



Gichuhi v Gathege (Civil Case E345 of 2022) [2025] KEMC 47 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEMC 47 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL CASE E345 OF 2022
PA NDEGE, SPM
MARCH 27, 2025**

BETWEEN

ANN WANJIRU GICHUHI PLAINTIFF

AND

MARGARET WANJIKU GATHEGE DEFENDANT

RULING

1. This ruling is in respect of a Notice of Withdrawal of Suit which was filed by the Plaintiff dated 01/11/2022. In the notice, the plaintiff has unequivocally notified the court that she withdraws the suit herein against the defendant.
2. At the time of filing the notice, the defendant had already entered appearance and filed his defence. Furthermore pleadings had already closed and this matter was pending for pre-trial directions. Nothing, however, appears to have happened in the suit herein till 14/03/2023, when the plaintiff through her counsel on record herein, wrote to the court seeking for a mention date on priority basis. The matter was thus fixed for the first mention on 03/06/2024.
3. During the mention, Ms. Towett appeared for the plaintiff and the court reminded her of the notice of withdrawal herein. On 26/11/2024, learned counsel informed the court that they now do not wish to withdraw. The issue that arise herein is whether in the circumstances of this case, the Plaintiffs' Notice of Withdrawal of the Suit filed on 02nd November, 2022 took effect upon filling.
4. On 14/03/2025, Ms. Morande appeared for the Plaintiff appeared to address the issue. She informed the court that she had taken over the conduct of this matter from the previous counsel. She relied on the case of *Shadrack Silla Muthama v Kebaso Wycliffe Maengwe* [2021] KEELC 665 (KLR) and submitted that such a notice takes effect once the same is served on the other party. That in this case there was no such service. She therefore prayed that the notice be expunged from the record.
5. Order 25 of the *Civil Procedure Rules* provides for withdrawal of suits 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)
 - (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn upon the filing of a written consent signed by all the parties.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.
6. The right to withdraw a suit under Order 25 Rules 1 and 2(1) is not fettered by any conditions and a party who intends to withdraw their suit, has an absolute right to do so. However, under Order 25 Rule 2(2), withdrawal of a suit requires permission of the court and the withdrawal may be subject to terms that the court considers just, including payment of costs or filing of any other suit.
7. In the case of *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 7 Others*, Supreme Court Application No. 16 of 2014, the Supreme 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.
8. In the case of *Beijing Industrial Designing & Researching Institute vs. Lagoon Development Limited* [2015] eKLR, the court of appeal stated as follows;

As a general proposition, the right of party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde vs. Pan Atlantic Shipping & Transport Agencies Ltd & Others* SC 154/2002 identified those circumstances to include where;

 - (i) A Plaintiff realises the weakness of his claim in the light of the defence put up by the Defendant.
 - (ii) A Plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,
 - (iii) Where by abandoning the prosecution of the case, the Plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or
 - (iv) A Plaintiff may possibly retain the right to relitigate the claim at a more auspicious time if necessary.
9. In the instant case, the case had not been set down for hearing. Therefore, the Plaintiff did not need leave of court to withdraw her case. Even in circumstances where a party needs leave of court to withdraw their suit, the court would allow the application subject to just terms. It will however be noted that under Order 25 Rule 1, the Notice of Withdrawal takes effect upon service of the same on all parties in the suit. In this case, the Plaintiff avers that she did not serve the notice on the defendant.



We are however yet to hear from the defendant, who has since not been served any mention dates that have been recently fixed, on whether he was served or not. Noting the age of this suit, I do direct that the defendant be served with a mention date so that he confirms whether he was served with the notice or not. The next course of action shall depend on whether the defendant was served or not as we cannot proceed to determine the fate of this suit without hearing from him.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY/ PHYSICALLY AT NAKURU
THIS 27th DAY OF March 2025.**

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: n/a

Defendant's counsel: n/a

Plaintiff: n/a

Defendant: n/a

