



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 137 OF 2017**

**ABDULKADIR AHMED RAHIMKHAN.....1<sup>ST</sup> PLAINTIFF**

**JABEEN MANAN..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**COUNTY GOVT OF KWALE.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, MOMBASA..... 2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION..... 3<sup>RD</sup> DEFENDANT**

**THE DIRECTOR OF SURVEYS..... 4<sup>TH</sup> DEFENDANT**

**THE DIRECTOR OF PHYSICAL PLANNING.....5<sup>TH</sup> DEFENDANT**

**COUNTY EXECUTIVE COMMITTEE MEMBER,**

**LANDS NATURAL RESOURCES & URBAN PLANNING,**

**COUNTY GOVT OF KWALE.....6<sup>TH</sup> DEFENDANT**

**RULING**

***(Application for leave to withdraw a suit; plaintiffs having filed suit seeking an order that their expired lease be renewed; while the matter is pending judgment the lease is renewed; no substratum left in the suit; application allowed; counterclaim of 1<sup>st</sup> and 6<sup>th</sup> defendant who wished to have orders declaring that the land has reverted to them overtaken by events and is struck out; each party to bear their own costs.)***

1. Through an application dated 21 January 2020 and filed on the same date, the plaintiffs have applied to withdraw this suit pursuant to the provisions of Order 25 Rule 12 (2) of the Civil Procedure Rules 2010. The application is opposed.

2. The suit itself was commenced through a plaint which was filed on 19 April 2017. In the plaint, the plaintiffs sought orders inter alia for a mandatory injunction to compel the defendants to renew the lease of the plaintiffs over the property identified as LR No. 4659 (Original No. 3855/19) and they be issued with a Certificate of Title to the said land. Apparently, the plaintiffs held a lease to the suit property which expired on 1 January 2013 but was not renewed forthwith upon its expiry hence this suit.

3. The County government of Kwale and the County Executive Member Lands, Natural Resources and Urban Planning of the County Government of Kwale were sued as the 1<sup>st</sup> and 6<sup>th</sup> defendants respectively. They filed a defence and counterclaim where they inter alia contended that since the lease expired without it having been renewed the interest in the suit property reverted to the County Government of Kwale to hold in trust for the residents of Kwale County. They sought a declaration to that effect in their counterclaim alongside a mandatory injunction for vacant possession against the plaintiffs.

4. The suit proceeded for hearing and the parties closed their respective cases on 17 September 2019. Counsel were then given directions on the filing of submissions and the case was due for mention today for purposes of taking a date for judgment. In between, this application was filed.

5. The supporting affidavit to the application is sworn by Jabeen Manan, the 2<sup>nd</sup> plaintiff. He has deposed inter alia that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have now renewed their lease and they have now been issued with a Certificate of Lease. A copy of the same is annexed to the application. It is his view that this suit has now been overtaken by events and it is not necessary for the court to deliver a judgment.

6. The 1<sup>st</sup> and 6<sup>th</sup> defendants have opposed the application through a replying affidavit sworn by Kevin Dzumo, the Legal Director of the County Government of Kwale. He has deposed inter alia that the act of renewing the lease while this suit was pending offends the doctrine of *lis pendens* and defeats the substratum of the case. It is his view that this act is calculated at pre-empting the judgment of the court and a scheme to defeat the counterclaim. He believes that it is necessary for the court to proceed and deliver judgment in the case. He has further averred that the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are contemptuous. He has deposed that withdrawing a suit at this point in time after witnesses have testified negates the court's power to make a just determination of the issues raised by the parties.

7. I have considered the rival arguments of Mr. Oluga, learned counsel for the plaintiffs, and Ms. Gitari, learned counsel for the 1<sup>st</sup> and 6<sup>th</sup> defendants. Mr. Mwanje, learned counsel for the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants did not oppose the application to withdraw the suit and there was no appearance on the part of the National Land Commission, the 3<sup>rd</sup> defendant.

