



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELCA. CASE NO. E005 OF 2020

SHADRACK SILLA MUTHAMA..... PLAINTIFF

-VERSUS-

KEBASO WYCLIFFE MAENGWE.....DEFENDANT

RULING

1.This ruling is in respect of an oral application made by Mr. Nyamweya Counsel for the Appellant on 28th October, 2021 seeking to have the appeal marked as withdrawn with no order as to costs.

2. Counsel stated that the appeal was filed by the wrong party as the face of the Memorandum of Appeal shows that the Appellant is Shadrack Silla Muthama, a party whom Mr. Nyamweya did not act for. That on realizing that the appeal was filed in error, Counsel filed a Notice of Withdrawal of the appeal on 13th May 2021 as he had no instructions from Mr. Shadrack Silla Muthama to file the appeal. He prayed that the appeal be marked as withdrawn with no order as to costs as there was no intention to prosecute it. Mr. Nyamweya further stated that under Order 42 of the Civil Procedure Rules, an appeal is commenced by a Memorandum of Appeal. That in the Memorandum of Appeal on record, they made a grave mistake which they regret, and that the appeal is incompetent. He argued that Order 25 Rule 1 of the Civil Procedure Rules provides that a pleading is withdrawn by the simple act of filing a withdrawal notice as long as the matter has not been set down for hearing, hence the appeal stood withdrawn and any documents filed thereafter were unnecessary.

3.Mr. Kitonga, Counsel for the Respondent did not oppose the withdrawal of the appeal subject to payment of costs to the Respondent. He stated that on 26th May, 2021, the court gave a date for the mention of the appeal and the appeal came up for mention on 29th September 2021, whereby the court made orders, which Mr. Kitonga extracted and served on the Counsel for the Appellant. He argued that once a party files a notice of withdrawal of a suit, it must be adopted as an order of the court before it takes effect, which was not done in this case. He however stated that if Mr. Nyamweya seeks to withdraw the appeal, he had no objection subject to payment of costs to the Respondent, as the appeal was opposed.

4.Counsel for the Respondent further submitted that the Respondent filed his Notice of Appointment on 13th October 2020 and served the same. He also filed a preliminary objection on 11th May 2021 in respect of the appeal and the Appellants application dated 29th September 2020. He also stated that the Respondent filed a list of documents in opposition of the appeal and therefore Counsel for the Appellant was misleading the court. It was also his contention that the Notice of Motion by the Appellant dated 29th September 2020 shows that the supporting affidavit is sworn by Mr. Nyamweya's client, Mr. Kebaso Wycliffe Maengwe, where he states that he is the Appellant in this case. He therefore stated that the allegation that the appeal was filed by Mr. Shadrack Silla Muthama does not hold water as it is Mr. Kebaso Wycliffe Maengwe who was aggrieved by the order of the Magistrate's court as is captured in the Memorandum of Appeal. That the Memorandum of Appeal shows that the Appellant is Mr. Maengwe. He concluded that the Appellant's withdrawal of the appeal should be on condition that the Respondent's costs are paid.

5.The history of this case is that on 30th September 2020, the firm of Nyamweya Mamboleo filed this appeal against the ruling of the Lower Court made on 22nd September 2020 pursuant to leave granted by that court. In the Memorandum of Appeal Shadrack Silla Muthama is named as the Appellant while Kebaso Wycliffe Maengwe is referred to as the Respondent. However, within the body of the Memorandum of Appeal it is stated as follows:

“The Appellant, Kebaso Wycliffe Maengwe, being aggrieved by the ruling of Hon. Caroline A. Ocharo, Magistrate, made on 22nd September 2020 appeals against the whole of the said ruling.”

6.Simultaneous with the filing of the Memorandum of Appeal on 29th September 2020, the firm of Nyamweya Mamboleo Advocates also filed the Notice of Motion dated 29th September 2020 under certificate of urgency seeking for stay of proceedings in **Machakos Magistrates Court ELC no. 71 of 2018- Shadrack Silla Muthama v. Kebaso Wycliffe Maengwe**, pending hearing and determination of the appeal.

