



REPUBLIC OF KENYA



**KENYA LAW**  
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**Onyango v Osiye (Civil Appeal 14 of 2018) [2023] KEHC 20421 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20421 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA**

**CIVIL APPEAL 14 OF 2018**

**WM MUSYOKA, J**

**JULY 21, 2023**

**BETWEEN**

**PAUL OWINO ONYANGO ..... APPELLANT**

**AND**

**GEORGE VINCENT OSIYE ..... RESPONDENT**

*(Being an appeal from the ruling and order of Hon. WT Lopokoiyit, Resident Magistrate, RM, delivered on 23rd January 2018, in Kakamega SPMCCC No. 457 of 2010)*

**JUDGMENT**

1. The suit before the trial court was by the appellant against the respondent and another, who is since deceased, for compensation, allegedly arising from theft of timber, allegedly committed by the respondent and the other against him. The respondent resisted the suit by a defence, in which he denied liability. A trial was never conducted, for the suit was withdrawn on April 5, 2016. An application was brought by the appellant, dated January 4, 2018, seeking reinstatement of the suit, on grounds that the withdrawal was done by his then Advocate, without his instructions. The application was dismissed, vide a ruling delivered on January 23, 2018.
2. The appeal herein arises from the said ruling, dated January 23, 2018. The appellant argues that the application was unopposed and should not have been dismissed, the appellant had not expressly instructed his Advocate to withdraw the suit, the suit should have been withdrawn in writing pursuant to Order 25 rule 1 of the *Civil Procedure Rules*, and the court misinterpreted the decisions in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, SC Application No 16 of 2014 and *Beijing Industrial Designing & Research Institute v Lagoon Development Limited* [2015] eKLR (Makhandia, Ouko & M’Inoti, JJA).
3. Directions were given on August 13, 2019, for canvassing of the appeal by way of written submissions. The appellant has filed written submissions. He has cited *Westward Properties Limited v Chezer Investments Limited* [F. Ochieng, J] eKLR and *Monica A. Otieno & 32 others v Jaramogi Oginga*



*Odinga University of Science and Technology & another* [2018] eKLR (M. Onyango, J), where suits withdrawn by the Advocates for the parties, without instructions or knowledge of the parties, were reinstated.

4. There are 3 issues for me to consider, whether the withdrawal was without instructions, whether it should have been done under Order 25 rule 1, and whether the trial court ought to have reinstated the suit.
5. When the suit was withdrawn on April 5, 2016, the Advocate then on record for the appellant informed the court that he had instructions to withdraw the suit. In the application to reinstate the suit, dated January 4, 2018, the appellant averred that he had given no such instructions, as the suit was withdrawn without his knowledge, information and consent. The trial court was not persuaded, and found that the Advocate then on record had ostensible authority to act for the appellant, hence his decision to withdraw the case bound the appellant. No material was placed on record, from the said Advocate, to confirm that he had such instructions, and all the trial court had was the affidavit of the appellant denying having given such instructions. I am unable to discern the circumstances under which an Advocate would decide to withdraw his client's suit without express instructions from the client. However, since I see no word on record from the Advocate challenging the statement by the appellant on oath, I shall give the appellant the benefit of the doubt, and find that there is nothing to show that the said Advocate acted with instructions. Do the general instructions to act include power to withdraw suit without reference to the client? Certainly not. An Advocate has no ostensible or apparent authority to withdraw a suit without express instructions from the client.
6. Regarding Order 25 rule 1, the appellant appears to be arguing that, even if there was justification to withdraw the suit, that withdrawal could not be done otherwise than in accordance with Order 25 rule 1. Order 25 rule 1 applies to cases where a notice is lodged in court, withdrawing the suit before the matter comes up for hearing for the first time. Such written notice terminates a suit before it comes up for hearing for the first time, obviating the need to attend court, unless only for the purpose of confirming the notice of withdrawal. Order 25 rule 1 is not the only mode of withdrawal of suits at that stage, and it does not bar parties, when the matter comes up in open court, for hearing or mention, to inform the court that they wish to withdraw the suit, whereupon the court can quite properly mark the case as withdrawn, subject to the question of costs being addressed. Where the withdrawal is made in open court, at a mention or hearing, there would be no need for compliance with Order 25 rule 1. *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others*, SC Application No 16 of 2014 and *Beijing Industrial Designing & Research Institute v Lagoon Development Limited* [2015] eKLR (Makhandia, Ouko & M'Inoti, JJA) bespeak that position. The suit herein could be properly withdrawn in that manner in open court, as happened on April 5, 2016.
7. Should the trial court have reinstated the suit? As I have found that the trial court did not have any word from the Advocate, who withdrew the matter, challenging the allegation on oath by the appellant, that he had not instructed him to, the trial court ought to have reinstated the suit, unless there existed other reasons for not ordering the reinstatement.
8. Should I allow the appeal, and order the reinstatement? I do not think I should. Firstly, the application for reinstatement was made after a prolonged delay. The withdrawal order was made on April 5, 2016, and the application to reinstate was not made until January 18, 2018. The delay was not explained. The appellant had practically lost interest in the matter, and he only woke up when auctioneers threatened to execute for costs. He took no action for 1 year and 8 months. Where was he for that 1 year 8 months, and why had he not followed up on the matter for that while? Secondly, the suit had been filed in 2010, and by the time it was being withdrawn on April 5, 2016, no serious effort had been made or serious step taken towards prosecuting it. Thirdly, the suit, as framed, is incredibly vague, for it is a



“claim ... that the Defendants jointly conspired to steal timber from his custody,” and the prayer is for “Compensation for the losses undergone by the Plaintiff.” It is clearly an issue of material loss, or special damage, yet the same has not been specifically pleaded as required.

9. There is the argument about the application, dated January 4, 2018, being unopposed, and that then it should have been allowed as a matter of course. Whether to reinstate a suit or not is a matter of discretion. The mere fact that an application is not contested does not make it an automatic candidate for grant of the orders sought. The court seized of it has the duty to assess it on its merit, lack of opposition or challenge to it notwithstanding.
10. I am not persuaded that the appeal should be allowed, for the foregoing reasons. I hereby dismiss it with costs. The file, in Kakamega SPMCCC No 457 of 2010, shall be returned to the relevant registry, for the execution proceedings to be finalized. This appeal file shall be closed. Orders accordingly.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 21<sup>ST</sup> DAY OF JULY, 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

Mr. Nabasenge, instructed by Kutto Nabasenge & Company, Advocates for the appellant.

