REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 12 OF 2019

WASHUMBU (D.A) COMPANY LIMITED.....PLAINTIFF

VERSUS

CITY BUILDING LIMITED.....1ST DEFENDANTS

ATTORNEY GENERAL.....2ND DEFENDANTS

RULING

1. By a Notice of Motion dated 22nd February 2019 brought under Order 25 Rule 1 and 5 of the Civil Procedure Rules, Sections 3, 3A and 63 (e) of the Civil Procedure Act and Section 10 of the Judicature Act, the Plaintiff/Applicant seeks orders to set aside an order dated 18th February 2019 for withdrawal of the Notice of Motion Application dated 25th January 2019 and the entire suit, and for the suit to be reinstated.

2. The application is supposed by the affidavit of James Mwang'ombe Kinusa, the secretary of the plaintiff sworn on 22nd February 2019 and a further affidavit sworn on 11th April 2019 and is premised on the following grounds:

i. That the notice of motion application dated 25th January 2019 and the entire suit were withdrawn by the advocate for the plaintiff on 18th February 2019 without the consent and/or authority of the plaintiff.

ii. That the plaintiff is now exposed to the dangers of meeting unnecessary costs of the suit.

iii. That the 1st defendant has now applied for the prospective license of the mining for the entire land owned by the plaintiff.

iv. That the case has not been heard and the issues raised therein by the plaintiffs have not been addressed.

v. That there risks and emotional and advance reaction by the members of the plaintiff due to the 1st defendant's claim on the entire land owned by the plaintiff.

vi. That the agreement and the approval of all documents clearly demonstrate that the 1st defendant was given 5000 acres and nothing more.

vii. That the plaintiffs are the registered owner of the suit property.

3. In the affidavit in support of the motion, it is deposed that the Plaintiff instructed the firm of Kadima & Co Advocates to act on its behalf in this suit. That the firm of Kadima & Co. Advocates did not communicate or inform the plaintiff that they had any difficult with the pleadings which were prepared, filed and served on behalf of the plaintiff. That on 21st February, 2019, the deponent went to the registry to check on the conditions of the file and to his surprise discovered that the plaintiff's suit had been withdrawn with costs to the defendants on 18th February 2019 without the consent or authority of the plaintiff. He further deposes that on the same day he received a copy of a letter which was addressed to the Director of Mines, Nairobi which letter was given to the plaintiff's Chairman who had gone to the office of Director of Mines, Nairobi to check on the status of the Plaintiff's land. The letter is dated 20th February, 2019 and was simply advising the Director of Mines to issue a prospecting license to the 1st defendant based on the withdrawal of the suit. That the decision to withdraw the suit by the plaintiff's advocate was done without the Plaintiff's consent or authority. The Plaintiff urged the court to reinstate the suit so that the same can proceed to full hearing. The plaintiff avers that the decision of their advocate to withdraw the suit without consulting the plaintiff is a case of professional misconduct and that the plaintiff's advocate did not even advance to the court the reasons for withdrawing

the suit.

4. The 1st defendant opposed the application through notice of preliminary objection, grounds of opposition and a replying affidavit sworn by Shakir Swaleh Mohamed, a director of the 1st defendant on 26th March 2019. The 1st Defendant avers that the plaintiff had filed an application and plaint both dated 25th January 2019. That the 1st Defendant filed a replying affidavit dated 15th February sworn by its director Fatuma Jepchumba and filed a notice of preliminary objection against the plaintiff's application stating that mandatory provisions of the law had been contravened by the plaintiff including lack of authority by James Mwang'ombe to institute the suit on behalf of the company. That when the application came up for inter-parties hearing on 18th February, 2019, the plaintiff's advocates on record, M/s Kadima & Company Advocates withdrew both the application and the suit with costs to the 1st defendant. That the plaintiff has not paid the costs ordered by the court and therefore should be barred from instituting another suit before settling the same.

