

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCC NO. 43 OF 2015

RAMJI MEGHJI GUDKA LIMITED PLAINTIFF

VERSUS

KISII COUNTY GOVERNMENT 1ST DEFENDANT

EXECUTIVE COMMITTEE MEMBER, LANDS, KISII COUNTY GOVERNMENT
..... 2ND DEFENDANT

EDWARD NORMAN NYAMWEYA (Sued as Legal Representative of the estate of
NYAMWEYA MIYOGO – Deceased) 3RD DEFENDANT

RULING

(Application filed by plaintiff for leave to withdraw suit; suit concerning title to four plots of land; 3rd defendant having a parallel title to one of the four plots; the County Government of Kisii contending that all the titles are fraudulent as the land is public land; suit partly heard with plaintiff and 3rd defendant closing their cases with the only evidence left being that of the County Government of Kisii; court not persuaded to allow for the withdrawal of the suit; withdrawal of the suit at this late stage would not lead to a determination of the existing titles and whether or not the suit plots are public land; court persuaded that it is in the public interest that a decision on the titles be made; application dismissed)

1. The application before me is that dated 29 July 2025 filed by the plaintiff. It is an application said to be brought pursuant to Order 25 of the Civil Procedure Rules, 2010. The orders sought are as follows :
 - (1) The Honourable Court be pleased to grant leave to the plaintiff/applicant to withdraw/discontinue the whole of the claim/suit against the defendants.
 - (2) Consequent to prayer (1) hereinabove being granted the claim/suit accordingly be marked as withdrawn/discontinued with no costs.
 - (3) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is supported by the affidavit of Ashwin Ramji Gudka, a director of the applicant. He acknowledges that the suit is partly heard but judgment is yet to be entered. He deposes that the applicant no longer wishes to continue with the matter considering that he intends to venture into Economic Business outside the Country whereby the director will be away for a very long period of time hence it will be hard to follow the proceedings regarding the matter herein. He does not see what prejudice the respondents will suffer.
3. The application is opposed by the 1st and 2nd defendants through a replying affidavit of Anne Githinji, who is counsel in the employment of the County Government of Kisii. She is of opinion that the application should be dismissed and the hearing to proceed as scheduled.
4. The 3rd respondent filed grounds of opposition. It is stated that the case has dragged in court for 10 years. It is further stated that if the applicant wishes to withdraw suit, then it should be withdrawn with costs, and if not, then the case to proceed to its logical conclusion.
5. I directed counsel to file submissions and I have taken note of the submissions filed. In his submissions, Mr. Mulisa, learned counsel for the applicant submitted that a plaintiff is at liberty to discontinue his case at any time and courts ought not to interfere with that right which is provided under Article 48 of the Constitution. He referred me to the case of *Lelli vs Kenya Medical Training College & 2 Others (Petition No. 10 of 2021) (2021) KESC 21 (KLR) (Civ) (3 December 2021) (Ruling)*.
6. The 1st and 2nd respondents submissions dwelt mostly on the leave given to them to file additional documents and the burden of proving a good title. I frankly do not see what that has to do with the application to withdraw.
7. What I see in the submissions of the 3rd respondent is an argument that he deserves costs if the withdrawal is to be allowed.
8. I have considered the matter.
9. This case was commenced through a plaint filed on 10 February 2015. That plaint was subsequently amended on 6 March 2018. In the plaint, the applicant contends that she owns the land parcels Kisii Municipality/Block III/360, 361, 362 and 363. She complained of interference from the 1st and 2nd respondent and it is claimed that the servants and agents of the 1st and 2nd respondents destroyed his fence, removed the beacons and flattened the ground on 4 February 2015. Regarding the 3rd respondent the dispute is over the land parcel Kisii Municipality/Block III/360 of which the 3rd

respondent also claims to have a title to. The 3rd respondent filed pleadings asserting title to this parcel No. 360. The pleadings of the 1st and 2nd respondents is that the titles of the applicant and the 3rd respondent are fraudulent as the land is public land set aside for recreational use.

10. The applicant's witness testified on 4 February 2025 and the applicant's case (as plaintiff) was closed. The 3rd defendant testified on 6 May 2025 and also closed his case. On that day counsel for the 1st and 2nd respondents sought leave to file some documents which I allowed and therefore what is left of the case is the taking of the evidence of the 1st and 2nd respondents.
11. Order 25 relates to withdrawal of suits. What matters to us is Rules 1 and 2 which are drawn as follows :

1. *Withdrawal by plaintiff [Order 25, rule 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. *Discontinuance [Order 25, rule 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.*

- (3) *The provisions of this rule and rule 1 shall apply to counterclaims.*

12. From the foregoing it will be seen from Order 25 Rule 1, that where the suit has not been set down for hearing, the plaintiff may withdraw the suit through a notice in writing served to all partes. Here, leave is not necessary and there is full freedom to withdraw the suit. However, where the matter has been set down for hearing, the suit can only be discontinued by consent, or with leave of the court. It follows therefore that in a case such as this, which is partly heard, the withdrawal has to be by consent or with leave of court.
13. There is no consent offered by either of the defendants to the discontinuance of the suit and therefore the discontinuance can only be with leave of court. The court has discretion to either allow the withdrawal/discontinuance of the matter or decline. Just like any other

discretion, the court needs to exercise the same judiciously, taking into account the surrounding circumstances of the case.

14. Now, it will be recalled that the dispute at hand relates to four plots of land. The applicant asserts to have title to the four plots whereas the 3rd respondent contends that he has title to one of them and he should be declared the owner of it. The 1st and 2nd respondents assert that all these titles are fraudulent and that the land is public land. If I allow the suit to be discontinued, it means that there will be no determination on whether the plots are truly owned by the applicant, or they are public land as contended by the 1st and 2nd respondents, or whether the 3rd respondent is entitled to title to the plot Kisii Municipality/Block III/360. We will be left with a scenario where the plaintiff still holds four titles to the four plots but no resolution regarding the title of the 3rd respondent to one of the plots, and no resolution as to whether the suit plots are actually public land.
15. In my opinion the resolution of the dispute is critical, and it is in the public interest, so that it can be settled whether the suit lands are actually public land. It would be a different matter if the applicant was withdrawing his claim to the suit lands, i.e conceding to the claims of the respondents that his titles are not good. But he is not, meaning that the legality of the titles at hand need determination, and it is in the public interest that such determination be made.
16. It is because of the above reasons that I am not persuaded to allow the application to discontinue the suit. The suit will have to proceed to its logical conclusion.
17. The application is hereby dismissed with costs.
18. Orders accordingly.

DATED AND DELIVERED THIS 12 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mulisa instructed by M/s Oguttu Mboya, Ochwal & Partners Advocates

Ms. Githinji for the 1st and 2nd respondents instructed by the County Attorney.

N/A on part of Mr. Sagwe for the 3rd respondent

Court Assistant – Michael Oyuko