



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**ELC NO.181 OF 2015**

**LUCIA WANGESHI KAMAU.....PLAINTIFF**

**VERSUS**

**JARED RODRICK NYAUNDI.....1<sup>ST</sup> DEFENDANT**

**JOHN KAMAU GICHIGO.....2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR NAKURU.....3<sup>RD</sup> DEFENDANT**

**RULING**

***(Application seeking to reinstate a suit that was withdrawn; applicant stating that a notice of withdrawal of suit which was filed was procured irregularly from her; application allowed; suit reinstated)***

1. The application before me is that dated 17 October 2017 filed by the plaintiff through the law firm of M/s Mwangi Mukira & Company Advocates. The application seeks the following substantive orders which are prayers 2, 3 and 4, of the application, being :-

*(i) That this Honourable Court be pleased to set aside the Notice of Withdrawal dated 23 November 2013 and filed on 30 November 2016.*

*(ii) That consequently to the above this Honourable Court be pleased to reinstate the suit herein.*

*(iii) That this Honourable Court be pleased to reinstate the orders of inhibition previously on record prior to the withdrawal pending the hearing and determination of the suit.*

2. The application is opposed, and before I got to the gist of it, I think it is necessary for me to give a bit of a background to the same.

3. This suit was commenced by the applicant through a plaint filed on 24 June 2015 by the law firm of M/s Mwangi Mukira & Company Advocates. In the plaint, the plaintiff pleaded inter alia that she was the registered owner of the land parcels Nakuru Municipality Block 2/80 and 81. She averred that she lives in Kitale, and she had a succession matter in respect of the estate of her deceased husband, being Kitale HCCC Succession Cause No. 41 of 2006, which was taking rather long to complete, and that she then asked the 1st defendant, who presented himself to the plaintiff as an advocate, to assist her conclude the case. She avers that she then handed over to the 1st defendant the original land documents to enable him (1st defendant) pursue the succession matter. She has pleaded that upon conclusion of the case, and upon confirmation of the grant in the year 2009, she asked the 1st defendant to assist in effecting transmission in accordance with the confirmed grant, and the parcels of land were transmitted to her and titles issued on 23 April 2010. The plaintiff has pleaded that she made several requests to the 1st defendant to return the title documents to her, and that the 1st defendant made promises to return the same, but never did so. On 27 May 2015, she has averred that she travelled to Nakuru, to confirm the position on the ground, when she learnt that the suit properties have now been sold to the 2nd defendant and title issued in his name. It is the position of the plaintiff that this transfer was effected through fraud, inter alia, through the 1st defendant submitting a forged power of attorney. She reported the matter to the police and criminal charges were preferred against the 1st defendant, being the case Nakuru CMCR No. 1447 of 2015. In the suit, the plaintiff sought orders to have the title of the 2nd defendant revoked and the same to revert back to her name, and a permanent injunction against the 1st and 2nd defendants, restraining them from the suit properties.

4. Together with the suit, the applicant filed an application for injunction, seeking the preservation of the suit properties pending hearing of the suit. The application came before me on 25 June 2015, when I gave interim orders stopping any dealings over the suit land and gave a date for inter partes hearing. Thereafter, the 1st defendant instructed the law firm of M/s Githui & Company Advocates to represent him whereas the 2nd defendant, instructed the law firm of M/s Alphonse Mutinda & Company Advocates. The State Law Office appeared for the 3rd defendant. On 29 February 2016, parties entered into a consent vide which they agreed to have the interim orders maintained until the suit is concluded and I gave time for the filing of the requisite pre-trial documents and also gave a date for mention of the matter to confirm readiness for trial. The matter was mentioned on several occasions, and on 16 March 2017, counsel represented that the matter was ready for

trial. I was also informed by Mr. Githui, learned counsel for the 1st defendant/respondent, that the criminal case had been withdrawn. On this day, I did point out to counsel that there is on record a notice of intention to act in person, and a notice withdrawing the suit, filed by the plaintiff. Mr. Mukira, who was present in court for the plaintiff, stated that he was not aware of the notices as he had not been served with the same. He indeed stated that he had spoken to the applicant that morning. Being seized of those submissions, I directed the matter to be mentioned on 22 May 2017, and directed the applicant to be personally present so that I can verify directly from her whether she filed the documents in question. The applicant did appear on 10 October 2017, when she affirmed that the signatures in the Notice of Intention to Act in Person, and the Notice of Withdrawal of suit were her signatures, but she stated that she has no intention to withdraw this suit.

