



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. MISC. JUDICIAL REVIEW CASE NO. 02 OF 2020

REPUBLIC.....APPLICANT

VERSUS

EXPORT PROCESSING ZONES AUTHORITY.....1ST RESPONDENT

NATIONAL ENVIRONMENT

MANAGEMENT AUTHORITY.....2ND RESPONDENT

WATER RESOURCES AUTHORITY.....3RD RESPONDENT

AND

LONDON DISTILLERS (K) LTD.....1ST INTERESTED PARTY

MAVOKO WATER & SEWERAGE CO.....2ND INTERESTED PARTY

COUNTY GOVERNMENT OF MACHAKOS,

DEPARTMENT OF ENVIRONMENT

& NATURAL RESOURCES.....3RD INTERESTED PARTY

DENVIC PROPERTY MANAGERS LTD.....4TH INTERESTED PARTY

AND

ERDERMANN PROPERTY LIMITED.....EX-PARTE APPLICANT

RULING

1. This Ruling is in respect to the Applicant's Notice of withdrawal of the suit. The Application to withdraw the suit by the Applicant has been opposed by the 1st Interested Party. The 1st Respondent has not opposed the withdrawal of the suit, save for the payment of costs of the suit by the Applicant.

2. The issue of whether this suit can be withdrawn, and if so, whether costs are payable, was argued by way of written submissions. The Applicant's advocate submitted that vide a Chamber Summons Application dated 24th January, 2020 (*hereinafter "the Application"*), the Applicant sought leave to commence judicial review proceedings seeking, *inter alia*, orders of prohibition restraining the 1st interested party's discharge of untreated, hazardous and toxic effluent into the sewer line operated by the 1st Respondent.

3. It was submitted that the Applicant's contention was necessitated by the perceived inaction and dereliction of statutory duty by the Respondents in curbing or taking action against the 1st Interested Party's pollution; that before the Application could be set down for hearing, the Applicant was constrained to file an application seeking the trial court's recusal which in effect necessitated it being heard on priority and that the Application for recusal was itself not without controversy, for the 1st Interested Party sought to have the Applicant's managing director and its counsel cited for contempt on alleged breach of the *sub-judice* rule.

4. Counsel submitted that during the pendency of the Application for recusal, the 1st Respondent issued a non-compliance notice dated 21st May, 2020 to the Interested Party notifying it to ensure that its discharge conforms to regulatory standards before discharge of effluent to its sewer line and that shortly thereafter, the 2nd Respondent also issued a control order dated 9th June, 2020 to the 1st Interested Party requiring it to adopt adequate compliance measures of its particulate emissions.

5. It was submitted that in view of the respective notice and control order issued by the Respondents, the Applicant, being reasonably convinced that the substratum of the pending proceedings had been determined and overtaken by events, filed a notice of withdrawal dated 8th July, 2020 which was served upon the respective parties in this suit.

6. The Applicant's counsel submitted that as a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned and that a court of law cannot force an unwilling Plaintiff to continue with a cause of action because, even if the court insists that he should continue, he may well refuse to tender evidence or take any further steps in the action. Counsel relied on the Supreme Court of Kenya decision in *John Ochanda vs. Telkom Kenya Limited [2014] eKLR*, where the Court held as follows:

"I do hold the view that a prospective appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any."

7. It was submitted by the Applicant's counsel that this proposition was accepted and followed by the Supreme Court again in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others, SC App. No. 16 of 2014* where it was reiterated that:

"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 that the court can do is to make an order as to costs where it is deemed appropriate."

8. The Applicant's counsel also relied on the Court of Appeal decision in *Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited, 2015 eKLR*, in which the court reiterated that the right of party to discontinue a suit or withdraw his claim cannot be questioned.

9. It was submitted that the withdrawal of the Application, signified vide the Notice of Withdrawal dated 24th January, 2020, is made in utmost good faith, in view of the various notices issued by the 1st and 2nd Respondents; that the instant withdrawal is issued by the Applicant on the premise that it retains its right to re-litigate the claim should the circumstances necessitating the Application for leave subsist.

10. It was submitted by the Applicant's counsel that whilst not strictly bound by the Civil Procedure Rules, 2010, the withdrawal of the Application may be anchored on the provisions of Order 25 of the Civil Procedure Rules, 2020 which provides as follows:

"1. At any time before the setting down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

2. 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.

3. 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."

