



**Gachu & another v Manyeki & another (Civil Appeal  
E044 of 2021) [2024] KEHC 5621 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL E044 OF 2021  
RM MWONGO, J  
MAY 22, 2024**

**BETWEEN**

**RICHARD MANEGENE GACHU ..... 1<sup>ST</sup> APPELLANT**

**SYMON MURAGE GACHU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MICHAEL MWANGI MANYEKI ..... 1<sup>ST</sup> RESPONDENT**

**EMMAH NJOKI MANYEKI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The two appellants in this case Richard Manegene Gachu and Symon Murage Gachu had filed a Memorandum of appeal on October 26, 2021, through their advocate’s Wanjiru Waweru & Co. Advocates.
2. On August 18, 2023 Wanjiru Waweru Advocate filed a letter of even date, addressed to the Deputy Registrar giving notice that the appellants wished to withdraw the appeal. The letter stated, *inter alia*:  
  
“The appellants herein do not wish to pursue the appeal. Kindly mark the appeal as withdrawn with no order as to costs”.  
  
No other document other than the Memorandum of appeal had been filed at that time.
3. The court on October 31, 2022, administratively marked the appeal as withdrawn with no order as to costs.  
  
“Provided that no response had been filed by the respondents”  
  
The file was thus closed.



4. On January 18, 2023 a different counsel, Tess Kimotho & Co. Advocates filed a certificate of urgency on behalf of the 2<sup>nd</sup> appellants alone, indicating she was coming on board in place of Wanjiru Waweru. The application sought to reinstate the appeal, amongst other orders seeking status quo on suit property Mwerua/Kiandai/595.
5. The court on January 19, 2023 the court determined that the certificate of urgency was not urgent, but directed the applicant to serve the certificate on the other parties.
6. Upon the certificate being served the 1<sup>st</sup> Appellant opposed the application to reinstate the suit. His ground of opposition is that the Applicant and the 1<sup>st</sup> Appellant/Respondent had instructed their advocate to withdraw the appeal and it was marked as withdrawn on 3.10.2022, that upon withdrawal of the appeal, it ceased to exist and no order can be made on that which does not exist.
7. The 1<sup>st</sup> Appellant/Respondent asserts that, at the time of filing this Appeal, the Advocates on record for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants were Messers Waweru Wanjiru & Co Advocates; and that the 2<sup>nd</sup> Appellant has not adduced any evidence before the court showing that he had expressly instructed his previous advocates not to compromise the suit, neither has he adduced any evidence to show that he did not receive any communication from his previous advocates nor that he ever raised a formal complaint against his previous advocates, at the time or immediately after the withdrawal of the Appeal.

#### **Applicant submissions**

8. The applicant submits that the proper procedure to withdraw a suit would be once a letter is done by the advocate on record for appellants to withdraw the appeal it ought to be served upon all parties to the suit.
9. In this case that was not the case the appellants advocate Wanjiru Waweru did a letter asking the court to mark the appeal withdrawn as the appellants do not wish to pursue the matter. In the letter it is shown to have been copied to her clients and the advocate for the respondents but there is no evidence that the parties that were copied the letters were served.
10. The applicant submits that failure to serve parties in the matter to the suit was fatal and renders the procedure used irregular. Again there is no evidence that upon the receipt of the letter the court ordered the respondents or the appellant or all the stakeholders involved to appear before the court for adoption of the order or that the respondent should file a response to the letter.
11. The applicant submit that this was a breach to fair hearing where the law provides that before the court makes any order the parties in the case ought to be called to respond to any letter/or allegation brought before it.
12. He submits that he was never informed by his advocate on record by then that she wanted to with draw the appeal of course he couldn't have agreed because consenting to that only means to get evicted out of a piece of land, he has lived for over 50 years and he has no other place to go.
13. The 2<sup>nd</sup> Appellant/Applicant was dissatisfied with the Lower Courts judgment and seeks is to be heard and the appeal considered on merit.
14. The 1<sup>st</sup> Appellant/Respondent submits that the appeal was withdrawn by M/s Wanjiru Waweru Advocate who was acting as an agent and on the instructions of the Appellants and hence after the withdrawal there is no suit before court.
15. He relies on the case of *Kinuthia Eston Maina & 3 others v Coffee Board of Kenya* [2015] eKLR, Justice Mathews Nderi Nduma in dismissing an application for setting aside an order for withdrawal of a suit



cited with approval the case of *Kenya Commercial Bank Ltd-vs-Specialized Engineering Co. Ltd* [1982] eKLR at p.485 where it was held:

“A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. An advocate has general authority to compromise on behalf of his client as long as he is acting bonafide and not contrary to express negative directions. In the absence of express direction, the order shall be binding. I am bound by this decision and I will adopt these statements of law. Consequently, I am of the view that the suit was properly withdrawn.”

