REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC PETITION NO. 15 OF 2015

BUNDOTICH KIMULGUL & 29 OTHERS ..... PETITIONERS

VERSUS

KENYA FOREST SERVICE ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

NATIONAL LAND COMMISSION ..... 3RD RESPONDENT

RULING

[NOTICE OF MOTION DATED THE 17th SEPTEMBER 2019]

1. The Petitioners filed the Notice of Motion dated 17th September, 2019 seeking for the following orders *inter alia*:

> *(i) That in the interim, there be stay orders of further proceedings in this matter pending hearing and determination of this application;*
>
> (ii) *That the court be pleased to set aside orders made on 27th July, 2017 discontinuing the proceedings in this matter and the petition be reinstated and heard on merit.*

The application is supported by the affidavit sworn by Isaac Kiprotich Kiptoo, the applicant, on the 17th September, 2019. It is his case that the Petitioners had instructed counsel in 2016 to file proceedings in relation to their property, ***Mosop/Kapchorua plots No. 913***. That upon the petition being filed, the 1st respondent sought through the notice dated 1st July 2016, to cross examine the 1st Petitioner. That the 1st Petitioner was then very sick and subsequently died on the 17th June 2019 without being cross examined. That the petition was discontinued on the 27th July 2017 because of the 1st petitioner's illness. That as he is the registered owner of parcel Plot No. 913 that was affected by the petition, the same should be reinstated and heard on merit, as he cannot file fresh proceedings.

2. The 1st Respondent filed ground of opposition dated the 28th July 2020, and a replying affidavit sworn by **PROFESSOR NIXON SIFUNA** on 28th July, 2020 in opposition to the aforesaid application. That to the affidavit is attached a copy of the order of 27th July, 2017 that was issued on 4th October, 2017 marked as **"NS1"**, and a copy of the 1st respondent's bill of costs dated 31st January, 2019 annexed as **"NS 2"**. The 2nd and 3rd Respondents also filed grounds of opposition dated 21st July, 2020 in opposition to the said application.

3. On 12th May, 2020 the court directed the parties to file and exchange the submissions on the application. The learned counsel for the 1st Respondent, 2nd & 3rd Respondents, and the applicant filed their written submissions dated 1st September, 2020, 5th November 2020 and 6th May, 2021 respectively. The submissions are as summarized hereinbelow;

> **(A)** The applicant submitted that the petition was discontinued on the 27th July 2017, when it came up for cross examination of the 1st petitioner, following the 1st Respondent's notice to cross examine dated 1st July, 2016. That the 1st Petitioner failed to attend court on the 27th July 2017, due to his illness leading to the discontinuance of the petition. That the 1st Petitioner subsequently passed on the 17th June 2019. That the discontinuance of the petition was not by consent, as it was occasioned by the court's refusal to grant an adjournment to counsel for the Petitioners. That Respondents' contention that the discontinuance was by consent is misplaced. That the applicant cited the case of **JOSEPH KINYUA V. G.O OMBACHI CIVIL APPEAL NO. 82 OF 2017[2019] eKLR,** in which the guiding principles for the reinstatement of a suit were outlined, in support of his submissions that the petition should be reinstated. He further submitted that as the petition has not been heard on its merit, and as the 1st Respondent has not shown how it would be prejudiced other than in the taxation of its bill of costs, which can be taxed once the matter is heard on its merits, the application ought to be allowed.

