



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**LAND & ENVIRONMENT CASE NO.17 OF 2013**

**GODFREY WANJALA WAFULA.....1<sup>ST</sup> PLAINTIFF**

**KOLOLI WAFULA NASIOMBE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAIRUS WAKHUNGU MULUNDA.....DEFENDANT**

**RULING**

[1]. When this case came up for hearing on 23/2/2016, Mr. Juma Learned Counsel for the Plaintiffs told the Court that the Plaintiffs had withdrawn their suit and served the respondent on 3/10/2015. He said the issue left was only on costs.

Miss Mufutu learned Counsel for the respondent stated that the suit was alive under *Order 25 rule 2* and that they had a counterclaim which had not been determined.

[2]. The Court ruled that the Applicant was allowed to withdraw his originating summons with costs to the defendant.

The defendant was allowed to fix her counterclaim for hearing and serve the applicant.

[3]. When the defendant's counterclaim came down for hearing on 5/11/2016, the applicant said that there was Civil Suit No.5 of 2016 concerning the same subject matter. She wanted both matters consolidated and the Court to deal with both matters together. Madam Mufutu Learned Counsel for the respondent vehemently opposed the proposition. She argued that this suit was withdrawn with costs on 23/2/2016 and that the inclusion of Suit No.5 of 2016 is an afterthought and its purpose was to delay the interests of justice in this suit. She prayed that she be allowed to proceed with her formal proof.

[4]. Once a suit is withdrawn, the suit or originating summons in this case, ceases to exist. There is therefore no consideration of that suit that can take place. The only issue alive herein is the counterclaim which seeks to evict the applicants. That counterclaim is not opposed. The same is only pending for formal proof. This is so because there is a Court order allowing the originating summons to be withdrawn with costs to the respondents.

Madam Mufutu is spot on when she argues that the alleged consolidation cannot take place.

The application for consolidation is dismissed with costs. The respondent shall proceed to fix her counterclaim of eviction for formal proof.

Judgment read in open court Mr. Anwar.

**DATED and DELIVERED at BUNGOMA this 10<sup>th</sup> day of March, 2017.**

**S.N. MUKUNYA**

**JUDGE**

**In the presence of:**

Court Assistants - Joy/Chemtai

Mr. Anwar - For Juma for Plaintiff

Kiarie & Company on record for the Defendant - Absent