



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 324 OF 2008**

**JULIUS MUSILI KYUNGA.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK.....1<sup>ST</sup> DEFENDANT**

**JOEL TITUS MUSYA T/A MAKURI ENTERPRISES.....2<sup>ND</sup> DEFENDANT**

**JAMES MURIUKI KARAYA.....INTERESTED PARTY**

**RULING**

1. By Notice of Motion dated 28<sup>TH</sup> February 2018, the Interested/Applicant seeks the following orders:

1. Spent

2. Spent

3. That this Honourable Court be pleased to set aside the notice of withdrawal of the 3<sup>rd</sup> defendant's suit dated 11<sup>th</sup> July, 2016 filed herein on 12<sup>th</sup> July, 2016 by the Advocates for the Plaintiff.

4. That this Honourable Court be pleased to set aside the consent order between the plaintiff and the defendant dated 11<sup>th</sup> July, 2016, filed on 12<sup>th</sup> July, 2016 and all consequential orders therefrom.

5. That the costs of this application be provided for.

2. The Application is supported by the affidavit of Kioko Maundu, Advocate for the interested Party sworn on 28<sup>th</sup> February, 2018 and is premised on the following grounds:

1. That in a public auction conducted on 11<sup>th</sup> November 2008 by the 1<sup>st</sup> Defendant at the behest of the 2<sup>nd</sup> defendant, the interested party successfully bid for LR NO.2812/I/MN, the suit property and paid the required deposit but was stopped from paying for the balance by orders issued in the suit.

2. That the Plaintiff herein filed suit on 13<sup>th</sup> November, 2008 challenging the said public auction and seeking an injunction against the selling, alienation, mortgaging, or otherwise dealing with the said suit property, LR. NO.2812/I/MN.

3. That on 9<sup>th</sup> February, 2009, the Interested Party filed an application for an order to be joined into the suit as an Interested Party, and after considering arguments, the court granted the order, making the Interested Party a party to the suit.

4. That subsequently, on 4<sup>th</sup> May, 2009, the Interested Party filed a defence and counter-claim in this suit property in which it prayed for a permanent injunction and an eviction order against the plaintiff.

5. That the Interested Party was shocked to learn that on 12<sup>th</sup> July, 2016, the Plaintiff acting surreptitiously file a notice of withdrawal of the Interested Party's suit, in which he purported to withdraw the case of the Interested Party.

6. That further on the same date of 12<sup>th</sup> July, 2016, the Plaintiff and the 1<sup>st</sup> Defendant, together and again acting surreptitiously, filed a consent in court under the terms of which the interests of the interested party were addressed and abrogated.

7. That the Interested Party was neither notified, consulted nor served with the said notice of withdrawal or consent until he came to learn of the said documents in court during proceedings and thereafter made copies from the court record.

8. That the Plaintiff lacked the prerequisite mandate to file the said withdrawal notice in view of the law and the court order joining the Interested Party into the proceedings.

9. That both the Plaintiff and the Defendants lacked the legal prerequisites to enter into the said consent without the involvement of the Interested Party and to address rights of the Interested Party without his involvement.

10. That the said notice of withdrawal and the consent are illegal and prejudicial to the Interested Party.

11. That it is only fair that the said notice and consent be set aside.

3. The Interested Party filed his submissions dated 23<sup>rd</sup> May, 2018 in which it is admitted inter alia, that an advocate is permitted to swear affidavit on behalf of the his client in interlocutory application. This was in response to the issue raised by the Plaintiff in his replying affidavit faulting the advocate for Interested Party for jumping into the arena of litigation by swearing the affidavit in support of the Application. It was submitted that the deponent of the said affidavit solely alluded to facts which are within the knowledge of both parties and produced documents which form part and parcel of the court record. The applicant relied on **Halsbury's Laws of England, 3<sup>rd</sup> Edition, Paragraph 485; Kentainers Ltd –v- Assani HCCC NO.1625 of 1996; Simon Isaac Ngui –v- Overseas Courier Services (K) Ltd (1998)KLR and Moses Wachira –v- Niels Bruel and 2 Others (2013)eKLR.**