(B) The 1st respondent submitted that the withdrawal of the petition was by consent order entered on the 27th July, 2017 and the same was endorsed by the court as such. That a consent order has contractual effect and it can only be set aside on grounds which would justify setting aside a contract. The 1st Respondent relied on the following cases in support of their submissions: **FLORA N. WASIKE V. DESTIMO WAMBOKO (1988) eKLR, JAMES MUCHORI MAINA V. KENYA POWER & LIGHTENING COMPANY [2005] eKLR, KENYA KENYA COMMERCIAL BANK LTD V. SPECIALISED ENGINEERING CO. LTD (1982) KLR 485, SMN V. ZMS & 3 OTHERS [2017] eKLR, AND KITALE INDUSTRIES V. ATTORNEY GENERAL & COUNTY GOVERNMENT OF TRANS NZOIA [2020] eKLR**. The 1st Respondent further submitted that the application does not meet the threshold required for setting aside a consent order or judgement. That the applicant has not presented any evidence of fraud or collusion in entering into the consent. That it has not been shown that the consent was contrary to the policy of the court, or that it was entered into without sufficient material facts, or in misapprehension or ignorance of such facts. That the application is an afterthought that is calculated to scuttle the taxation of the 1st respondent's bill of costs, and therefore an abuse of the court process. That the application should be dismissed with costs.

(C) The 2nd and 3rd respondents submitted that the order issued on 27th July, 2017 was a consent order which has contractual effect. That consent orders can only be aside on the grounds which would justify the setting aside of a contract entered into with the full knowledge of the material matters, by legally competent persons. That such grounds includes fraud, mistake, misrepresentation, collusion, duress, undue influence, agreement contrary to the policy of the court, lack of capacity of parties, misapprehension or ignorance of material facts, or where certain conditions remain to be fulfilled or carried out as was held in **FLORA N. WASIKE V. DESTIMO WAMBOKO (1982-88)1 KAR(1988) eKLR, MUTURI MWANIKI & WAMITI ADVOCATES V. EDWARD MUKUNDI KARANJA & 2 OTHERS [2017] eKLR, and ARNOLD MUATHA MAINGI V. COLLINS KITAKA KALOKI [2019] eKLR.** That the 2nd and 3rd respondents further submitted that the grounds for setting aside a consent order have not been met, and that no reason was advanced to explain why the other petitioners were not in court on the hearing date of the 27th July, 2017. That the applicant's decision to file the instant application after the lapse of 3 years amount to an inordinate delay. To buttress their submission, the 2nd and 3rd respondents relied on the case of **STEPHEN GATHUA KIMANI V. NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS [2016] eKLR,** where the Court dismissed an application for review, noting that re-opening of a case after an unexplained delay of 1year, amount to an abuse of the court process. The 2nd and 3rd respondents argued that this court ought to decline to grant the orders of reinstatement sought by the applicant since they failed to take steps to progress their case, yet they are the ones who dragged the respondents to court as was held in **ELIUD MUKHISA NALIANYA & ANOTHER V. JOSEPH WANJALA FULAFU & ANOTHER [2019] eKLR.**

4. That I have considered the application, affidavit evidence by all parties, grounds of opposition filed, the learned counsel's submissions, the superior courts decisions cited thereon, the record and come to the following findings:

(a) That the parties have agreed, and the record has confirmed that when this matter was come up for hearing of the petitioners' case on the 27th July 2017, the court directed after the call over that the hearing do commence at 11.00 am. That when the matter was called at 11.15 am, the counsel for the petitioners applied for adjournment for reasons that he did not have his witnesses in court, and that he intended to have the 1st Petitioner, who was 96 – 97 years old, substituted. That the 1st, 2nd and 3rd Respondents' counsel submitted that they were ready for the hearing and therefore opposed the application for adjournment. That after considering the learned counsel's submissions, the court made a ruling to the effect that counsel for the petitioners had not furnished the court with sufficient reasons to justify the application for adjournment, and directed that the hearing to proceed. That the counsel for the Petitioners then sought to have the petition heard through written submissions. The learned counsel for the 1st, 2nd and 3rd respondents opposed the aforesaid application indicating that directions for viva voce hearing had already been taken. The court rendered a ruling referring to the viva voce directions of 1st July, 2016 and rejected the petitioners' counsel application. The court again directed that the hearing to proceed then. The counsel for the petitioners then sought to have the petition withdrawn and discontinued on the strength of **Order 25 of the Civil Procedure Rules, 2010**. That after hearing the counsel for the respondents, the court made a ruling endorsing the petitioners' application to discontinue the petition with costs to the respondents. That the foregoing shows that when the counsel for the Petitioners could neither secure the attendance of the Petitioners nor an adjournment, he sought to withdraw the petition which was opposed by the counsel for the respondents. That the Petitioners' counsel then applied to have the petition discontinued under **Order 25 of the Civil Procedure Rules**, which application the court allowed with costs to the respondents. That the copy of the order issued on 27th July, 2017, extracted on 4th October, 2017 annexed to the replying affidavit of the 1st respondent's counsel, and which is similar to the copy on the record, reads as follows:

"IT IS HEREBY ORDERED THAT:

This matter is hereby discontinued with costs to the two Respondents the Attorney General and Kenya Forest Service."

That order is obviously not a consent order.

(b) That earlier on the 1st July, 2016 the parties had by consent abandoned their applications dated 14th October, 2015 and 16th February, 2016 with a view to fast track the hearing of the main petition. That the counsel for the applicant's assertion that the matter herein was discontinued on a date when it was scheduled for cross examination of the 1st petitioner is obviously not correct. That the petition was discontinued on the 27th July, 2017 which date had been fixed on the 8th March, 2017 for the hearing of the main petition. That it appears no reasons were given then, and none has been tendered now, why the Petitioners, and or their witnesses, did not attend court on the date which had been set for hearing of their petition through viva voce evidence.

(c) That the main issue for consideration in making a determination of the application is whether the applicant has succeeded in showing that the order of discontinuance granted at the petitioners' request on the 27th July, 2017 is amenable to setting aside and reinstatement of the petition orders. That **Order 25 Rule 2 of the Civil Procedure Rules** provides that where a suit has been set down for hearing, it may be discontinued upon the filing of a written consent signed by all the parties or with the leave of the court.

In the instant claim, a discontinuance was entered at the instance of counsel for the petitioners, and was duly endorsed by the court. That in the case of **BAHATI SHEE MWAFUNDI V ELIJAH WAMBUA [2015] eKLR,** the Court held as follows:

''… Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.

Under Order 25 once a suit is withdrawn or discontinued the court shall enter judgment for costs against the plaintiff.

It follows that order 25 does not permit a party to withdraw a notice to withdraw or discontinue a suit. The filing of such a notice to withdraw or discontinue a suit terminates the suit and there cannot be, thereafter, a setting aside of the notice to withdraw or discontinue a suit. The following is what the learned author Stuart Sime in the book "A Practical Approach to Civil Procedure" 9th edition stated:

"Notice of discontinuance takes effect and brings the proceedings to an end as against each defendant, on the date it is served upon the defendant."

(d) The Court in **KOFINAF COMPANY LIMITED & ANOTHER V NAHASHON NGIGE NYAGAH & 20 OTHERS [2017] eKLR,** discussed at length the factors to be considered when making a determination whether the allow the withdrawal of a discontinuance as follows:

''… In respect to the test for withdrawal of a discontinuance the Court was referred to the Canadian case of Candominium Plan No. 0724494 vs. Efuwape 2012 ABQB 355 (CanLII), in which the Court held:-

"The test for withdrawal of a discontinuance is set out in Neis v. Yancey, (1999) ABCA 272 at para. 27. Madam Justice Russell, writing for the Court found:

[Master Funduk, in Eisenkrein v. Eisenkrein (1984) 53 A.R. 199,] adopted the test for the withdrawal of a discontinuance equivalent to that enunciated in Barasky v. Quinlan, supra, stating that "where a limitation period has accrued, a discontinuance can be withdrawn only if there are 'very special circumstances"' such as where a plaintiff discontinued the wrong action, or where the defendant breached conditions upon which the discontinuance was given. Special circumstances have also been defined to include cases of "inadvertence, mistake or misapprehension of relevant procedural matter": Adam and Adam v. Insurance Corporation of British Columbia (1985), 1985 CanLII 584 (BC CA), 66 B.C.L.R. 164 at p. 170 (C.A.); Morten (Litigation guardian of) v. Fanzutti, [1994] O.J. No. 1129 (Q.L.) (Gen. Div.); Singh v. Street Bernt and Traditional Holdings Ltd., 1990 CanLII 7820 (SK CA), [1990] 5 W.W.R. 518 at p. 523 (Sask. C.A.). Such circumstances suggest oversight rather than the sort of substantive mistakes of law in this case. Hence, I agree with Master Funduk that special circumstances in the nature of a slip must be established before a discontinuance may be withdrawn. Therefore, special circumstances must include an absence of actual prejudice to the defendant: Bararsky v. Quinlan, as well as a consideration of the circumstances giving rise to the discontinuance."

39. This is my view of the matter. This Court has little difficulty accepting the argument by the Affected Defendants that where the Right of a Plaintiff to withdraw or Discontinue is unfettered, the Plaintiff can, by unilateral action do so by giving a Notice. In which case the Withdrawal is complete once the Court receives the Notice. In that event the Plaintiff is barred from revoking or recalling the act of withdrawal.

40. However, it would be different where a Party is required to seek Leave of Court before Withdrawing or Discontinuing and the Court has not granted that Leave or made the endorsement. The Withdrawal or Discontinuance having not been effectuated the Plaintiff, where appropriate, should be able to recall the Notice of Withdrawal or Discontinuance. What is appropriate will depend on the circumstance and facts of each case. One such instance that comes to mind, is where there has been agreement by the parties to withdraw a suit on certain conditions which the Defendant subsequently breaches. The Plaintiff should be permitted to recall the Notice of withdrawal if it had not been endorsed. One theme of the Court of Appeal decision in Beijing (supra) is that Courts should avoid a literal application of order 25 Rule 1 where such application would aid in the abuse of the process of Court. In the same vein, I would think, even in the absence of an express provision permitting the withdrawal of a Notice to Discontinue or Withdraw, a Court should apply the Provisions of Order 25 Rule 1 in such manner as may be necessary for the ends of justice where Leave for Withdrawal or Discontinuance is required but is yet to be given.

Having held that this matter falls in the category of cases where a unilateral withdrawal could not be permitted…"

(e) That Isaac Kiprotich Kiptoo, the applicant herein, described himself at paragraph 1 of the supporting affidavit as the ***'' 6th Respondent''***, while his counsel at paragraph 3 of their submission stated that the said applicant was ***''one of the petitioners and is petitioners' No. 28''***. That I have perused the petition dated the 14th October, 2015 and confirmed that the applicant is indeed the 28th Petitioner. That however, there is no evidence attached, or any deposition in his affidavit to the effect that he has the authority of the other petitioners to file and prosecute the instant application on their behalf. That accordingly, I take this application to be by, and for the benefit of the applicant alone. That indeed the counsel signed off their written submissions dated the 6th may 2021 as ''**ADVOCATES FOR THE APPLICANT''** and not for petitioners.

(f) That even assuming that Isaac Kiprotich Kiptoo, the applicant, was one of the petitioners who were dissatisfied with the order of 27th July, 2017 discontinuing their petition, he has not explained or tendered any explanation why he did not seek to have that order reviewed, set aside or appealed against soon after it was made, or in any case, without undue delay. That I am therefore of the view

that the applicant should take legal advice on his options in filing a fresh cause to purse his claim, as there has been inordinate delay in moving the court in this instance. That the respondents would be prejudiced if the application is granted as it would result to the taxation of the filed bill of costs being unreasonably delayed. That the respondents having actively participated in the hearing of the application are entitled to costs.

5. That from the forgoing, I find the application filed on the 18th September 2019, which is approximately 3 years after the order was issued on the 27th July, 2017, to be an abuse of the court process, as no justifiable reason has been advanced to persuade the court to act in favour of the applicant. The application is therefore dismissed with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF JUNE, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

28TH PETITIONER/APPLICANT: ABSENT

OTHER PETITIONERS: ABSENT

RESPONDENTS: ABSENT

COUNSEL: MR. KURIA FOR 2ND AND 3RD RESPONDENTS ONLY.

COURT ASSISTANT: CHRISTINE.