5. The 1st defendant further avers that the 1st defendant entered into an agreement 30th November 2017 for the prospecting of minerals in the plaintiff's ranch, and the agreement provides for Alternative Dispute Resolution mechanisms which the plaintiff has failed to utilizes or chosen to ignore. Further, that the plaintiff's application has contravened mandatory provisions of the law one of them being that the person swearing the affidavit, James Mwang'ombe does not have the pre-requisite mandate as he is not a director of the plaintiff nor does he have any authority to institute the suit. It is the 1st defendant's contention that the plaintiff is attempting to frustrate the agreement for reasons best known to it. The 1st defendant further contends that the application is premature, bad in law and an abuse of court process and urged the court to dismiss it with costs.

6. The application was canvassed by way of written submissions. The plaintiff filed their written submissions on 11th April 2019 while the 1st defendant filed theirs on 24th May 2019.

7. I have considered the application and the submissions filed. The issue for determination is whether the order made on 18th February 2019 withdrawing the plaintiff's application and suit should be set aside and the suit reinstated.

8. The record shows that the plaintiff's application dated 25th January, 2019 was scheduled for inter parties hearing on 18th February 2019. All the advocates for the parties were present in court on 18th February, 2019. When the matter came up, Mr. Amadi advocate who held brief for Mr. Kadima advocate for the plaintiff informed the court that in light of recent developments, the plaintiff was of the view that the application and the suit have been overtaken by events. He added that the Plaintiff wished to withdraw the application and the suit in its entirety. Mr. Muunzio counsel for the 1st defendant and Mr. Mwandeje counsel who was holding brief for Mr. Wachira for the 2nd Defendant did not object to the plaintiff's application for withdrawal of the motion and the suit, subject to payment of costs to the defendants. The Notice of Motion dated 25th January 2019 and the entire suit were marked as withdrawn with costs to the defendants.

9. 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 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 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 withdraw any part of his claim upon such term 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 counter-claims.**
>
> **3. Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.**
>
> **4. –**
>
> **5. (1)-**
>
> > **(2) The court, on the application of any party, may make any further order necessary for the implementation and execution of the terms of the decree.**

10. The question of withdrawal of suit 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 three scenarios regarding the 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 and 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 suggest that it is not a mere formality"

11. In this case, the main suit had not been set down for hearing. What was coming up before the impugned withdrawal was the hearing of the plaintiff's application dated 25th January 2019. From the above decision of the court of appeal, the law can be stated to be that as general proposition the right of a 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. It should be noted that the Rules do not provide for the withdrawal of a prayer seeking withdrawal. This may be because once the order is endorsed, and the suit is withdrawn, it becomes effective immediately. In Mulla The Code of Civil Procedure 18th Edu 2011 at page 21 it is stated:

"This is because withdrawal of the suit under subrule (1) is complete as soon as it takes place and in any case when the court is informed of it. That being so, there are no questions of a right to revoke such withdrawal."

Muller's commentary was on provisions which are in pari material the provisions of Order 25 Rule 1. Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuance cannot be raised as a defence in a subsequent suit.

12. In this case, the issue is whether the court can review and set aside an order that was made pursuant to an application by the applicant's advocate. The Applicant's complaint is that their advocate who was then on record, M/s Kadima & Company Advocated had no instructions to withdraw the application and the suit.

13. Section 80 of the Civil Procedure Act gives power of review while Order 45 sets out the rules. The rules restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made; or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

14. The fact that setting aside is a discretion of the court is not disputed. What is important is whether the Applicant has demonstrated that there is sufficient cause to warrant the exercise of the court's discretion in their favour. The orders herein were issued pursuant to a request made by the applicant's advocate and the advocates for the Defendants consented, save for costs

15. In the case of **SMN –v- ZMS & 3 Others (2017)eKLR**, the Court of Appeal, while considering an appeal that challenged the refusal by the High Court, Lenaola J (as he then was) to review, vacate or set aside a consent order recorded by the court stated as follows:

"17. There is now dearth of authorities on the law governing the setting aside of consent judgments, or orders, ad we are grateful to counsel for citing some of them before us. Generally a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. The factors touted for impeaching the consent in this matter were fraud and collusion. It is also alleged that counsel had no authority to enter into the consent. The onus of proving those assertions to the required standard was on the appellant. They are serious imputations bordering on crime and therefore the burden of proof is a necessity slightly higher than on balance of probability but perhaps not beyond reasonable doubt. An allegation made against an advocate of the High Court that he was involved in fraud or colluded with another advocate or person to subvert the cause of justice in a matter pending in court is certainly one of utmost gravity. It destroys the advocate's honour and respect. It can undo his entire legal practice and attract censure from his professional body. It cannot merely be flashed or mentioned only to be believed. There must be cogent and truthful evidence of such charges……. "

16. The Court of Appeal went on and highlighted the following authorities to illustrate the approach attendant to the issue at hand. In **Flora N. Wasike –v- Destimo Wamboko (1988)eKLR**, the Court of Appeal 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: see the decision of this court in J.M. Mwakio –v- Kenya Commercial Bank Ltd Civil Appeal 28 of 1982 and 69 of 1983. "***

In Kenya **Commercial Bank Ltd –v- Specialized Engineering Co. Ltd (1982) KLR 485**, Harris J correctly held, inter alia, that:

"***1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without material facts or in misapprehension or ignorance of such facts in general or a reason which would enable the court to set aside an agreement.***

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. "

17. In **Kenya Commercial Bank Limited –v- Benjoh Amalgamated Limited & Another (1998)KLR** the Court of Appeal cited a passage in the Supreme Court Practice 1976 (Vol. 2) paragraph 2013 page 620 stating:

> "***Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen (1903) 1 Ch pp 817, 818, Little –v- Spreadbury (1901) 2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice. See Welsh –v- Roe (1918-9)ALL E.R. Rep 620. "***

18. Finally, the Court of Appeal considered the Ugandan case of **Lenina Kemigisha Mbabazi Star Fish Ltd.-v- Jing Jeng International Trading Ltd (HC-OO-MA344-2012)** where the court stated:

> "***The court cannot set aside a consent judgment when there is nothing to show that counsel for the applicant has entered into it without instructions. Furthermore, that even in cases where an advocate has no specific instructions to enter a consent judgment but has general instructions to defend a suit, the position would not change so long as counsel is acting for a party in a case and his instructions have not been terminated, he has full control over the conduct of the trial and apparent authority to compromise all matters connected with the action.***"

In dismissing the appeal the Court of Appeal held:

> ***"22. In this case, the findings on liability depended mainly on the credibility of Mr. Gakinya and S. The advocate deposed that there were no written instructions given him by his client and the client was unable to show otherwise. It must therefore be assumed that instructions from the client and the advice given by the advocate were oral throughout. Why they chose that mode of communication which is clearly prone to abuse and says little about accountability, is a matter between the advocate and client. The trial court was inclined to believe the advocate's account of events and having looked at the record and assessed the evidence ourselves, we find no reason to fault that finding. The advocate had ostensible authority to compromise the petition and did in fact do so before Lenaola J on 11th July 2013 in the interest of his client. We find no proof to the contrary to impeach the advocate's bona fides. "***

19. In the present case, it is not disputed that the firm of Kadima & Company Advocates had instructions to act for the Applicant in the suit. Indeed it is the same firm who filed the suit and the application on behalf of the plaintiff. The applicant has not alleged any fraud or conllusion against M/s. Kadima & Company Advocates.

20. Being guided by the above decisions of the Court of Appeal which no doubt are binding on me, I find that the court cannot set aside the orders of 18th February, 2019 when the applicant has not shown any evidence that counsel made the application for withdrawal without instructions. It is therefore my finding that the actions of the plaintiff's advocate who was duly instructed are binding on the plaintiff. From the material placed before me, the applicant has not demonstrated that there is sufficient cause to warrant the exercise of the court's discretion in their favour. Any decision taken or made by the plaintiff through its advocate would be binding on the plaintiff unless fraud or collusion has been proved. In this case, none has been alleged, let alone proved.

21. By reason of the foregoing, it is my finding that the notice of motion dated 22nd February 2019 is without merit. The same is hereby dismissed with costs to the defendants.

DATED, SIGNED and DELIVERED at MOMBASA this 7th day of October 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Buxton for Gikonyo for Applicant

Ms. Rukia for 1st Respondent

Yumna Court Assistant

C.K. YANO

JUDGE