



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC MISCELLANEOUS CIVIL APPLICATION CASE NO.

05 OF 2020

FRANKLINE KARITU NJIRU.....1ST APPLICANT

ELIAS MICHENI MUGO.....2ND APPLICANT

LOYFORD MURATHA MURITHI.....3RD APPLICANT

MARY CIAMWARI KIRIMO.....4TH APPLICANT

GEOFFREY GITARI MATHAI.....5TH APPLICANT

LUCY KANYUA MBAKA.....6TH APPLICANT

PURITY KANGAI PETER.....7TH APPLICANT

VERSUS

KENYA URBAN ROADS AUTHORITY.....1ST RESPONDENT

THE ADMINISTRATOR – CHUKA TOWNSHIP.....2ND RESPONDENT

THE COUNTY GOVERNMENT OF THARAKA NITHI.....3RD RESPONDENT

RULING

1. This ruling concerns an application for withdrawal of this suit filed by the plaintiffs and dated **19th May, 2020**. The notice reads as follows:

WITHDRAWAL OF SUIT UNDER ORDER 25 RULE 1 CPR

TAKE NOTICE that the plaintiff wishes to wholly withdraw their suit against all the defendants on account of the acts and commissions of the 1st defendant which rendered the plaintiffs suit to wit Chief Magistrates court ELC.13 of 2020 nugatory and overtaken by events when the 1st defendant through this agents and servants on 4th April, 2020 demolished, damaged and destroyed the plaintiffs plot to wit M26B, M26A2, M25, M19, M.20B, M23 and M.27B despite the suit seeking for an interim injunction to restrain the 1st defendant from demolishing the said plot.

Dated at Chuka this 19th day of May, 2020

2. The application was canvassed by way of written submissions.
3. The applicants' written submissions are reproduced in full herebelow without any alterations whatsoever:

APPLICANTS SUBMISSIONS IN RESPECT OF THE WITHDRAWAL OF SUIT NOTICE DATED 19TH MAY 2020

1. Your lordship on 22ND May 2020 the applicant sort to withdrawal ELC MISC NO.5 OF 2020 vide the application dated 19th May 2020,

because the said MISCELLANEOUS APPLICATION had been rendered nugatory on account of the acts of the defendants. The application was seeking the opinion of the court as to whether the chief magistrates had pecuniary jurisdiction to hear and determine Chief Magistrates ELC Case No.13 of 2020 as presented in the pleading particularly the plaint. The respondents had orally raised the issue of the chief magistrates having no requisite jurisdiction to hear and determine the suit. The applicants had a different opinion, that is the chief magistrates and the requisite jurisdiction after all none of the seven properties had its value assessed.

2. In Chief Magistrates ELC case no.13 of 2020, the applicants (herein) the plaintiffs sought an interim injunction to restrain the respondent from demolishing the applicants' plots namely, m26b, m26 a2, m25, m19, m20b, m23 and m27b vide an application under certificate of urgency dated 27th February 2020 under Chief Magistrates ELC CASE NO.13 OF 2020. Before the application could be canvassed the applicants opted to invoke the supervisory powers of this court for an opinion as to whether the Chief Magistrates had pecuniary jurisdiction to hear and determine the suit. It was granted that counsel for the 2nd and 3rd respondents had orally raised the jurisdiction issues.

3. The applicants moved to the ELC court for the opinion of the court vide the instant application to wit ELC MISC Application No.5 of 2020. The application was under certificate of urgency and the court on its own motion fixed the application for hearing on 30th March 2020. That by 30th March 2020, the respondents those served had not responded in any manner. The respondents had put no notice of appointment of advocate. The respondent had not put in a replying affidavit or grounds of opposition. Seemingly the respondent seemed interested to defend or oppose the instant application. The respondents filed their notice of appointment of advocates on 26th May 2020, but they did not serve the applicants' counsel. The applicant's counsel on the other hand had posted the notice to withdraw the instant application to the respondent personally. In fact the counsel for the respondent opted to file their notice of appointment of advocate, after counsel for the applicants had informed the counsel for the respondent through telephone that the applicant's counsel had withdrawn the instant application, by filing the notice on 19th May 2020 and received in court on 22nd May 2020.

4. That COVID-19 pandemic made the court to be shut by 16th March 2020. That on 30th of March 2020 came and matter could not be heard for the court were non-functional on account of COVID-19 pandemic. The matter stalled indefinitely.

