



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**HCC NO. 79 OF 2011**

**SITUMA WANYAMA FRANCIS..... PLAINTIFF**

**VERSUS**

**JOTHAM SIMIYU MAFUNGA..... DEFENDANT**

**RULING**

The Defendant/Respondent has raised a preliminary point of law to the application seeking to strike out his defence. The preliminary point is seeking to have the Plaintiff's suit struck out for being an abuse of the court process. The Defendant submits there is a pending suit vide Webuye SRMCC No. 193 of 2010 between the same parties seeking similar orders as the present suit. This contravenes the provisions of the law. The defendant submits further that if the plaintiff wanted to withdraw the Webuye suit, they ought to have filed a formal application not just filing notice of withdrawal.

The Plaintiff in response submits this is the only suit existing between the parties herein. That Webuye SRMCC No. 193 of 2010 was withdrawn on 23.1.12 and has annexed a notice of withdrawal filed in his supplementary affidavit. They have cited Article 159 of the Constitution and asked the court not to strike out this suit on technicality.

I have considered in totality the submissions presented by the parties herein. It is not in dispute that the Plaintiff had filed a suit vide Webuye SRMCC No. 193 of 2010 regarding the same subject matter. According to the Plaintiff, that suit is already withdrawn while the defendant contends otherwise. I have seen the notice of withdrawal annexed as 'SWF 1'. It bears stamp from Webuye court showing it was received on 23.1.12 which is over a year to the raising of this Preliminary Objection.

The Defendant has not cited what provisions of the law that requires a party withdrawing his suit to file a formal application. In my understanding filing "*notice to withdraw*" itself is satisfactory procedure. Once the notice was received by court, that suit ceased to be pending. The Defendant did also not annex any proceedings in the Webuye SRMCC no 193 of 2010 file to verify that the notice of withdrawal had not been endorsed as a court order. In the absence of such evidence, I find the objection is not merited. The defendant can get recourse in the withdrawn suit by assessing their costs if any. In the end the objection is dismissed with costs to the Plaintiff.

**RULING DELIVERED AND DATED** in open court this 4th day of February 2014.

**A. OMOLLO**

**JUDGE.**