani ELC Misc. No. 7 of 2022* during the pendency of this suit wherein the Plaintiffs obtained ex parte orders. Further, the Notice to Withdraw this suit was filed after the Defendant had filed his Application seeking to stay the said *Kithimani Case*.
11. Based on the circumstances at hand, I find that the Plaintiffs' actions of filing the said Notice to Withdraw this Suit during the pendency of Application to stay the *Kithimani case*, amounted to bad faith. Further, by filing the aforementioned *Kithimani Suit* during the pendency of this suit and obtaining ex parte orders, noting that there were already orders of injunction in place, it indeed amounted to an abuse of the court process. In relying on the decisions cited above, I find that even though the Plaintiffs had a right to withdraw the suit, this right is not absolute as the Court has to grant them leave to withdraw the suit and make any other orders to that effect. Further, I find the Plaintiffs' actions in filing the *Kithimani suit*, indeed undermines the Rule of Law. It is trite that this court has inherent jurisdiction to enhance administration of justice and where a Notice to Withdraw suit is filed with a view to defeat the ends of Justice, prejudice an opponent and abuse the Court process, then this Court has no option but to set the record straight by declining to adopt the said Notice to Withdraw the suit, as in this instance.
12. In the circumstances, I find the Notice of Motion dated the 29th March, 2023 merited and will allow it with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 1ST DAY OF
NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