11. On the issue of the interpretation of Order 25 of the Civil Procedure Rules, counsel relied on the Court of Appeal decision in the *Beijing Industrial Case (supra)* which held as follows:

"the above provision presents three clear scenarios regarding discontinuance of suit or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, at any time to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent of all the parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereto. In such eventuality, the Plaintiff must obtain leave of court to discontinue the suit or withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain leave of the court. That such leave is granted on terms suggests that it is not a mere formality."

12. It was submitted that no responses had been filed by any of the parties to the Application for leave prior to the lodging of the instant Notice of Withdrawal; that it follows that the Applicant does not need the leave of the Honourable Court in view of the fact that the Application seeking leave had not been set down for hearing and that in the absence of any evidence of bad faith on the Applicant in withdrawing the instant proceedings, this Honourable Court must give effect to the Applicant's absolute right to withdraw the Application.

13. The 1st Respondent's advocate submitted that The 1st Respondent is not opposed to the withdrawal of the entire suit as proposed by the

Applicant and that the 1st Respondent is entitled to costs having spent considerable time in attending court, doing research and incurring expenses in defending the matter.

14. The 1st Respondent counsel submitted that the Compliance order in question was issued by the 1st Respondent to London Distillers LTD (*the 1st Interested Party*) and not the *ex-parte* Applicant; that the 1st Respondent did not at any point in time have any issue or dispute with the *ex-parte* Applicant and that Section 27(1) of the Civil Procedure Act, 2010 recognizes award of costs as discretionary and the Judge has the discretion to determine by whom and out of what property and to what extent such costs are to be paid, provided that costs of any action, cause or other matter or issue shall follow the event unless the Judge shall for good reason otherwise order.

15. Counsel submitted that the matter has come up before this court at least four times since it was filed; that the 1st Respondent was represented in all the attendances; that the 1st Respondent has spent considerable resources in instructing Advocates who are based in Nairobi to travel all the way to Machakos in defending its interests and that the 1st Respondent has shown reasonable cause that it deserves costs.

16. While submitting on the issue of costs, counsel for the 1st Respondent relied on the case of *Joseph Oduor Anode V Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR* where Odunga, J. observed:

“... In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so.”

17. Counsel submitted that it is a general principle that costs follow events; that withdrawal of the suit before formal determination by the court is deemed as an event that should entitle the 1st Respondent costs. Counsel relied on the case of *Republic v Kenya Airports Authority & 4 others Ex-Parte Transglobal Cargo Centre Limited [2015] eKLR* where the court stated as follows:

“In this case the proceedings were initiated by the applicant. Before the proceedings could be determined in the normal manner, the applicant withdrew the same. In the normal course of events a withdrawal of proceedings amounts to a determination thereof in favour of the respondents thereto and pursuant to the provisions of section 27 aforesaid the respondents would be entitled to costs...”

18. The 1st Respondent’s counsel finally submitted that the Honourable Court should also take into consideration that the Advocates representing the 1st Respondent were led by Senior Counsel Muite who appeared in court personally on 26th February 2020 and that the court should issue a certificate of senior counsel pursuant to the provisions of the Schedule 6 of the Advocates Remuneration Order, 2014 which states that:

“(iii) In any case which a certificate for senior counsel has been given by the judge, the instruction fee allowed on taxation as between party and party shall be increased by one-half and other charges shall be doubled where requisite, the allowance for attendances of the senior counsel in court conducting or leading the cause being on the higher scale.”

19. Counsel submitted that it is only fair that the party who has been dragged to court and has consequently incurred costs to defend themselves be entitled to costs where the Applicant withdraws the case.

20. The 1st Interested Party’s advocate submitted that that this Honourable Court should not permit the Applicant to discontinue these proceedings until the pending contempt of Court proceedings are heard and determined.

21. Counsel submitted that on the date fixed for hearing of the Applicant’s Application, one Nancy Mireri, an Advocate of this Honourable Court, acting for the Applicant, knowingly made false and disparaging remarks to a battery of journalists, casting aspersions on the trial judge and alleging bias on his part and alleging that he was favouring the 1st Interested Party in proceedings pending before this Court, and which publication was published to the whole world on different platforms.

22. It was submitted that the actions of the said Nancy Mireri were not only contemptuous, but also in violation of the sub judice rule and put the integrity, power, authority and processes of this Honourable Court to public ridicule.

23. The 1st Interested Party’s advocate submitted that by an Application dated 12th February, 2020 and filed on even date, the 1st Interested Party sought for orders to cite the said Advocate and the controlling mind behind the Applicant for contempt of this Honourable Court and that in response, the contemnors jointly filed a Notice of Preliminary objection dated 23rd February, 2020 which is pending before this Honourable Court.

