



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 321 OF 2014**

NYAMBENE COFFEE MILLS LIMITED.....1<sup>ST</sup> PLAINTIFF

NYAMBENE COFFEE ESTATES LIMITED.....2<sup>ND</sup> PLAINTIFF

VERSUS -

EQUATORIAL COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT

IAN LAWSON SMALL.....2<sup>ND</sup> DEFENDANT

KIERAN KEVIN DAY.....3<sup>RD</sup> DEFENDANT

**RULING**

1. On 24<sup>th</sup> July 2014 the plaintiffs filed this suit. On that same day, the plaintiffs filed an application seeking injunctive reliefs against the defendants.
2. As against **EQUATORIAL COMMERCIAL BANK LIMITED**, the plaintiffs sought an injunction to restrain it from selling, disposing of, offering for sale or alienating the plaintiffs' properties.
3. Meanwhile, as against **IAN LAWSON SMALL and KIERAN KEVIN DAY** (*the Receiver Managers*), the plaintiffs sought an injunction to restrain them from acting in the capacities of Receiver Managers. The plaintiffs also wanted the said Receiver Managers restrained from interfering with the plaintiffs' quiet possession of their property, land, machinery, equipment, assets and stock.
4. That application was filed under a Certificate of Urgency, and it was therefore placed before Ogola J. on the same date. The learned Judge certified the application as urgent and heard it *ex parte*, in the first instance. And having given due consideration to the submissions made by Mr. Ngilu, the learned advocate for the plaintiffs, the court fixed the application for hearing *inter partes* on 31<sup>st</sup> July 2014.
5. The court also ordered that the two interlocutory injunctions would issue forthwith, and would remain in force until 31<sup>st</sup> July 2014.
6. On 31<sup>st</sup> July 2014, Mr. Wanyonyi, the learned advocate for the defendants, sought an adjournment because he needed time to obtain more detailed instructions from his client.
7. The court adjourned the application to 18<sup>th</sup> September 2014.
8. On 12<sup>th</sup> August 2014 the defendants filed an application seeking an injunction to restrain the plaintiffs from selling, disposing of, or offering for sale, any of their properties, land, machinery, equipment, assets or stock.

9. As the 12<sup>th</sup> of August 2014 fell during the Court Vacation, the defendants' application was adjourned to 18<sup>th</sup> September 2014.
10. When the matter came up on 18<sup>th</sup> September 2014, the defendants had not yet served their application on the plaintiffs. The court adjourned the 2 applications to 23<sup>rd</sup> October 2014, in order to allow the parties time to serve their respective documents.
11. Instead of waiting until 23<sup>rd</sup> October 2014, when the court was due to give its Directions on the 2 pending applications, the plaintiffs filed an application dated 10<sup>th</sup> October 2014.
12. That new application sought injunctive reliefs to restrain the Bank from disclosing to the Credit Reference Bureau, the financial status and other information concerning the plaintiffs. The plaintiffs were apprehensive that if their financial records were made known to the Credit Reference Bureau, they could be listed as defaulters, and that would then prejudice their credit-worthiness before any financial institution.
13. As the court had already fixed the other 2 applications for hearing on 23<sup>rd</sup> October 2014, the application dated 10<sup>th</sup> October 2014 was also fixed for Directions on that same date.
14. On 22<sup>nd</sup> April 2015, Miss Kiome, the learned advocate for the plaintiffs, was, reportedly, ill. Therefore, at the request of Mr. Juma advocate, who had held brief for Miss Kiome, the court was asked to adjourn the applications dated 10<sup>th</sup> October 2014 and 11<sup>th</sup> August 2014.
15. Mr. Wafula, the learned advocate for the defendants, was not amused. He stressed the fact that the plaintiffs had already enjoyed interim reliefs since July 2014, yet the applications had not been canvassed substantively.
16. The defendants also pointed out that, whilst the case was still pending, the plaintiffs filed 2 other cases before the High Court, at Meru.
17. When those 2 cases came up before the Judge on 21<sup>st</sup> April 2015, they were adjourned to await the outcome of the applications in this case.
18. As Ms. Kiome advocate was in court on 21<sup>st</sup> April 2015, Mr. Wafula appeared to doubt that Ms. Kiome had been taken ill between that court appearance and the very next day. In the light of the history of delays occasioned by the plaintiffs, the defendants submitted that if this case was adjourned from 22<sup>nd</sup> April 2015, the interim orders ought to be vacated.
19. The plaintiffs' advocate, Mr. Juma, told the court that Ms. Kiome did not choose to be indisposed.
20. At that point, the court asked the plaintiffs for their response to the request by the defendants, that the interim orders be vacated. In response, the plaintiffs' advocate informed the court that the application dated 10<sup>th</sup> October 2014 had been overtaken by events. For that reason, the plaintiffs sought to withdraw that application.
21. For the record, the application dated 10<sup>th</sup> October 2014 was the one pursuant to which the plaintiffs sought to bar Equatorial Commercial Bank Limited from disclosing their financial status to the Credit Reference Bureau.
22. Having withdrawn that application, the plaintiffs then suggested that the parties be allowed to canvass the other 2 applications, (dated 11<sup>th</sup> August 2014 and 17<sup>th</sup> February 2015, respectively), through written submissions.
23. The application dated 18<sup>th</sup> August 2014 sought to restrain the defendants from selling or disposing of the plaintiffs' properties. Meanwhile, the application dated 17<sup>th</sup> February 2015 sought the transfer of this case, to the High Court of Kenya, at Meru.
24. After giving consideration to the submissions of the parties, the court marked as withdrawn, the plaintiffs' application dated 10<sup>th</sup> October 2014. The costs of that application were awarded to the defendants.
25. The court further directed the parties to file their respective written submissions on the applications dated 23<sup>rd</sup> July 2014 and 11<sup>th</sup> August 2014.
26. Those orders were made on 22<sup>nd</sup> April 2015. And in order to verify compliance with the said orders, the court directed that the case be mentioned on 21<sup>st</sup> May 2015.
27. On 6<sup>th</sup> May 2015, the firm of Humphrey & Company Advocates filed an application for leave to cease acting for the plaintiffs.
28. Although the case had been scheduled to be mentioned on 21<sup>st</sup> May 2015, that did not happen.