4. It was submitted that the Interested Party was brought into the suit vide an order of court and therefore under Order 25 rule 1 of the Civil Procedure Rules the Plaintiff could only withdraw or discontinue his suit against the defendants. Further , that the Interested Party filed a counter-claim on 4<sup>th</sup> May, 2009 which remains alive and unheard and which the Plaintiff cannot purport to withdraw on behalf of the Interested Party. The Applicant cited the case of **Beijeng Industrial Designing & Research Institute –v- Lagon Development Limited (2005)eKLR and Kofinaf Company Limited and Another –v- Nahashon Ngige Nyagah & 20 Others (2017)eKLR** and submitted that the plaintiff should not be allowed to use the right to discontinues or withdraw so as to abuse the process of court or to defeat the ends of justice. The Interested Party further submitted that the Court of Appeal had found that the plaintiff herein had lost his right of redemption. On the consent, the Interested Party submitted that the same was reached without his involvement or that of the court, yet it sought to abrogate the applicant's rights. It is the Interested Party's submission that the consent was arrived at secretly and without his knowledge or the court and that its objective was to defraud the Interested Party of his rights under both the sale and the suit in court. For these reasons, the Interested Party urged the court to allow the application.

5. The plaintiff opposed the Application through a replying affidavit filed on 17<sup>th</sup> April 2018 and filed submissions dated 20<sup>th</sup> May 2018. The plaintiff states that he is the registered owner of the suit property. That whereas the suit property was charged to the 1<sup>st</sup> defendant, the same was duly redeemed and a discharge was executed and duly registered on the title. The Plaintiff further submitted that the Interested Party's counsel overstepped his mandate by swearing an affidavit which contained contentious issues **such as completion of the purchase price and cited the case of Regina Waithira Mwangi Gitau –v- Boniface Nthenge (2015) eKLR**, which was cited with authority in **Francis Kimutai Bii –v- Kaisugu (Kenya) Limited (2016)eKLR**, and **Isaac Ngugi –v- Overseas Courier Services (K)Ltd (1998) eKLR** and **Kisya Investments Ltd & Others –v – Kenya Finance Corporation Ltd.** The plaintiff urged the court to strike out the affidavit of Kioko Maundu.

6. On the issue whether the court should set aside the notice of withdrawal of the suit against the Interested party, it was submitted that the matter had not been set down for hearing and under Order 25 Rule 1 of the Civil Procedure Rules a party's right to withdraw a matter cannot be taken away. The Plaintiff relied on the case of **Nicholas Kiptoo Arap Korir Salat –v- IEBC & 7 Others, SC, App No. 16 of 2014** where the Supreme Court of Kenya stated:

**“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 make an order as to costs where it is deemed appropriated.”**

The plaintiff also cited the case of Beijing Industrial Designing & Researching Institute (supra) and submitted that the court is not bound to set aside the withdrawal notice filed on 11/7/16.

7. On whether or not the court can set aside the consent order between the plaintiff and the defendants dated 11/7/16, it was the plaintiff's submission that a consent judgment can only be set aside by grounds that would vitiate a contract. The Plaintiff relied on the case of **Samuel Mbugua Ikumbu –v- Barclays bank of Kenya Ltd (2015) eKLR.** The Plaintiff further submitted that the applicant was not a party to the said consent, and relied on the case of **Agricultural Finance Corporation –v- Lengetia Limited & Jack Mwangi (1985)eKLR** and submitted that the applicant has no colour of right to move the court to set aside the said consent, and relied on the case of **Agricultural Finance Corporation –v- Lengetia Limited and Jack Mwangi (1985)eKLR** and submitted that the applicant has no colour or right to move the court to set aside the said consent. The plaintiff urged the court to dismiss the application with costs.

8. The defendants filed submissions dated 28<sup>th</sup> February, 2019 in which they submitted that the applicant cannot reject or oppose the plaintiff's withdrawal of the suit as order 25 Order 3 grants him the liberty to pursue the issue of costs against the plaintiff who has withdrawn a suit. It is the defendant's submission that the plaintiff's suit against the defendant herein in essence stopped the logical conclusion of the public auction but did not take away the rights of the parties. That the suit property, at all material times remained in the

name of the plaintiff and remained a security in the hands of the 1<sup>st</sup> defendant. That the debt continued to notwithstanding the pendency of the suit. The defendants state that when the plaintiff withdrew the suit and settled the outstanding loan, the 1<sup>st</sup> defendant could not possibly decline that fortunate turn of events. The defendants pointed out that though the suit property was held as security by the 1<sup>st</sup> defendant, the plaintiff continued to retain physical possession and use of the property, and on a balance, the rights and interest of the plaintiff over the property far outweigh the interest of the Interested Party. The defendants submitted that it would have been different if the Interested Party had fully paid the purchase price as that would have in a way “extinguished” the plaintiff’s equity of redemption. It is their submission that the Interested Party can be adequately compensated by way of costs. The defendants prayed that the Interested Party’s application be dismissed with costs.

