



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E&LC. NO.426 OF 2015

JEREMIAH TUITOEK.....1ST PLAINTIFF/APPLICANT

NICKSON TUITOEK.....2ND PLAINTIFF/APPLICANT

VERSUS

KIPRONO MULALIT.....1ST DEFENDANT/RESPONDENT

KIBIWOTT KIPTOO.....2ND DEFENDANT/RESPONDENT

KIPKOECH MULALIT.....3RD DEFENDANT/RESPONDENT

TOROCH KIPTOO.....4TH DEFENDANT/RESPONDENT

KIPRUTO KIPTOO.....5TH DEFENDANT/RESPONDENT

KIPCHIRCHIR KIPTOO.....6TH DEFENDANT/RESPONDENT

RULING

1. The Applicants approached this court through the Notice of Motion under certificate of urgency, both dated 7th October, 2021 seeking for orders that: -

1. *“Spent*

2. *Spent*

3. *Spent*

4. *That this Honourable Court be pleased to set aside or vary its orders made on 23rd september 2021 withdrawing the entire suit.*

5. *An order issue reinstating the suit herein and an order do issue that the same be heard on priority in the interests of justice.*

6. *That pending hearing and determination of this suit this Honorable Court be pleased to reinstate the orders of status quo.*

7. *Costs of this application be provided for.”*

The application is based on the five (5) grounds on its face marked (a) to (e) and supported by an affidavit sworn by Nickson Tuitoek, the 2nd Applicant, on the 7th of October, 2021, in which he among others deponed that the suit concerns an erroneous map that the Respondents are seeking to enforce, resulting to their homestead being curved out into the Respondents’ land; that they had consented to adopt the surveyor’s report of 11th September, 2018 as the basis of their settlement; that when the matter came up in court on the 23rd September, 2021, their counsel misapprehended the instructions and instead withdrew the suit, and that was the basis of filing the instant application; that the application should be allowed in the interests of justice and considering it had been brought expeditiously. The deponent attached among others the copies of the charge sheets to several criminal cases which he claimed had arisen from the dispute between the Applicants and Respondents over the issues giving rise to this suit.

2. The application is opposed by the Respondents through the undated replying affidavit sworn by Kipkoech Mulalit, the 3rd Respondent, and filed on the 2nd November, 2021 in which he among others deponed that the application is incompetent, an abuse of the court process and should be dismissed with costs; that upon the suit being withdrawn at the instance of the Applicants, it ceased to exist and the court has no jurisdiction to entertain the application; that the Applicants cannot claim that their advocate had no instructions to withdraw the suit, and if aggrieved with the action of their counsel, they should seek redress against their advocate; that no consent had been filed and the application has not satisfied the conditions for grant of the orders sought.

3. That following directions issued on the 25th October, 2021 on filing and exchanging submissions, the learned counsel for the Respondents and the Applicants filed theirs dated the 4th November, 2021 and 1st December, 2021 respectively. The learned counsel for the Applicants urged the court to reinstate the suit pointing out that the mistake of their advocate ought not to be visited upon them. The counsel cited several court decisions to that effect, and especially urged the court to consider that the 1st Plaintiff had already partially testified before court. They further submitted that they would be greatly prejudiced if the orders sought were not granted. The counsel for the Respondents submitted that the court lacks jurisdiction to reinstate the suit *under Order 25 of the Civil Procedure Rules*, and cited several decisions wherein the courts had been faced with similar applications but refused to reinstate the main suits. The learned counsel took issue with the failure by the Plaintiff's advocate, who was in conduct of the matter at the time of the alleged mistake, to file an affidavit to that effect. The counsel cited a superior court decision in which such an affidavit was found to be required.

4. The following are the issues for the court's determinations;

a. Whether the Applicants have established a case for setting aside or varying the order of 23rd September 2021;

b. Whether the Applicants have made a case for reinstating of their suit and

c. Who pays the costs of the application.

5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by counsel, the superior courts decisions cited therein and come to the following conclusions;

a. That withdrawal of suits is governed by Order 25 of the Civil Procedure Rules 2010. The Rules under the said Order do not provide for the reinstatement of a withdrawn suit. That Rule 1 of the said Order provides as follows;

“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.”

*The above Rule leaves room for a subsequent action to be lodged despite the withdrawal or discontinuance of a suit. That position was well stated in the case of **Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party) [2021] eKLR**, where the court was faced with a similar application like the instant one in a suit that had been withdrawn, and declined to allow it. The court expressed itself as follows;*

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. The withdrawal is complete or effective as soon as it takes place. The right to revoke the withdrawal can only be allowed by the legislature by expressly providing so in the rule and not by courts. In the same vein, the rules do not confer the court with the power to reinstate a suit once withdrawn.”

That the court agree with the reasoning and finding in the above decision.

b. The Applicants have urged the court to do justice to the parties by allowing their application claiming that the withdrawal was erroneous. They have produced a letter by their then counsel dated 26th April 2021 wherein he wrote to the Deputy Registrar seeking that a consent be recorded in this suit, and another document titled terms of settlement that shows the agreement between the Applicants and their Advocate on the alleged terms of the consent. That whereas I am sympathetic to the Applicants' situation, I cannot help but notice that the alleged mistake of their advocate goes beyond erroneously withdrawing the suit. Order 25 Rule 5 of the Civil Procedure Rules provides that;

*(1) “Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, **order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith.**”*

(2) The Court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.” (emphasis mine)

The above provision requires that where there is a whole or part compromise in a suit, the same is then recorded and judgment entered in the terms thereof. In this case, there is no compromise that had been agreed upon by the parties either wholly or partially settling the suit that had been recorded and entered as judgement of the court by the time of the withdrawal. Whereas the Applicants urges the court to find that a consent indeed existed, the facts presented only show what they sought through their proposal to the consent, to the effect that the surveyor's report of 11th September, 2018 be accepted by the Respondents. The Respondents have

denied that a consent was ever arrived at between themselves and the Applicants, and as none was recorded and entered as judgement of the court, then the Applicants' claim that the counsel who represented them in court on the 23rd September 2021 misapprehended the instructions has not been established.

c. That the fact that the Applicants' case was partly heard as of the 23rd September, 2021, when the application to withdraw the suit was made and allowed, did not mean the Applicants' rights under Order 25 of the Civil Procedure Rules had been taken away. That further, the withdrawal of the suit is not a bar for the Applicants to file a new suit, and any losses the Applicants may have suffered by virtue of the alleged 'mistake' of their counsel may be pursued against the said party, as the suit herein is no more.

d. That as the Applicants' application is without merit, the Respondents are entitled to costs in accordance with section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya.

6. That from the foregoing, the court finds the Applicants application dated the 7th October, 2021 has no merits and is hereby dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 2ND DAY OF MARCH 2022

S.M.Kibunja,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFFS: Absent

DEFENDANTS: Absent.....

COUNSEL: Mr. Martim for the Plaintiffs.....

Ms. Odwa for the Defendants.....

COURT ASSISTANT: ONIALA

S.M.Kibunja,J.

ELC ELDORET