



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

CONSTITUTIONAL PETITION NO.6 OF 2018

IN THE MATTER OF ARTICLE 10,22,23,27,28,35,40,43,47,

48,50,73,75,77,232 AND 258 OF THE CONSTITUTION

AND IN THE MATTER OF ALLEGED CONTRAVENTION OF

ARTICLES 10,27,28,35,40,43,47,48 50 AND 73 OF THE CONSTITUTION

BETWEEN

STEPHEN MBUGUA MWAGIRU.....PETITIONER

VERSUS

THE CHIEF LAND REGISTRAR.....1ST RESPONDENT

THE HON.ATTORNEY GENERAL.....2ND RESPONDENT

SARAH CHELIMO MAINA.....3RD RESPONDENT

TATU CITY LIMITED.....4TH RESPONDENT

KOFINAF COMPANY LIMITED.....5TH RESPONDENT

AND

ROSEMARY W.NJAU.....1ST INTERESTED PARTY

JOSEPHINE MWAGIRU.....2ND INTERESTED PARTY

ANNE WALKER.....3RD INTERESTED PARTY

RULING

The Petitioner herein filed the instant Petition on the **12th of April 2018**, and simultaneously filed Notice of Motion Application dated **11th April 2018** seeking for various orders. The Court did not give any interim orders and directed the Petitioner to serve the other parties for interparties

hearing on the **24th of April 2018**. The matter has since then come up before Court on various other dates. However. On the **7th of November 2018**, the Petitioner filed a Notice of Withdrawal, and/or discontinuance of the Petition dated **2nd November 2018**, under **Order 25 Rule1** stating that he has wholly discontinued and/or withdrawn the entire proceedings as against the Respondents and the Interested parties.

When the matter came up for hearing on the **13th of December 2018**, Ms.Muchira holding brief for **Mr.Githui** for 1st, 2nd and 3rd interested parties indicated she did not have instructions on the issue of withdrawal, **Ms.Fatma** for the 1st and 2nd Respondents stated that she did not object to the withdrawal. However **Ms.Hannah** for the 4th and 5th Respondents stated that she objected to the manner of withdrawal of the

Petition as the Petitioner needed to seek leave of the Court since the 4th and 5th Respondents had filed a Replying Affidavit to the Petition and further that a similar Petition had been filed earlier and later withdrawn. It was therefore her contention that the Notice of withdrawal is made in bad faith and is an abuse of the Court process and the Court should proceed and determine the matter to its logical conclusion.

The Court directed that the issue of withdrawal of Petition be canvassed on the **27th May 2019** and ordered parties to file authorities to support their respective positions.

The matter came up for hearing on the **27th of May 2019**. Ms. Ngira for the Petitioner submitted that the Petitioner seeks to withdraw the suit with leave of the Court under **Order 25 Rule 1** of the Civil Procedure Rules and that the right of a party to discontinue the suit cannot be questioned by the Court as the Court of law should not force an unwilling party to continue with the suit. She further submitted that any party with leave of Court can withdraw any proceedings and therefore no party should insist on the continuance of the suit.

It was her submissions that the Petitioner's right to withdraw the suit is absolute and should not be taken away as provided by **Order 25 Rule 2** with considerations to costs and therefore the Petitioner's wish to withdraw the suit is not an abuse of the Courts process and it is a right that is confined to the Petitioner.

Mr. Ahmed Nassir, for the 4th & 5th Respondents in opposing the Application submitted that the suit is a Constitutional Petition and not a Plaint and therefore **Order 25 Rules 2** of the Civil Procedure do not apply as the Mutunga Rules (Practice and Procedure Rules 2013) are applicable Rules in the instant Application. He further submitted that the Application is an abuse of the Court process as on **4th April 2018**, the Petitioner filed **Constitution Petition No. 5 of 2018**, as evidenced at **page 254-566** of

the 4th Respondent's Replying Affidavit sworn by one **Christopher Barron**. He further submitted that the Application sought for interim orders and the said Application and the Petition were not served on the 4th and 5th Respondents, and when the Court made an order for them to be served and hearing dates were given, the Petitioner withdrew the said Petition and the Application and the 4th & 5th Respondents were not served with the Notice to withdraw.

It was his submissions that eight days later on **12th April 2018**, the Petitioner filed **Constitution Petition No. 6 of 2018** that is similar to **Constitutional Petition No. 5 of 2018** and again the Court directed the Petitioner to serve all the parties and an interparties hearing date was given. Further that the Petitioner has again sought to withdraw the 2nd Petition.

He further submitted that as per **Rule 27** of the Mutunga Rules, a Constitutional matter cannot be withdrawn **without** the **leave** of the Court as there is a public interest issue to be addressed and the Court must have an audit of what happened. He relied on various decisions in which he submitted that the Court held that withdrawal of Constitutional Petition is not automatic but subscribed by **Rule 27 of Mutunga Rules**. The Counsel further submitted that the conduct of the Petitioner shows that if this suit is withdrawn, he will most likely file another one. He urged the Court to determine whether there are genuine grievances so that the game played by the Petitioner can come to an end. He urged the Court to reject the Notice of Withdrawal.

This Court has now carefully read and considered the Pleadings, submissions of the parties and the authorities and provisions of the law. It is not in doubt that **Order 25 Rule 2** of the Civil Procedure allows a party to discontinue a suit without seeking the leave of the Court, but even in so doing the Courts have severally held that a Plaintiff is only allowed to withdraw the suit when the same has not been set down for hearing. It would therefore mean that the Plaintiff's rights in reference to **Order 25** to withdraw a suit without the leave of the Court is not absolute. See the case of **Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd (2015) eKLR**. Where the Court held that:-

"...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 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)

When the Court has already set a matter down for hearing then it would only mean that the Plaintiff must then seek the leave of the Court. This is to prevent parties from acting to the detriment of the other party.

On the **1st of November 2018**, when this matter came up for hearing, the Petitioner's Advocate sought for time to amend the Petition. The Court then directed that the Petitioner should be allowed to amend his Petition and serve it on all parties. Further parties were granted time to file their replies with the Petitioner then also granted more time to file a supplementary Affidavit in regard to the main Petition. The Court further directed that the said Petition be canvassed by way of written submissions.

This Court takes Judicial Notice that there are various ways in which the hearing of a matter is allowed to proceed. One way can be through oral hearing and the other way may be through canvassing the same by way of written submissions. In this regard therefore the Court finds that the matter was already set down for hearing and the parties having been directed on how to proceed, the Petitioner therefore required the leave of the Court to enable him withdraw the suit. The Court takes note that the Civil Procedure Rules in Order 25 Rule 1 do allow for withdrawal of suits. See the case of **Kofinaf Company Limited & another ...Vs... Nahashon Ngige Nyagah & 20 others [2017] eKLR** where the Court held that;

'From the two decisions of the Court of Appeal (which needless to say are binding on this Court) the law can be stated to be that as a general proposition the right of a Plaintiff to Discontinue a Suit of 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 and untrammelled 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.”

Nevertheless this is a Constitutional Petition and the same is not subject to the Civil procedure Rules. Just like an Election Petition the Courts have held that before a Petitioner can discontinue a suit then the leave of the Court must be sought. See the case of **Kofinaf Company Limited & another ...Vs... Nahashon Ngige Nyagah & 20 others [2017] (Supra)**

“And it has to be said that unlike some other procedural rules, The Civil Procedure Rules, in respect to order 25 Rule 1, does not have any provisions requiring the Leave of Court to Discontinue a suit or withdraw a claim. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013, for example provides as follows in rule 27(1):-

“27(1) The Petitioner may;

(a) On notice to Court and the Respondent, apply to withdraw the Petition; or

(b) With Leave of the Court, Discontinue the proceedings.

2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effect of that decision.

3) Despite sub Rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case in spite of the wish of the Petitioner to withdraw or discontinue the proceedings”.

Similarly, The Elections (Parliamentary and County Elections) Petition Rules, 2017 requires that Leave of an Election Court be sought before there can be a withdrawal of an Election Petition. The requirement for Leave in both Constitutional and Election Petitions extends to where the Petition has not been set down for hearing.

Further in the case of **Harry John Paul Arigi & 2 Others ..Vs..Board Kenya Ports Authority & 2 others (2016)eklr** the Court held that;

“Rule 27(1)(a) allows a petitioner who wishes to withdraw a Petition to apply to withdraw the same after giving notice of his intention to both the Court and the Respondent. Clearly, under that provision the withdrawal of the Petition is not automatic and is not achieved merely by notice.”

Though the Petitioner’s Advocate had stated in her submissions that Petitioner is seeking leave to withdraw the suit, the Application that had been presented to Court is not that of someone seeking leave but one indicates that the Petitioner had already discontinued the suit and this much was submitted. The Notice also clearly states that the Petitioner **has** wholly discontinued and withdrawn the entire proceedings. **Rule 27 (1)** of the **Constitution of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules, 2013** provides that the Petitioner may:-

(a) On notice to Court and the Respondent, apply to withdraw the Petition; or

(b) With Leave of the Court, Discontinue the proceedings.

2) The Court shall, after hearing the parties to the proceedings, decide on the matter and determine the juridical effect of that decision.

3) Despite sub Rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case in spite of the wish of the Petitioner to withdraw or discontinue the proceedings

The said rule is very clear that the Petitioner may have to apply to Court for withdrawal of the Petition already filed and this would therefore mean that there is a requirement for the Petitioner to **apply** and with leave of Court discontinue the proceedings. This Court therefore finds that the said Rule requires the Petitioner to apply to the Court in order for him to obtain the necessary leave from the Court before he could discontinue or withdraw the Petition and Consequently the withdrawal of the said Petition without the leave of the Court is unjustified.

On whether or not this Court can allow the discontinuance of the suit, **Mr.Ahmed Nassir** for the 4th and 5th Respondents submitted that the Petitioner is seen to be playing games and therefore must be forced to continue with the Petition so that the same can be finally heard and determined. He argued that the Petitioner has been in the business of filing Petitions and before the same is heard, he quickly withdraws the same. He specifically made reference to **Petition No.5 of 2018** and further to the Replying Affidavit of **Christopher Barron** wherein the same allegations had been made.

This Court has gone through the Replying Affidavit by the 4th and 5th Respondents and it is worthy to note that the Petitioner’s Counsel **Ms. Ngira** was given an opportunity to respond after the submissions made by **Mr. Ahmed Nassir**, but she chose not to counter the said allegations. This Court is therefore restrained to consider the said allegations and has no difficulty in believing the submissions made by the 4th and 5th Respondents Counsel. The Court has already held and found that the Petitioner did not seek leave of the Court before he withdrew the Petition and therefore the said withdrawal is not valid.

Even if there was a proper Application for withdrawal, **Rule 27 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** gives the Court discretion to hear the parties before it can determine whether or not to allow the withdrawal, **Sub Rule 3** further allows the Court to proceed with the Petition despite the wish by the Petitioner to withdraw or discontinue the suit. It provides that;

‘Despite sub Rule (2), the Court may, for reasons to be recorded, proceed with the hearing of a case in spite of the wish of the Petitioner to withdraw or discontinue the proceedings.’

This Court having carefully looked at the submissions by the parties herein and also noting that the Petitioner did not in any way give any reasons as to why he was withdrawing the Petition, finds that there is no valid reason given for withdrawal. On the contrary the withdrawals seem to be prejudicing the Respondents as everytime the Petitioner files a Petition, the Respondents are required to defend it and this becomes costly as they always hire an Advocate each time and it becomes a fresh suit with costs implications. Further litigation must come to an end the Petitioner should not be seen to be abusing the Court process by seeking to continuously engage the Respondents in litigation.

The Court having found and held that the Petitioner did not follow the right procedure in withdrawing the suit and further that the Withdrawal seems to be prejudicing the 4th and 5th Respondents, this

Court finds that the same is not merited and is inclined to deny the said application. Further, the Court and orders that the Petitioner prosecutes the instant Petition to its logical Conclusion. The Withdrawal is therefore disallowed and the Notice of withdrawal dismissed with costs.

It is so ordered.

Dated, Signed and Delivered at Thika this 21st day of June 2019

L. GACHERU

JUDGE

21/6/2019

In the Presence of

Ms. Ngira H/B for Osundwa for the Petitioner

N/A for the 1st & 2nd Respondents

N/A for the 3rd Respondent

Ms. Gachomba H/B for Ahmed Nassir for the 4th & 5th Respondents

N/A for the 1st 2nd & 3rd Interested Parties

Lucy Court Assistant

Ruling read in open cort in the presence of the above Advocates

L. GACHERU

JUDGE

21/6/2019