24. It was submitted that in view of the fact that the Applicant and its Advocate have not purged the contempt, the move to withdraw the instant proceedings is a clear calculated attempt to compromise and steal a match on the Interested Party’s application dated 12th February, 2020.

25. The 1st Interested Party’s advocate submitted that the Applicant has even filed a Complaint against the Hon. Mr. Justice Angote before the Judicial Service Commission alleging his bias against it in the manner he has conducted the instant proceedings among others and alluding to the trial judge’s collusion with the 1st Interested Party; that the Applicant has filed the Application dated 30th January, 2020 seeking recusal of the Judge on the basis of the Petition filed at the JSC and that the said matters being in the public domain, the Applicant should not be allowed to withdraw the instant proceedings.

26. 1st Interested Party's advocate submitted that it is clear from several suits pending before this Honourable Court pitting the Applicant against the 1st Interested Party that its intention is to illegally use the Court process to sanitize its adverse campaign against the 1st Interested Party to economically sabotage the operations of its distillery and that it is in bad taste that it should seek to withdraw the instant proceedings which have been defended to the hilt without awarding the 1st Interested Party costs.

27. Counsel submitted that any person who has committed an act of contempt of Court is liable for indictment as held in *Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013* where the court held as follows:

"The reason why courts will punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt of court proceedings. It is about preserving and safeguarding the rule of law..."

28. According to the Applicant's counsel, the Applicant has through its Advocates engaged in gamesmanship and are attempting to pull the rug from under the feet of this Honourable Court, which it has disparaged in a vile manner so as to curtail and or compromise its powers to punish for contempt by purporting to withdraw the proceedings even before purging the contempt.

29. It was submitted by counsel that the improper purpose sought by the Applicant and its Advocate is to continue duping the whole world that it is a victim of the Honourable trial judge's bias as widely published by them in the public domain and to escape the sanction of this Court by curtailing its powers to punish them for contempt.

Analysis and findings:

30. The Applicant filed an Application dated 24th January, 2020 seeking, *inter-alia*, for leave to file Judicial Review Proceedings against the Respondents and the Interested Parties. Although the Application was filed under a Certificate of Urgency, the court did not grant the Applicant interim stay orders at the *ex- parte* stage and instead fixed the matter for hearing inter partes on 30th January, 2020.

31. On 30th January, 2020, the court directed the Respondents and the Interested Parties to file their responses and exchange submissions on the Application seeking leaving to file Judicial Review proceedings. The matter was scheduled for mention to confirm compliance on 31st March, 2020.

32. On the same day, the Applicant filed another Application dated 30th January, 2020 seeking *inter-alia* recusal of the court from handling the Judicial Review Application and or any other subsequent proceedings in the matter.

33. On 12th February, 2020, the 1st Interested Party filed an Application of even date. In the Application, the 1st Interested Party sought for the committal to civil jail of Nancy Mwireria Advocate and John Zeyung Yang, the Applicant's Director, for contempt of court.

34. According to the depositions of the 1st Interested Party's representative, on 30th January, 2020, Nancy Mwireri Advocate, while acting under the instructions of John Zeyung Yang, acted recklessly, irresponsibly and contemptuously when she addressed the media immediately after the court proceedings.

35. In the contempt Application, it is the 1st Interested Party's case that in addressing the press, the said Advocate willfully disregarded the doctrine of *sub judice* and that as a result of the said press statement, the sanctity of this court has been scandalized, demeaned, exposed to public ridicule and has interfered with the due process of the court by personally attacking the character of the court. The Application for contempt has not been heard.

36. The record shows that the Application dated 30th January, 2020 for recusal came up for directions on 26th February, 2020 when the court directed the parties to file their responses and submissions. The Application was set for hearing on 24th March, 2020.

37. The hearing could not proceed on 24th March, 2020 due to the outbreak of the COVID-19 pandemic. When the matter was mentioned virtually on 28th July, 2020, the Applicant's advocate informed the court that the Applicant wishes to withdraw the entire suit. The withdrawal of the suit has been opposed by the 1st Interested Party.

38. As a general proposition, the right of a party to discontinue a suit or withdraw his claim, where the same has not been set down for hearing, cannot be questioned. Indeed, a court of law cannot force an unwilling Plaintiff/Applicant to continue with a cause of action because, even if the court insists that he should continue, he may well refuse to tender evidence or take any further steps in the action.