8. This suit has already proceeded for hearing and is pending judgment. The provisions of Order 25 Rule 2 on discontinuance of a suit therefore apply. The said rule is drawn as follows :-

*Discontinuance [Order 25, rule 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.*

*(3) The provisions of this rule and rule 1 shall apply to counterclaims.*

9. It will be seen from the above that where a suit has been set down for hearing, it may either be discontinued by consent of the parties or by leave of the court. There is certainly no consent forthcoming from the 1<sup>st</sup> and 6<sup>th</sup> defendants hence the discontinuance will have to be by leave of the court which is exactly what the plaintiffs want.

10. The reasons given for discontinuing the suit are that the plaintiffs have already got a renewed lease and therefore no purpose is served by continuing this suit. In other words, the plaintiffs say that they have already got what they wanted before this court could render itself on the matter. These to me would be valid reasons for the withdrawal of a suit, for if a litigant has already got from the defendant what he wanted in the suit, then truly there would be no substratum left of the case.

11. I have considered the reasons given by the 1<sup>st</sup> and 6<sup>th</sup> defendants in opposing the withdrawal. I see no substance in the same. Ms. Gitari submitted that the court issued orders on 28 February 2018 (probably meant 21<sup>st</sup> February 2018) preserving the title. That may be so, but that was no bar to any of the defendants compromising the suit. It appears that it has dawned upon the 2<sup>nd</sup> – 5<sup>th</sup> defendants that they may have been wrong in not renewing the lease and it does seem that the 2<sup>nd</sup> -5<sup>th</sup> defendants have thus sought it fit to give in to the plaintiffs' claim. Parties are actually encouraged to settle their disputes out of court without waiting for a court judgment and where parties do agree out of court, unless there is some mischief, the court ought not to stand in their way. When two parties agree to a settlement out of court, this cannot be argued to be going contrary to the principle of *lis pendens* for the court does not have to pronounce itself on matters that are no longer in dispute.

12. It was submitted that the renewal of the lease compromises the 1<sup>st</sup> and 6<sup>th</sup> defendant's counterclaim. My view is that the renewal of the lease makes superfluous the counterclaim, for there cannot now be a declaration that the lease has reverted to the County Government of Kwale. If the County Government of Kwale is aggrieved by the title issued to the plaintiffs the recourse is now to file a new suit to challenge that title. It was mentioned by Ms. Gitari that her clients wish to amend the counterclaim but to me the issues that have now emerged following the issuance of a renewed lease to the plaintiffs can no longer be considered within this suit for this suit has lost its substratum. The County Government of Kwale is of course at liberty to file a fresh suit to challenge the title of the plaintiffs if it so wishes.

13. From the above discourse, I see no reason why the plaintiffs should not be allowed to withdraw and/or discontinue this suit. I therefore allow the application and this suit is hereby marked as discontinued. There is no purpose served in the counterclaim which clearly has now been overtaken by events. I therefore proceed to order that the counterclaim is overtaken by events and the same is struck out. There is absolutely no prejudice to the 1<sup>st</sup> and 6<sup>th</sup> defendants for as I have mentioned, if they are so inclined, they are at liberty to challenge the title of the plaintiffs by filing a new case to seek a cancellation of the plaintiffs' title.

14. The only issue left is costs. Ms. Gitari did argue that her clients deserve the costs of this suit. I am not convinced. It is apparent that the plaintiffs have got what they wanted in this suit. One would argue that they are the successful litigants and thus deserving of costs. However, the matter was settled amicably out of court. I do not see how the 1<sup>st</sup> and 6<sup>th</sup> defendants can argue that they deserve costs against the plaintiffs. The best order in the circumstances is to have every party bear their own costs.

15. The final order therefore is that the plaintiffs suit is ordered discontinued and the counterclaim having been overtaken by events is struck out. Each party to bear his/her own costs.

16. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 12<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Oluga for the plaintiffs.

Ms. Gitari for the 1<sup>st</sup> and 6<sup>th</sup> defendants.

Other parties ; Absent.

Court Assistant; David Koitamet.