29. The case was next in court on 11<sup>th</sup> June 2015. On that date, the defendants disclosed that the plaintiffs had filed another application for an injunction in **MERU** Hccc No. 27 of 2014.
30. Mr. Wafula, the learned advocate for the defendants, informed this court that when the application came up before the High Court at Meru, he drew the attention of that court to the existence of this case. That information was relayed to that court in 4<sup>th</sup> June 2015.
31. It does appear that after the learned Judge at Meru had learnt about the existence of this case, he put on hold the matter which was before him, albeit temporarily.
32. On 10<sup>th</sup> June 2015, the defendants' advocates were served with a Notice, indicating that the plaintiffs had withdrawn this case.
33. The defendants' conclusion, arising from the purported withdrawal of the suit, was that the plaintiffs were abusing the process of the court. That conclusion was derived from the fact that the plaintiffs had enjoyed the fruits of orders which were made in the case, but when their applications were supposed to be canvassed *inter-partes*, the plaintiffs opted to withdraw the case upon which they had derived the interim orders.
34. Mr. Wafula advocate was saying that the court ought not to permit itself to be used by the plaintiffs.
35. I therefore inquired from the defendants if the court could compel a party to pursue a claim which the said party had chosen to withdraw.
36. The defendants answer was in the negative. However, the defendants still emphasized that the plaintiffs were abusing the process of the court.
37. The defendants reminded the court that the relationship between the plaintiffs and the Bank was one of a borrower and a lender, respectively. Each of the said parties had their rights. And if a dispute arose between them, the defendants view was that such disputes had to be resolved expeditiously.
38. Quoting the provisions of Article 159 (2) (b) of the Constitution of Kenya 2010, Mr. Wafula reiterated that justice should not be delayed.
39. In this case, the plaintiffs are said to have failed to make any repayments to the bank, with a view to servicing the financial facilities accorded to them. The said failure had lasted from July 2014, when the plaintiffs first came to this court.
40. The plaintiffs had come to court, alleging that their rights had been infringed. Therefore, the defendants view was that the plaintiffs should have moved swiftly to prosecute their applications, so as to speedily resolve the dispute, as envisaged by Section 1A of the Civil Procedure Act.
41. But the plaintiffs are said to have used the process of the court to block the defendants from enjoying their rights. For that reason, the defendants submitted that the plaintiffs should not be permitted to move to another court, to pursue the same claim.
42. The defendants insisted that they wanted to have the dispute resolved, and not to have it moved to another court. I was therefore invited to stop the plaintiffs from abusing the process of the court.
43. The defendants cited the case of **HARRY JOHN PAUL ARIGI & OTHERS Vs THE BOARD OF DIRECTORS, KENYA PORTS AUTHORITY, CONSTITUTIONAL PETITION No. 24 of 2015 (MSA)** as authority for the proposition that the court can reject an application for the withdrawal of a suit.
44. As this court had rejected the plaintiffs quest to transfer this case to Meru, the defendants said that the court should reject the attempt to withdraw the case.
45. Ms. Kiome, the learned advocate for the plaintiffs, submitted that the plaintiffs had a constitutional right to choose whether or not to withdraw their claim.
46. Secondly, as this case had not reached the stage of trial, the plaintiffs believe that Order 21 Rule 1 of the Civil Procedure Rules, allows the plaintiffs to withdraw the suit.
47. On 26<sup>th</sup> May 2015, Ms. Kiome had written to Mr. Wafula, notifying him that the plaintiffs had decided to withdraw this suit.
48. On 4<sup>th</sup> June 2015, Mr. Wafula informed the court at Meru, that he was not happy about the intended withdrawal of this case. At that stage, the court at Meru is said to have decided to await the Directions which this court would make.
49. As far as the plaintiffs were concerned, they cannot be compelled to prosecute the case. They believe that the defendants only remedy was in being awarded costs.
50. After receiving those submissions from the parties, the court ordered, with the consent of the parties, that the firm of Humphrey & Company Advocates had been granted leave to cease acting