39. This is the position that was reiterated by the Supreme Court in *John Ochanda vs. Telkom Kenya Limited [2014] eKLR*, where the Court held as follows:

"I do hold the view that a prospective appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs, which can be claimed by the respondents, if any."

40. The above proposition was accepted and followed by the Supreme Court again in *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7*

Others, SC App. No. 16 of 2014 where the court stated as follows:

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

41. However, there are instances where the court will decline to allow a party to discontinue or withdraw a suit. Those circumstances were clarified by the Court of Appeal in *Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited*, 2015 eKLR as follows:

*“Under normal circumstances, the respondent would have, in our view, been able to discontinue the suit or withdraw the claim without leave or hindrance if issues of violation of a court order by the respondent were not pending for determination by the court. Granted the peculiar circumstances of this appeal, we ask ourselves whether at the time of the discontinuation of the suit, the matter was still a straightforward dispute between only the appellant and the respondent so as to fall neatly within the confines of Order 25 Rule 1. From the circumstances surrounding the discontinuation of the suit while an application seeking committal of two of its directors for contempt of court and the filing by the respondent of a new suit the very next day raising exactly the same issues as those in the suit it had discontinued, the contention by the appellant that the sole purpose of the discontinuation of the suit was to defeat the contempt of court proceedings is not, with respect, an idle complaint. Contempt of court proceedings are quasi-criminal.....quasi-criminal proceedings ought not to be terminated at the exclusive instance or discretion of the party alleged to be a perpetrator of a criminal or quasi-criminal act. There is yet an additional and more compelling reason why we are convinced that the respondent, who was alleged to be in contempt of court, was not at liberty to discontinue the suit at its own instance or discretion. As Lord President Clyde noted way back in 1923 in *JOHNSON V. GRANT*, 1923 SC 789 AT 790, the purpose of the law on contempt of court is not to protect the personal dignity of the judiciary or the private rights of parties or litigants. Nor is it intended to assuage the offended dignity of the court. Rather, it is intended to uphold and protect the supremacy of the law. To that extent, contempt proceedings involve much more than the private interests of the plaintiff and the defendant and implicate the public interest at large. On compliance with court orders, which the respondent is alleged to have failed to do...”*

42. While declining to allow the discontinuance or withdrawal of the suit due to the pendency of an Application for contempt, the Court of Appeal in the *Beijing case (supra)* stated as follows:

“The uncritical application of Order 25 Rule 1 to the facts of this case resulted, in our respectful view, in an anomalous situation where the public interest in the upholding and protection the rule of law was sacrificed, without the slightest consideration, at the altar of the respondent’s alleged absolute right to withdraw its suit, even when it was alleged to have deliberately undermined the rule of law. The public interest was placed at the mercy of the respondent, because to vindicate the supremacy of the law depended on the continued existence of the respondent’s suit, even if for the limited purpose of facilitating the hearing and determination of the contempt of court application alone.”

43. In the above case, the Court of Appeal was clear that a party who has been accused of being in contempt of court cannot be allowed by the court to withdraw his case, because doing so will be an abuse of the court process. In that respect, the court held as follows:

“We entertain no doubt in our minds that the withdrawal by the respondent of its suit for the purpose of defeating the contempt of court application against it was an abuse of the process of court. Under Section 3A of the Civil Procedure Act the High Court’s inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court is preserved. Where a party uses the right to discontinue a suit in manner that amounts to abuse of process of court or to defeat the ends of justice, the court has power to stop such abuse or undermining of justice.”

44. It is not in dispute that the 1st Interested Party has filed an Application dated 12th February, 2020 for contempt of court. In the Application, the 1st Interested Party has accused the Applicant’s advocate, together with her instructing client, for willfully disregarding the doctrine of *sub judice*, and that as a result of the press statement that was made by the Applicant’s advocate on 30th January, 2020, the sanctity of this court has been scandalized, demeaned, exposed to public ridicule and has interfered with the due process of the court.

45. The 1st Interested Party having filed the Application for contempt, the matter stopped being a contest between the Applicant and the 1st Interested Party. Contempt proceedings, being *quasi-judicial* in nature, encompass public interest, which interest cannot be circumvented by the Applicant by withdrawing or discontinuing the suit at will.

46. Considering that the Application for contempt has not been heard, I decline to allow the Applicant’s application to withdraw the suit. Having declined the Applicant’s Application to withdraw the suit at this stage, I will not address the issue of costs.

47. For those reasons, I strike out the Applicant’s Notice of Withdrawal of the suit with costs to the 1st Interested Party.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 25TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE