



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**ELC NO. 14 OF 2020 (O.S)**

**KEVIN KIVIASI KEZENGWE.....PLAINTIFF**

**VERSUS**

**MUNGAI WACHIRA.....DEFENDANT**

**RULING**

1. This matter came up today for further hearing of the plaintiff's case. The hearing had been adjourned from **28/10/2021**. On that date the plaintiff gave evidence in part, in absence of the defendant who had neither entered appearance nor responded to the Originating Summons (O.S) as it was before directions were given on **3/6/2021** that the Originating Summons and support affidavit be deemed as the plaintiff's pleadings. Further directions of that date were that the hearing was to proceed as though the matter was commenced by way of plaint and *viva voce* evidence.

2. The record shows that on that date, the **3/6/2021**, the plaintiff testified and closed his case. He was required to file submissions within seven days of the order. However, on **16/6/2021** the court gave further directions, having noted that service of the Originating Summons was defective. By the directions the plaintiff was required to serve the summons by way of advertisement in a daily newspaper of nationwide circulation within **21 days**. The affidavit of service filed in court on **21/7/2021** attests to the service having been effected through the Standard Media Service on the **28/6/2021**.

3. The advertisement notwithstanding the defendant did not enter appearance. That being so, the plaintiff filed written submissions on **5/10/2021** basing them on the evidence that had been adduced on **3/6/3021** and asked for judgment.

4. Upon the court analyzing the record and looking at the law, it was of the view that that was irregular and unprocedural. This is because since the hearing of **3/6/2021** preceded proper service, the proceedings of that date were therefore a nullity. A Sodom apple tree can only bear Sodom apple fruits, which are poisonous to humans. A fig tree can only bear figs. For that reason the court directed that the matter proceeds afresh.

5. On **28/10/2021** the plaintiff was led in evidence by his counsel. After testifying to the end, the plaintiff sought to close the case, without producing a certified extract of the title as required by **Order 37 Rule 7(2)** of the **Civil Procedure Rules** as obligated under **Section 173 (1)** of the **Evidence Act**. The court wondered out aloud, as to whether a certificate of official search that the plaintiff had produced was equivalent to an extract of title. This prompted the plaintiff's counsel to stand the witness down and seek leave of the court to obtain a certified extract of the title and file it before proceedings with the further hearing of the client's case. That was granted.

6. On **9/11/2021** when this matter came up for further hearing, the plaintiff's counsel confirmed to the court that the extract of title had since been procured and duly filed. She, however, did not wish to proceed with the matter further for the reasons that the certified extract of title showed that the parcel of land in question had since changed ownership to two owners, one after the other. She thus applied to have this suit withdrawn. It was on that basis that this Ruling came about.

7. Counsel did not indicate the provisions that grant the plaintiff chance to withdraw the suit after it has been listed for hearing. The court cannot, of course, compel a party to continue with a suit that he or she does not wish to. However, as the party withdraws the suit, the law has to be complied with.

8. The relevant law regarding withdrawal of suits on this level of court is **Order 25** of the **Civil Procedure Rules**. The provisions envisage two situations that may arise when a party intends to withdraw a suit. These are, withdrawal before and after a suit has been set down for hearing. Under **Order 25 Rule 1**, the plaintiff may withdraw a suit that has not been set down for hearing by filing a notice of withdrawal of that suit or any part of the claim. That has to be served on all parties. The Rule is silent as to whether the service on all the parties refers to those who have entered appearance and filed defence or it includes any party who was served but did not enter appearance or file any document at all. In my view, the Rule presupposes those parties who are interested in the conduct of the suit. That interest is expressed by

way of a party who has been served by summons to enter appearance entering an appearance or filing such other notice as to bring to the attention of both the court and the other parties to the suit that they are aware of the matter and they intend to take part in it. Other persons who are served and do not enter appearance or file such other notice should be taken to have “fallen by the wayside” unless and until they demonstrate to the satisfaction of the court that they failed to file the requisite documents for reasons beyond their advertence. Even when they satisfy the court in that manner, if that is done way after the plaintiff has withdrawn his suit against them, that will not help them but will serve as an academic exercise. There shall be no suit against them and that will end the matter there.

9. The next Rule under the Order is the one that applies to the present circumstances. The plaintiff herein seeks to withdraw the suit after it has been set down for hearing; actually it has proceeded in part. **Order 25 Rule 2** provides that if a party is to withdraw a suit or part thereof after it has been set down for hearing, he/she has to do so upon filing a written consent signed by all parties. The issue of such parties to the suit has been discussed above.

10. In the present circumstances the defendant did not enter appearance or file any other documents. How then shall the plaintiff procure a consent from him? Does he once again advertise in the media or otherwise that he wants to withdraw the suit? This, in my view, is unnecessary and unreasonable. That is why this court finds its reasoning regarding involvement of parties who do not enter appearance or file other documents to signify their interest in a matter, proper as discussed above. The plaintiff cannot be compelled to once again call on the defendant herein to consent to the withdrawal of this suit.

11. While I note that **Order 25 Rule 1** envisages the filing of a notice of withdrawal of a suit or part thereof and therefore may require a discussion as to whether or not an oral application suffices, that is not before me today.

12. For the foregoing reasons I find the application by the plaintiff reasonable. The learned counsel states to the court that she wishes to have the suit withdrawn at this stage so that she can advise the client further regarding the discovery of the new obtaining circumstances. The court sympathizes with the client. But were it not for the wisdom of the court and that of the drafters of the Rules that production an extract of the title is key in success or failure of suits commenced by way of an Originating Summons, the suit could have been dismissed, and further, the plaintiff shall have not found that the title had changed many hands. I therefore grant the prayers sought.

13. I order that the suit be and is hereby withdrawn with no order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 11TH DAY OF NOVEMBER, 2021.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

Advocate present:

Ms. Chebet for the plaintiff

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE**

**9/11/2021**