5. In the meanwhile the respondent took action through their agents, Hyper Construction and Equipment Company Limited, and one Rachel Njeru Njoho (a plant operator) by demolishing, damaging and destroying the applicants' developed plots. The respondents despite their knowledge regarding the instant application and CHIEF MAGISTRATE ELC NO.13 OF 2020, which was seeking for an injunctive order to restrain the respondents from demolishing the applicants' plots, went on and did exactly what the order was seeking to restrain. On 4th April 2020 the applicants' plots were flattened.

6. Your lordship it was under the foregoing circumstances that on 19th May 2020, the applicants opted to withdraw the instant application and Chief Magistrates ELC NO.13 OF 2020. The instant application had been rendered nugatory and useless. Although the court on its own motion had fixed the instant application for hearing for 30th March 2020, the respondent did not file any opposition or objection by way of either grounds of opposition or replying affidavit, if this application had proceeded on hearing on 30th March 2020, it would have proceeded on an opposed basis because the respondents had not objected to it as pointed out by way of either grounds of opposition or replying affidavit, the matter would have proceeded on an opposed basis. Seems therefore the only purpose of the respondent filing a notice of appointment of advocates was to seek costs. One wonders what kind of costs they were looking for when the respondent had not opposed the instant application either by replying affidavit or grounds of opposition. The notice of appointment of advocate by respondent was made in bad faith and dishonesty, for they cannot answer one question why they choose to come in after being informed by counsel for the applicant that the applicant had withdrawn the application and secondly when they are not objected or opposed the application by 30th March 2020 when the application had been fixed for hearing by the court.

7. The suit having been rendered nugatory by the very illegal acts of the respondents to demolish the applicants' plots, despite there being a suit touching of the demolition of the same plots, the applicants decided to withdraw both ELC NO.13 OF 2020 and ELC MISC NO.5 OF 2020. The notice is dated 19th May 2020 and received in court on 22nd May 2020. It was served upon the respondents personally and not through their advocate, because they had not objected or opposed to the application and further, there was no notice of appointment of advocate on record.

8. Your lordship the oral opposition by advocate for respondents of the withdrawal of the instant application is purely academic, having not opposed the application and having not put in notice of appointment of advocate, neither the respondent nor their counsel have a legal standing to oppose the applicants' withdrawing this application. The withdrawal was meant to save judicial time rather than engage on futile exercise.

9. We are persuaded that all the counsel for the respondents is after in opposing the withdrawal of this application is costs. The respondents are not entitled to costs, granted that they had not opposed the application either by way of grounds of opposition or replying affidavit. The applicants cannot be blamed for the acts that have read to withdrawal of the application. The circumstances were wholly occasioned by the respondents.

10. The respondents' counsel raised the issue of the civil procedure rule under which the applicants sought to withdraw the instant application. Form cannot defeat pleading or end of justice. In principle the applicants' intentions are clear from the notice dated 19th May 2020 which is that the applicants wished to have the instant application withdrawn for it has been rendered nugatory by the respondents. It is true that the applicants came under order 25 rule 1 civil procedure rule but counsel for the respondents was of the view that the notice should have come under order 25 rule 2 where the applicants should have come by way of a formal application with a supporting affidavit and served upon the respondent. Order 51 rule 10 CPR is clear that citing the wrong rule cannot defeat the substance of the pleading for all that which is required of the court is to understand the intentions of the litigants and serve justice. Your lordship article 159 of the constitution can cure this small error.

11. Finally your lordship we urge the court to allow the applicants to withdrawal the instant application for it has been rendered useless on account of the respondents acts omissions and commissions , they are not entitled to any cost for they had not opposed the application either by way of grounds of opposition or by replying affidavit as of 30th march 2020 when the court on is own motion fixed the application for interparties herein. We rest our submission and pray.

DATED AT CHUKA THIS18thDAY OFJune,.....2020.

DRAWN AND FILED BY

M/S I.C MUGO & CO

ADVOCATES I.C MUGO & CO ADVOCATES FOR THE APPLICANTS

4. The 2nd and 3rd defendants' submissions are reproduced in full herebelow without any alterations whatsoever:

THE 2ND & 3RD RESPONDENTS SUBMISSIONS IN RESPECT OF WITHDRAWAL NOTICE DATED 19TH MAY, 2020

May it please you, Your Lordship,

1. Your Lordship, through a purported Notice of withdrawal of suit dated 19th May 2020, and filed herein on 22nd May 2020, the Applicants sought to withdraw the herein Application/Suit. The Notice is said to have been brought under Order 25 Rule 1 of the Civil Procedure Rules, 2010. These submissions are made in response to the Applicants' submissions in support of the said Notice of Withdrawal of Suit.

