



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 83 OF 2018

KARISA CHENGO NGUMA.....PLAINTIFF

VERSUS

KACHE RUWA KALAMA

SHIDA ALI NGUMA.....DEFENDANTS

RULING

1. The application before me for determination is the Notice Motion dated 27th June 2018 brought under Sections 1A, 1B, 3A and 80 of Civil Procedure Act and Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff/applicant seeks orders:

1. Spent

2. That this Honourable Court be pleased to review and/or set aside and/or vacate the orders made herein on 14th May, 2018(sic) adopting the Notice of Withdrawal of suit dated 7th May, 2018 and/or any other consequential orders made herein on the basis of the withdrawal notice dated 7th May, 2018.

3. That costs of this application be borne by the defendants/respondents herein.

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Karisa Chengo Nguma, the applicant sworn on 27th June 2018. The applicant avers that on the 11th April 2018 he filed the present suit together with an application for injunction dated 10th April 2018 which was fixed for hearing on 25th June, 2018. That on 4th May, 2018, the pleadings herein were served on the defendant/respondents, but have not entered appearance. That on 8th May 2018, a purported notice of withdrawal of suit dated 7th May 2018 was filed by people whom the applicant believes were acting on behalf of the defendants herein. The applicant states that upon being served with the notice of withdrawal of suit he filed an affidavit on 10th May 2018 disowning the notice dated 7th May 2018 which was adopted as an order of the court on 14th May, 2018. It is the applicant's contention that the adoption of the notice by the court was an error apparent on the face of the record as his affidavit dated and filed on 9th May, 2018 and 10th May, 2018 respectively disowning the said notice was not in the court file.

3. The application is opposed by the defendants who filed a replying affidavit sworn by Shida Alia Nguma the 2nd Defendant on 15th August 2018. He deponed inter alia that on 6th May, 2018 they visited the applicant with a view to establish if he had any interest in Plot No. Bububu 'A' Settlement Scheme/27 and that he openly declared that he had no interest whatsoever. He denied that they were armed and stated that the applicant executed the notice of withdrawal based on his own admission.

4. I have considered the application the affidavits and the submissions made. The main issue for determination is whether the court should review and set aside or vacate the orders made herein on 10th May 2018 adopting the withdrawal of the suit made pursuant to the notice of withdrawal dated 7th May 2018 and filed on 8th May, 2018.

5. Order 25 of the Civil Procedure Rules deals with withdrawal, discontinuance and adjustment of suits. Rules 1 and 2 thereof 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 the 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 plaintiffs 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 question about a Notice to withdraw under Order 25 Rule 1 and 2 has been considered by the courts. In the Court of Appeal case of Pil Kenya Ltd –v- Joseph Oppong (2001) eKLR Bosire JA expressed this opinion:

“The notice of withdrawal was homemade and I infer that it was indeed filed by the Plaintiff/personally. I say so advisedly. By his conduct he had no interest in the suit, with the result that his advocates had to formally apply for leave to cease acting for him. The plaintiff in that suit did not need the leave of court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary.”(my emphasis)

7. In the case of Beijing Industrial Designing & Research Institute –v- Lagoon Development Ltd (2015)eKLR, before focusing on the import of Rule 1 of Order 25, the Court of Appeal set out the three scenarios regarding discontinuance of suits or withdrawal of claims and held:

“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 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 other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on the discontinuance of the suit or withdrawal of the claim or any part thereof. 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 the leave of the court. That such leave is granted on terms suggests that it is not a mere formality”(my emphasis)

8. From the two decisions of the Court of Appeal (which needless to say are binding on this court) the law can be stated that as a general proposition the right of the plaintiff to discontinue a suit or withdraw a claim under the provisions of order 25 Rule 1 (that is where the suit has not been set down for hearing) is an absolute right. Also, again, as a general proposition, it takes effect upon the filing of the Notice. No leave of court is required nor a court endorsement necessary to give effect to this withdrawal.

9. However, under Order 25 Rule 2 (that is where the suit has been set down for hearing), the Plaintiffs right to withdraw or discontinue ought to be fettered or is curtailed. A plaintiff wishing to invoke the right to discontinue a suit or withdraw a claim must seek the sanction and endorsement of the court. The court may reject it altogether or allow it on terms. In those circumstances a responsible plaintiff ought to move court for leave or endorsement. Where the party fails to act responsibly then the offended party or the court can recall the withdrawal for review and setting aside as the Court of Appeal did in the Beijing Case (supra).

10. The situation here is that the matter had been fixed for hearing of the application dated 10th April 2018 on 25th June, 2018. The filing of the Notice of Withdrawal on 8th May 2018 was therefore done after the suit had been set down for hearing. Under Order 25 Rule 2, the suit could only be discontinued or the claim or any part thereof withdrawn upon the filing of a written consent signed by all the parties or with the leave of the court. Had the Deputy Registrar perused the court record, she would have hesitated in endorsing the notice of withdrawal. In my view, the Deputy Registrar in consideration of the fact that the matter had been fixed for hearing and the filing of an affidavit disowning the notice had no jurisdiction to make or issue the order as she did, and to such extent, such order was void. I also note that the defendants filed a statement of defence in the matter on 31st August 2018. If there was no suit pending, then in my view it was not necessary to file a statement of defence on 31st August 2018.

11. In consideration of the foregoing, the upshot is that the notice of withdrawal of suit filed by the plaintiff on 8th May 2018 was invalid and incompetent. The same is struck out. The consequential endorsement of the said notice by the Deputy Registrar is therefore without legal basis, and the same is hereby set aside.

12. Costs in the main cause.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

MS. Kayatta for Defendants

No appearance for Plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE

19/2/19