

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E126 OF 2022

FLORENCE WANJIKU WANJIRU.....APPELLANT
-VERSUS-
FRANCIS WARUINGE NGURE.....RESPONDENT

JUDGMENT

1. The appellant filed a suit against the respondent in the magistrate’s court as Mombasa Chief Magistrates Court Civil Case No. 1241 of 2019 seeking what was described in the plaint as “*a protection order*” against the defendant and the interested party, to restrain them from, *inter alia*, harassing the appellant and confiscating her property.
2. The record of appeal shows that the respondent contested the claim and filed a statement of defence to that effect.
3. Before the suit was heard, the respondent filed an application dated 24 July 2019 seeking to have the appellant deliver to the court a vehicle whose ownership is apparently in dispute between the parties. On 12 September 2019, the court granted an interim order in favour of the respondent pending the hearing and determination of the application *inter partes*; in its material part, the order read as follows:

“That the Plaintiff and the interested party to release the subject Motor Vehicle Registration No. KCM 653Z and deliver it to the C.E.O. Mombasa Law Courts for safekeeping and custody before close of business today pending hearing and determination of the

application dated 24th July 2019 or until further orders from the Court.”

4. The appellant did not comply with this order but, instead, filed an appeal against it. According to an affidavit she swore on 12 July 2021 in response to an application against her for contempt of court, the appeal was dismissed. The contempt proceedings taken against the appellant were by way of an application dated 13 September 2019.
5. While the application for contempt was pending for hearing and determination, the appellant filed a notice dated 12 August 2022 withdrawing her suit. This withdrawal was vehemently contested resulting in a considered ruling rendered by Hon. Burudi Kalo, Chief Magistrate, on 22 August 2022.
6. The learned magistrate held that the attempt by the appellant to withdraw the suit was not in good faith and was meant to evade her compliance with the order which, as noted, required the appellant to surrender the motor vehicle to the court administrator. In particular, the learned magistrate held as follows:

“The attempt by the plaintiff to withdraw the suit herein is not done in good faith and is clearly intended to avoid compliance with the court order issued on 16.9.2019. To prevent that from happening. the court hereby recalls the Notice of withdrawal of

Suit and directs that the plaintiff compiles (sic) with the court's order issued on 16. 9. 2019 by delivering and surrendering the motor vehicle registration number KCM653Z to the Senior Court Administrator forthwith but in any event not later than three days from the date this order shall be served upon her. Should the plaintiff fail to comply with this order, warrants of arrest shall issue for her arrest and the Interested Party, the DCI Mombasa shall impound and cause the motor vehicle registration number KCM 653Z to be delivered and surrendered to the Senior Court Administrator Mombasa Law Courts.”

7. It is this order that the appellant is aggrieved by and hence this appeal. In her memorandum of appeal, the appellant has raised the following grounds:

“1. That the learned magistrate erred in law and fact by finding that the - Appellant needed to obtain the leave of court before withdrawing the suit and proceeded to recall the notice of withdrawal of suit.

2. That the learned magistrate erred in fact by holding that the Appellant act of withdrawing the suit against the Respondent who happens to be her ex-husband was not done in good faith.

3. That the learned magistrate erred in law and fact in failing to appreciate that on the basis of the materials and evidence placed on record the Appellant had an undeniable, right to withdraw the suit against the Respondent.

4. That the learned Magistrate erred in law in finding that the court is not - functus officio and proceeded to order the Applicant to comply with the court orders issued on 16th September 2019 within 3 days.

5. That the learned Magistrate erred in law in disregarding the Appellant/submissions.

6. That the learned Magistrate erred in law and in fact in failing to make an award on loss of future earning capacity”.

8. The appellant has asked this Honourable Court to allow the appeal and “be pleased to set aside the trial courts (sic) determination on withdrawal of the suit and substitute the same with a determination of its own”.

9. This being an appeal from an order on an intervening application, and being basically on a point of law, it is not necessary for this Honourable Court to interrogate the evidence before the trial court. As a matter of fact, the impugned order was made before the suit was set for trial.

10. The primary, and perhaps the only question which this appeal raises, is whether the learned magistrate was entitled to reject the appellant’s notice

withdrawing the suit particularly because the appellant faced contempt of court proceedings which would be thereby frustrated if the withdrawal of the suit was allowed.

11. This question is not new; it is a question that has been settled by the Court of Appeal in **Beijing Industrial Designing & Researching Institute v Lagoon Development Limited (2015) KECA 365 (KLR)** (“the Beijing case”), a decision that was cited by the respondent in the submissions contesting the withdrawal of the suit and which also the learned magistrate heavily relied upon in declining to have the appellant’s suit withdrawn.

12. At the centre of the court of Appeal’s discussion was order 25 sub rules (1) and (2) on withdrawal and discontinuation of suits. Order 25 reads 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.

13. To the extent that these provisions are also central to the appellant's appeal and the circumstances surrounding the withdrawal of the appellants suit are, more or less, similar to those in the Beijing case, I will do no more than adopt the Court of Appeal's reasoning on the application of these two provisions in determining this appeal.

14. According to the Court of Appeal, circumstances when suits may be withdrawn are first, where the suit has not been set down for hearing. At this stage of the proceedings, the plaintiff is free to discontinue the suit or withdraw the claim or any part thereof, and that all he is required to do is to serve the requisite written notice upon all the parties in the suit.

According to the court, the plaintiff has an absolute right to withdraw his suit without any hindrance in this first instance.

15. The second instance arises where the suit has been set down for hearing.

In this particular instance, the suit may be discontinued or the claim or any part thereof may be withdrawn when all the parties in the suit sign and file a written consent to that end. The condition here is that the consent of the rest of the parties to the suit must be obtained before the suit is withdrawn.

16. Lastly, in the third instance, the suit must have 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. Here, the plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof. Leave would normally be granted upon such terms as are just and, thus, it is not a mere formality.

17. The court reiterated that the plaintiff's right in the first instance, being an

“absolute and untrammelled” right, cannot be taken away from him. But even in a case where leave is required, courts ought not to stand in the way of a plaintiff who wishes to discontinue his suit; leave should be granted subject to such considerations as costs or such other terms that are deemed just.

18. Just as was the case in the Beijing case, so it was in the appellant's suit: the appellant's suit had not been set down for hearing and, therefore, according to the Court of Appeal, the appellant would have been entitled to discontinue the suit or withdraw the claim without the consent of the parties or the leave of the court. But in the background, was a pending question of the violation of a court order by the appellant.

19. The withdrawal of a suit in these circumstances would not just be a question between the appellant and the respondent and, therefore, the objection by the respondent that the withdrawal was meant to defeat contempt proceedings was not, in the words of the Court of Appeal "*an idle complaint*".

20. The Court of Appeal explained further that contempt of court proceedings are quasi-criminal and, to this end cited the case of **In Re Bramblevale Ltd (1970) CH 128** and held that criminal or quasi-criminal proceedings ought not to be terminated at the exclusive instance or discretion of the party alleged to be a perpetrator of a criminal or quasi-criminal act.

21. A further reason why the appellant could not unilaterally withdraw her suit while contempt proceedings were pending against her is that the purpose of the law on contempt of court is not to protect the personal dignity of the judiciary or the private rights of parties or litigants. Neither

are contempt proceedings intended to assuage the offended dignity of the court. Rather, it is intended to uphold and protect the supremacy of the law and, thus, contempt proceedings involve much more than the private interests of the plaintiff and the defendant and implicate the public interest at large. (see **Johnson v. Grant, 1923 SC 789 at 790** per Lord President Clyde).

22. Speaking of compliance with the court orders, the Court of Appeal in the Beijing case quoted *Justice Froneman* in the South African case of *Burchell v. Burchell, case no. 364/2005* where the learned judge stated as follows:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the courts and requires other organs of state to assist and protect the courts. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

23. Based on this understanding of the law, a mechanical application of Order 25 Rule 1 of the Civil Procedure Rules would result in the annihilation of public interest in upholding and protection of the rule of law at the altar of the appellant's right to withdraw her suit. What I mean is that to allow the appellant to, rather wittingly, withdraw her suit so as to evade contempt of court proceedings, is to deliberately undermine the rule of law. Public interest cannot be placed at the mercy of the appellant. In order to vindicate the supremacy of the law, the appellant's suit must be maintained albeit for the limited purpose of hearing and determination of the contempt of court proceedings.

24. Again, a mechanical application of Order 25 Rule 1 in the circumstances of the appellant's suit would enable the appellant to undermine the rule of law and walk away scot-free without being called to account on the question of her disobedience of a valid court order.

25. The Court of Appeal reiterated that, the law will not countenance a person benefiting from his wrongdoing or alleged wrongdoing and cited *Lord Finlay in New Zealand Shipping v. Societe Des Ateliers et Chantiers de France (1919) AC 1*, where he stated as follows:

“The decisions on the point are really illustrations of the very old principle laid down by Lord Coke (Co Litt. 206b) that a man shall

not be allowed to take advantage of a condition which he himself brought about.”

26. In *Castanho v. Brown & Root (UK) Ltd & Another (1981) 1 ALL ER 143*, the House of Lords held that termination of legal process such as a notice of discontinuance, like any other step in the process, could be used by a party to obtain a collateral advantage which would be unjust for him to retain and could, therefore, be prevented by the court under its inherent jurisdiction to prevent an abuse of the process of the court. **Lord Scarman** stated:

“The court has inherent power to prevent a party from obtaining by the use of its process a collateral advantage which it would be unjust for him to retain; and termination of the process can, like in any other step in the process, be so used. I agree, therefore, with Parker J and Lord Denning MR that service of a notice of discontinuance without leave, though it complies with the rules, can be an abuse of the process of the court. Was it, then, in the circumstances of this case an abuse? In my judgment, it was. A sensible test is that which both the judge and Lord Denning MR applied. Suppose leave had been required..., would the court have granted unconditional leave? It is inconceivable that the court would have allowed a plaintiff, who had secured interim

payments and an admission of liability by proceeding in the English court, to discontinue his action in order to improve his chances in a foreign suit without being put on terms, which could well include not only repayment of the moneys received but an undertaking not to issue a second writ in England.”

27. Like the Court of Appeal in the Beijing case, I entertain no doubt in my mind that the withdrawal of the appellant’s case was for the purpose of defeating the contempt of court proceedings against the appellant and, to that end, it was an abuse of the process of court. I also adopt the Court of Appeal’s reasoning that under **section 3A** of the Civil Procedure Act, this Honourable Court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of court. In this case, where it is obvious that the appellant employed the right to discontinue a suit in a manner that amounts to abuse of process of court or to defeat the ends of justice, the court has power to stop such abuse or undermining of justice.

28. For these reasons, I find no merit in the appellant’s appeal; the appeal is hereby dismissed with costs. Orders accordingly.

Signed, dated and delivered on 10 April 2026

Ngaah Jairus
JUDGE