2. In their submissions, the Applicants have narrated in brief the events culminating and/or informing their purported withdrawal of the herein suit. The 2nd and 3rd Defendants take a different view and submit as hereunder: -

3. Order 25, Rule 1 of the Civil Procedure Rules, 2010 provides that **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.

4. The Applicant's Notice of Withdrawal is improperly before Court on account of the following reasons: -

a) At the time of filing, this Honourable Court had already set down the Applicants' Application for hearing.

b) The Notice was not served on the 2nd and 3rd Respondents as mandatorily required.

5. In place of the Notice of Withdrawal, the Applicants ought to have filed and served a Notice of Discontinuance pursuant to Order 25 Rule 2 of the Civil Procedure Rules, 2010. Order 25 Rule 2 of the Civil Procedure Rules, 2010 provides as follows: -

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. (Emphasis ours)

6. Given that the Applicants' Application had already been set down for hearing, Order 25 Rule 1 of the Civil Procedure Rules, 2010 is inapplicable. Consequently, the Applicants' ought to have sought the discontinuance of their Application pursuant to Order 25 Rule 2 (2). In effect, the Applicants' could not withdraw the herein Application without leave of Court. Granted, at the time the 2nd and 3rd Respondents filed their Notice of Appointment and Grounds of Opposition (both dated 21st May 2020), the herein suit had not been withdrawn by the mere filing of the Notice of Withdrawal dated 19th May 2020. The 2nd and 3rd Respondents are, therefore, entitled to an order for costs. Although the Applicants' Advocates, in their submissions, claim that they made a phone call to the 2nd and 3rd Respondents' Advocates to report the intended withdrawal of the suit, which allegation is denied *in toto*, no evidence has been tendered to show that such a phone call was made. Further, and remarkably, the Applicants claim that there was no one on record for the 2nd and 3rd Respondents at the time of filing the impugned Notice of Withdrawal. How then did they decide on who to call? Why didn't they serve the Notice of Withdrawal on the same Advocates they purport to have called? Can the alleged call cure the fact the suit could not be withdrawn under Order 25 Rule 1?

7. The Lower Court has/had no jurisdiction to hear and determine Chuka CMELC No. 12 of 2020 and therefore the only remedy available to the Applicants was to withdraw the suit before the Lower Court and file a fresh suit in this Court which is seized of jurisdiction. The suit in the Lower Court (Chuka CMELC No. 12 of 2020) having been filed devoid of jurisdiction, was dead on arrival and could not be remedied by this Honourable Court's directions in the nature of a transfer or otherwise.

8. Indeed, it would have been illegal for this Honourable Court, in the exercise of its powers under section 18 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, to transfer the suit filed in a court lacking jurisdiction (the Lower Court) and therefore sanctify an incompetent suit. No competent suit existed capable of being transferred as prayed by the Applicants.

9. The herein Application was unnecessary, and the Applicants ought to have known that from the outset. The Application, as presented, is

premature as the Lower Court is yet to make a finding on whether it has jurisdiction or not. On account of the foregoing, we respectfully submit that the 2nd and 3rd Respondents are entitled to costs.

DATED at **NAIROBI** this 28th day of September, 2020

DRAWN & FILED BY:

SALUNY ADVOCATES LLP

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5. I do note that the issues raised by the respondents would have best been ventilated in the Miscellaneous application dated 3rd March, 2020. However, the defendants having destroyed the suit property before the application could be heard, the applicant felt it imperative to withdraw his application. In my view, the Notice of withdrawal saved this court valuable Judicial time.

6. Having considered the submissions filed by the parties, the following orders are issued:

- a) The Notice of withdrawal filed by the plaintiffs and dated 19th May, 2020 is hereby allowed.
- b) No order as to costs is issued.

Delivered in open Court at Chuka this 28th day of October, 2020 in the presence of:

CA: Ndegwa

Kiongo h/b Saluny for 2nd and 3rd Respondents

Kiogora Arithi h/b I.C. Mugo for the Applicant

P. M. NJOROGI,

JUDGE.