- for the plaintiffs.
51. I now need to make a determination on the matters canvassed before me.
52. First, it is clear that the plaintiffs have chosen not to prosecute their applications dated 23<sup>rd</sup> July 2014, and 17<sup>th</sup> February 2015. On the other hand, the defendants had already made their submissions on the application dated 23<sup>rd</sup> July 2014. The defendants had also made their submissions on their application dated 11<sup>th</sup> August 2014.
53. Instead of prosecuting their applications and also instead of responding to the defendants' application, the plaintiffs filed a Notice to withdraw the entire suit.
54. The Notice of Withdrawal of the Suit was filed on 10<sup>th</sup> June 2015.
55. As the plaintiffs had not filed their submissions in support of their applications, and had also not filed submissions in answer to the defendants' application, it is understandable why the defendants felt that the purported withdrawal of the suit was a way of avoiding the real issues in the case, after the plaintiffs had enjoyed interim reliefs for almost one year.
56. The plaintiffs had filed 2 applications under certificates of urgency. But after they had obtained the initial injunctive reliefs, the plaintiffs failed to canvass their applications.
57. Instead, the plaintiffs filed 2 other cases at the High Court of Kenya, at Meru. When it is considered that it was the plaintiffs who had chosen to file the case in Nairobi, their apparent turn-around, so as to file 2 other cases in Meru, does not paint a positive picture of the plaintiffs. The impression created is that the plaintiffs would prefer to proceed with their claims before the court at Meru, rather than at the Commercial Division of the High Court, in Nairobi.
58. Nonetheless, as the defendants' advocate admitted, the court cannot force a party which has decided to abandon or to withdraw its case, to prosecute the said case.
59. In **NICHOLAS KIPTOO ARAP KORIR SALAT Vs THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & OTHERS** [2014] e KLR, the Supreme Court said;

**“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 the court can do is to make an order as to costs where it is deemed appropriate”.**

60. In the Constitutional Petition **HARRY JOHN PAUL ARIGI & OTHERS Vs THE BOARD OF DIRECTORS, KENYA PORTS AUTHORITY, PETITION No. 24 of 2015 (MSA)**, Emukule J. observed that provided an applicant followed the Rules applicable to the withdrawal of suits, the court would permit such withdrawal.
61. In that case, the learned Judge made the following finding;

***“The purported Notice of Withdrawal of Petition dated 11<sup>th</sup> May, 2015, however failed to meet the requirements of Rule 27 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It also failed to meet the tests for withdrawal of a Petition as was held in Constitutional Petition No. 305 of 2012, consolidated with Petition No. 34 of 2013...”***

62. As that case involved Public Interest Litigation, and because the Rules were not followed by the Petitioners, and because;

***“the withdrawal was also tainted with ill motive, to circumvent the status quo order of this court, and the immediate filing of Hccc No. 64 of 2015, in which contrary orders were granted”, the learned Judge concluded that that was a classic case of an abuse of process. He therefore declared thus;***

***“The court will not accept the abuse of its process. No petitioner is permitted to either forum shop, nor to abuse the process of the court”.***

63. In the circumstances, the orders of the Deputy Registrar, purporting to withdraw the petition were set aside.
64. In this case, as already alluded to, the plaintiffs appear to have the desire to have their case heard

- in Meru, rather than at the Milimani Court, Nairobi. That would appear to be forum shopping, considering that the cases at Meru were filed when the plaintiffs, (*who had chosen to file the case in Nairobi*) still had applications which were pending before this court.
65. However, as the plaintiffs did comply with the Rules governing the withdrawal of suits, this court cannot compel them to prosecute their case.
66. Accordingly, I now order that this suit be marked as withdrawn.
67. However, in the light of the circumstances in which the withdrawal was done, I order that the plaintiffs will pay to the defendants, the costs of the suit.
68. The plaintiffs will also pay to the defendants, the costs of all the applications which had been filed in this case. I so order because the plaintiffs must be deemed to have abandoned their won applications and also to have had no answer to the defendants' applications.

**DATED, SIGNED and DELIVERED at NAIROBI this 7<sup>th</sup> day of July 2015.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Okelo for Miss Kiome for the 1<sup>st</sup> Plaintiff

Okelo for Miss Kiome for the 2<sup>nd</sup> Plaintiff

Begisen for Wafula for the 1<sup>st</sup> Defendant

Begisen for Wafula for the 2<sup>nd</sup> Defendant

Begisen for the 3<sup>rd</sup> Defendant

Collins Odhiambo – Court clerk.