7.On 30th September 2020 when the application dated 29th September 2020 came up before this court, the same was not certified urgent and

the court declined to grant any orders in the interim. On 9th October the Appellant filed an application dated the same date under certificate of urgency seeking for stay of proceedings in **Machakos Chief Magistrates Court ELC case number 71 of 2018** pending hearing and determination of his application dated 29th September 2020. Again, this application was placed before this court for ex parte interim orders on 13th October 2020 but the court declined to grant any orders in the interim. From 13th October 2020, nothing happened on the file, until 26th May 2021 when the firm of Kitonga Advocates fixed the appeal for mention on 29th September 2021. When the matter came up on 29th September 2021, there was no appearance on the part of the Appellant. Mr. Kitonga who was present in court sought for directions for the hearing of the Respondent's Preliminary Objection dated 11th May 2021. The court granted leave to the Appellant to file and serve the Record of Appeal in 30 days and fixed the matter for mention on 28th October 2021, on which date the Appellant made an oral application to have the appeal withdrawn with no order as to costs.

ANALYSIS AND DETERMINATION

8. I have considered the application; the submissions made orally by the parties and perused the record. The issues that arise for determination are;

a) Whether in the circumstances of this case, the Appellant's Notice of Withdrawal of the appeal filed on 13th May 2021 took effect upon filing.

b) Whether the Appellant's withdrawal of the appeal should be subject to payment of costs to the Respondent.

9. Order 25 of the Civil Procedure Rules provides 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.

(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."

10. 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.

11. In the case of **Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others**, Supreme Court Application No. 16 of 2014, the Supreme Court stated as follows;

"a party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate."

12. In the case of **Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited [2015] eKLR**, the court of appeal stated as follows;

"As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others SC 154/2002* identified those circumstances to include where;

(i) A Plaintiff realises the weakness of his claim in the light of the defence put up by the Defendant.

(ii) A Plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,

(iii) Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or

(iv) A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.

13. In the instant case, the appeal had not been set down for hearing. Therefore, the Appellant did not need leave of court to withdraw his appeal. Even in circumstances where a party needs leave of court to withdraw their suit, the court would allow the application subject to just terms. It will however be noted that under Order 25 Rule 1, the Notice of Withdrawal takes effect upon service of the same on all parties in the suit. In this case, the Appellant even after filing his Notice of Withdrawal on 13th May 2021, did not serve the same on the Respondent; which resulted in the Respondent fixing the matter for mention on 26th May 2021.

14. The argument by the Appellant's Counsel that the appeal was filed in error and on behalf of a party who was not his client is not

plausible. While Counsel states that the appeal was ostensibly filed on behalf of Shadrack Silla Muthama, the documents on record do not support such a view. The Memorandum of Appeal clearly states that the Appellant and the person aggrieved by the decision of the Lower court, and who filed the appeal was Kebaso Wycliffe Maengwe. In addition, the said Kebaso Wycliffe Maengwe swore the supporting affidavits in respect of the applications dated 29th September 2020 and 9th October 2020. In my view therefore there is no ambiguity or mistake on who filed the appeal. By exchanging the names in the title in the Memorandum of Appeal to have the Appellant in the place of the Respondent, and the Respondent in the place of the Appellant, does not change the fact that Kebaso Wycliffe Maengwe was the Appellant who filed the appeal in this matter.

15. Having filed the appeal, served the same on the Respondent; who retained the services of an advocate, who not only filed documents in the appeal, but also appeared in court upon listing the appeal for mention, the Appellant cannot therefore run away from paying costs; even though the appeal had not been set down for hearing at the time of the withdrawal.

16. In the end, I allow the Appellants application in the following terms;

(a) The appeal herein be and is hereby marked as withdrawn.

(b) The costs of the appeal are awarded to the Respondents.

17. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 30TH DAY OF NOVEMBER 2021.

A. NYUKURI

JUDGE