16. The 1<sup>st</sup> appellant submits that there no evidence that has been presented before this court to prove that the advocate who was representing the applicant did not have instructions to withdraw the appeal. Once an advocate has been instructed by a party, such advocate becomes possessed with the ostensible or apparent authority to act and take actions that bind the client, without necessarily having to consult with the client and such actions may even include compromising the suit and hence the applicant should be estopped from denying that his previous advocate M/s Wanjiru Waweru had instruction to withdraw the appeal.
17. The Respondents' counsel did not file an objection to the withdrawal of the appeal and hence it can be said it was withdrawn by consent.
18. The only issue for determination is whether the applicant's appeal should be reinstated having been formally withdrawn by the counsel on record who filed it.

### **Analysis and Determination**

19. The applicant's application seeks to reinstate this appeal as he is desirous of prosecuting the same. It is clear that a difference has arisen between the two original appellants as to whether the instructions to withdraw were properly issued.
20. The 1<sup>st</sup> Appellant/Respondent was opposed to the summons and he filed his grounds of opposition as well as his replying affidavit to the summons dated 18.1.2023. In his grounds of opposition, the 1<sup>st</sup> Appellant/Respondent confirmed that the 2<sup>nd</sup> Appellant/Applicant is his brother and that they had instructed M/s Wanjiru Waweru & Co. Advocate to file an appeal against the judgment delivered in Baricho SPM's Succession Cause No.164 of 2019 on 30.9.2021. He asserts that later they instructed the said advocate to withdraw the appeal after they settled the issues with the Respondents herein.
21. The Applicant admits that he had instructed M/s Wanjiru Waweru & Co. Advocates to act for him in the appeal. However, he was shocked to learn that his previous advocate M/s Wanjiru Waweru Advocate had withdrawn the appeal without his knowledge. On the other hand, the 1<sup>st</sup> appellant deposed that he was surprised when he was informed that the 2<sup>nd</sup> appellant was alleging that he never gave M/s Wanjiru Waweru instructions to withdraw the appeal.
22. There is nothing before the court to show that Wanjiru Waweru Advocate did not have the instructions of the joint appellant to withdraw the suit. The 1<sup>st</sup> Appellant/Respondent submits that there no evidence that has been presented before this court to prove that the advocate who was representing the applicant did not have instructions to withdraw the appeal.



23. The provisions of Order 25 of the [Civil Procedure Rules](#) provide for withdrawal of suits as follows;

“(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.”

24. In the case of [Shadrack Silla Muthama v Kebaso Wycliffe Maengwe](#) [2021] eKLR it was held that:

“The right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.”

25. The only condition imposed by the court on the withdrawal of the suit was that it was allowed unless the respondents had already been served. To date, there is no evidence of service of the appeal on the respondents, or any response or participation by them.

26. The applicant submits that failure to serve parties in the matter to the suit was fatal and renders the procedure used irregular. However, the only parties to the suit, before the court were the appellants, for whom Ms. Wanjiru Waweru acted. The respondents in the appeal have not participated in the suit.

27. Given facts of this case, the only recourse to an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her to do so. In [Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards \(Interested Party\)](#) [2021] eKLR, Justice Mativo observed:

“Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.”

## Disposition

28. The respondent herein has not shown that his advocate, who withdrew his appeal, did not have instructions to do so. Accordingly, the appeal having been marked as withdrawn there is no sound basis to consider its reinstatement. The withdrawal took effect immediately the court permitted it.

29. Unlike a dismissal by the court which is a court-initiated action, a withdrawal is an action of the party, initiated by it, without involvement of the court except at the point where the court is formally asked to record the withdrawal. A withdrawal amounts to a discontinuance which is an action that has finality. In the consequence, the suit dissipates and there is nothing left before the court to act upon.



30. Accordingly, the application for reinstatement is declined and is therefore dismissed.

31. There is no order as to costs.

Orders accordingly. The court file is to be returned to the Lower Court.

**DATED AT KERUGOYA THIS 22<sup>ND</sup> DAY OF MAY 2024**

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**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Kanyoni - for 1st & 2nd Respondent
2. Waweru - for 1st Applicant/Respondent
3. Makazi - for 2nd Appellant/Applicant

Court Assistant, Murage