9. I have considered the application. The issues for determination are whether the notice of withdrawal of suit dated 11<sup>th</sup> July 2016 and filed on 12<sup>th</sup> July 2016 by the plaintiff and the consent between the plaintiff and the defendants of even dates should be set aside. The notice of withdrawal read as follows:

**“NOTICE OF WITHDRAWAL OF SUIT**

**(Order 25 Rule 1 of the Civil Procedure Rules, 2010)**

TAKE NOTICE that the Plaintiff herein Julius Musili Kyunga have wholly withdrawn the suit against the Interested Party James Muriuki Karaya with costs.

Dated at Mombasa this 11<sup>th</sup> day July 2016”.

10. The provisions of law under discussion in this ruling are the provisions of Order 25 of the Civil procedure Rules which 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 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.**

**3. 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.**

**4. The provisions of this rule and rule 1 shall apply to counter-claims.**

11. The plaintiff’s main attack of the application is the competence of the affidavit in support of the application which has been sworn by the Interested Party’s advocate. I must say the plaintiff seeks to rely on matters of technicality which offends the provisions of Article 159 (2)(d) of the constitution which stipulates that courts shall administer justice without under regard to procedural technicalities. In my considered view, the interested party’s advocate is permitted by law to depone to affidavit in an interlocutory application on facts which do not decide on the rights of the parties, and which facts are within his knowledge such as in the present case. It is only in contentious matters that an advocate may not be permitted to swear affidavits.

12. The other issue is whether this court can set aside, the said withdrawal by the plaintiff. The question of notice to withdraw under Order 25 has been decided by the courts. In the case of **Beijing Industrial Designing & Research Institute –v Lagoon Development Ltd (2015) eKLR**, 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 at liberty, any time to discontinue the suit or to withdraw the claim or any part thereof. All that is required of 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 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 discontinuance of the suit or withdrawal of the claim or any part thereto. 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.”**

13. In this case, the record shows that on 22<sup>nd</sup> March 2016 the suit was fixed for hearing on 17<sup>th</sup> November, 2016. It follows therefore that the wish of the plaintiff as declared in the notice to withdraw, to wholly withdraw the suit against the Interested Party on 12<sup>th</sup> July 2016 when the notice was filed required leave of the court as no consent had been reached by all the parties. There is no indication that the Interested Party was notified of the Plaintiff’s intention to withdraw the suit against him. It is also evident that no consent was signed by all the parties as none was filed. Further, the Plaintiff did not obtain leave of the court to withdraw the suit against the Interested Party. The matter having been set down for hearing, the plaintiff was required to move the court under Order 25 Rule 2. Rule 1 of Order 25 which the plaintiff invoked, in my view, was not applicable since it is apparent that the suit had been set down for hearing. In the circumstances, the withdrawal of suit in the manner invoked by the plaintiff would have no efficacy before the sanction of the court. In my view, a unilateral withdrawal

could not be permitted. Besides the sanction of the court, a party who is affected by the withdrawal was entitled to be notified. I have perused the said notice dated 11<sup>th</sup> July 2016. There are remarks made thereon by the Deputy Registrar requesting to see a return of service of the notice upon M/s Kanyi & CO Advocates who are on record for the Interested Party. The record does not indicate whether such evidence of service was availed as requested.

14. In the case of Nicholas Kiptoo Arap Korir Salat –v- Independent Electoral and Boundaries Commission & 7 Others (2014)eKLR, the Supreme Court of Kenya 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.”**

15. The Supreme court also considered the issue of withdrawal of a notice of appeal in the case of John O. Ochanda –v- Telkom Kenya Limited (2014)eKLR and stated inter alia:

***“I do hold the view that a prospective Appellant is at liberty to withdraw a notice of appeal at any time before the appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules the right to withdraw or discontinue proceedings or withdraw a notice of appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents, if any”***

16. In the light of the guidance contained in the above authorities of the supreme court which no doubt bind this court, it is my view that this court cannot bar the plaintiff or take away the plaintiff’s right to withdraw the suit against the Interested party. I note that in the said notice the suit was withdrawn with costs to the Interested Party. Therefore the interested party cannot suffer any prejudice as he is entitled to costs of the suit against him that has been withdrawn. Moreover, the Interested party’s counter-claim is still in force and therefore he is at liberty to pursue the same. For the reasons given, I decline to set aside the notice of withdrawal of suit dated 11<sup>th</sup> July 2016 and filed on 12<sup>th</sup> July 2016 by the Plaintiff.

17. The other issue is whether this court can set aside the consent order dated 11<sup>th</sup> July 2016 between the plaintiff and the defendants. In the case of Samuel Mbugua Ikumbu –v- Barclays bank of Kenya Limited (2015)eKLR, the Court of Appeal stated:

**“.. The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts....”**

In the case of Flora Wasike –v- Destimo Wamboko (1982 - 1988)I KAR 625, Hancox JA (as he then was ) stated:

**“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”**

18. The consent dated 11<sup>th</sup> July 2016 was in the following terms:

**“By consent:**

**1) The Plaintiff shall pay the 1<sup>st</sup> defendant a sum of Kshs.3,875,000/= made up as follows:**

**a). Kshs.2,500,000/= being the aggregate liability of the plaintiff to the 1<sup>st</sup> defendant in relation to the existing charges over PLOT.LR. NO.2812/IMN.**

**b). The refund of the 25% paid by the Interested Party being Kshs.1,375,000/=**

**c). This amount shall be paid within three (3) days after the 1<sup>st</sup> defendant complies with clause (2) below and as per clause (3) below.**

**2) Upon the filing in court of this consent the 1<sup>st</sup> defendant shall release to its advocates the original title/certificate of title of PLOT LR. NO.2812/IMN and the 1<sup>st</sup> defendant’s advocates shall confirm to the advocates of the plaintiff the receipt of the document.**

**3) Once the 1<sup>st</sup> defendant has complied with clause 2) above the plaintiff shall deposit by way of RTGS the sum of Kshs.3,875,000 to an account as advised by the 1<sup>st</sup> defendant’s advocates.**

**4) The advocate for the 1<sup>st</sup> defendant shall release to the advocates for the plaintiff the original title deed/certificate of lease within three (3) days of confirmation of deposit as per the clause (3) above.**

**5) The plaintiff hereby agrees to indemnify the 1<sup>st</sup> defendant and undertakes to settle any liability adjudged payable by the**

**1<sup>st</sup> defendant to the interested party over and above Kshs.1,375,000/= in relation to this suit or counter-claim.**

**6) The plaintiff shall withdraw this suit as against the interested party and pay the costs thereof. A notice of withdrawal of suit has been filed in court prior to the filing of this consent.**

**7) Upon compliance with clauses 1,2, 3, 4 and 5 above this suit shall be deemed as settled as between the plaintiff and the defendants.”**

**19.** The above consent was signed by M/s. Munyithya Mutugi, Umara & Muzna Co. Advocates for the plaintiff and M/s Omondi Waweru & Co. Advocates for the defendants, the interested party was not party to the consent. The Interested Party was not party to the consent. Whereas the said consent was reached by the plaintiff and the defendants, and without the involvement of the interested party, it is clear that the rights of the interested party were going to be affected by the said consent. In my considered view, the said consent was entered into between the plaintiff and the defendant in collusion to abrogate the interested party’s right over the suit property. There is no evidence that the interested party had agreed to be refunded the 25% he paid for the suit property. Nonetheless, the consent indicated that the said 25% was to be refunded.

**20.** For the reason that the said consent was reached without the involvement of the interested party whose rights the consent sought to abrogate, the consent is liable to be set aside. A consent that was arrived secretly and without the knowledge of the interested party whose rights would be adversely affected, in my view cannot stand. The plaintiff and the defendants had a duty to involve the interested party in the consent, more so as a party to the suit and one who also has a claim over the suit property.

**21.** For the reasons given, the court hereby sets aside the consent order between the plaintiff and the defendant’s dated 11<sup>th</sup> July 2016 and filed on 12<sup>th</sup> July 2016 and all consequential orders therefrom.

**22.** In the result, I find merit in the notice of motion dated 28<sup>th</sup> February 2018 and allow it in terms of prayer 4 thereof. The applicant will have costs of the application.

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of May 2019.**

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Wafula holding brief for Munyithya for Plaintiff

Gathu holding brief for Waweru for Defendants

Maundu for Interested Parties

Yumna Court Assistant

**C.K. YANO**

**JUDGE**