5. The application herein is based on the following grounds :-

*(a) That vide a Notice of Withdrawal dated 23 November 2016, purportedly filed by the applicant on 30 November 2016, the suit herein was withdrawn.*

*(b) That the applicant herein had been duped by the 1st respondent to sign the notice of withdrawal in respect to Nakuru CMCR No. 1447 of 2015 on the ground that the 1st respondent would return to her the parcels of land the subject matter of the suit.*

*(c) That however the applicant herein has only learnt from her counsel that a notice of withdrawal had been filed on her behalf which was brought to the attention of the applicant's counsel on 22 May 2017, when the matter was coming up for pretrial directions.*

*(d) That the applicant is interested in pursuing the suit herein to its logical conclusion and the withdrawal herein was not done voluntarily but it was a connivance by the 1st respondent and other interested parties without the applicant's authority.*

*(e) That it is only fair that this Honourable Court do allow the instant application to allow the applicant to pursue justice as earlier intended.*

*(f) That no prejudice will be caused to any party if the orders herein were allowed.*

6. In her supporting affidavit, the applicant has deposed inter alia that apart from the criminal charge of forgery, she was attacked at her home, which led to the 1st respondent being charged with attempted murder at Kitale Magistrate's Court. She has deposed that she was persuaded by a family friend, one Rev. Mwathi, to have the matters settled amicably, and they met with the 1st respondent on 26 November 2017. She has averred that it was agreed that the 1st respondent would return her properties and that she would withdraw the various cases including the one before the Kitale Magistrate's Court. She annexed the signed minutes of the said meeting that they held. She has deposed that pursuant to their understanding, she withdrew the criminal case in Kitale and Nakuru, as she awaited the return of her parcels of land by the 1st respondent as agreed. She has stated that despite the withdrawal, the 1st respondent did not return her parcel of land, and only kept promising to do so in due course. She has contended that she was surprised to be informed that a notice of withdrawal of suit had been filed on the same day that she withdrew the criminal matters. She has stated that the notices are curious as no advocate on record had been served with the same. She is apprehensive that the notice was fraudulently done by the 1st respondent who had requested her to sign some documents for the withdrawal of the criminal case. She has deposed that she is illiterate and that the 1st respondent must have taken advantage of her.

7. The 1st respondent did not file anything to oppose the motion whereas the 2nd respondent filed a Notice of Preliminary Objection, which I directed be argued within the motion. The preliminary objection is of three points as follows :-

*(i) The application is incurably defective, incompetent, misconceived, frivolous, and vexatious, and therefore an abuse of the court process.*

*(ii) There is no existing suit upon which the applicant's application dated 17 October 2017 can be predicated.*

*(iii) The court lacks jurisdiction to entertain and determine the application dated 17 October 2017 since there is no suit pending between the parties herein.*

8. I took in the submissions of Mr. Mwangi, learned counsel for the applicant, and Mr. Gichigo, learned counsel for the 2nd respondent, who also held brief for Mr. Githui for the 1st respondent. I have considered these in my arriving at my decision.

9. What is before me is an application to formally reinstate a suit that was apparently withdrawn through a Notice of Withdrawal of Suit filed on 30 November 2016. That notice of withdrawal appears to have been contemporaneously filed with a Notice to Act in Person, said to have been filed by the plaintiff. Now, there is no dispute that the said documents were indeed signed by the applicant, given the applicant's own affirmation in court on 10 October 2017. However, the plaintiff contends that she executed the documents on being duped by the 1st respondent and that what she intended to withdraw were the criminal matters. The averments of the applicant are actually not denied by the 1st respondent. The 1st respondent has not sworn any affidavit to rebut the depositions of the applicant that she was duped to execute the said documents. Given the lack of rebuttal, I find no reason not to believe the applicant.

10. I have considered the argument of the 2nd respondent's counsel that there is no provision under Order 25 to reinstate a withdrawn suit and that the only recourse is to file a new suit. I agree that this is indeed the position, but that would presuppose a properly filed notice of withdrawal of suit, which is not the case in this instance. I have also considered the objection that given the notices of withdrawal, there is no suit upon which to found the current application. I see no substance in that argument. If that was to be allowed, then it means that there can never be entertained any application to reinstate a suit that has either been withdrawn or dismissed. Let us take the example of a suit that has been dismissed for the non-attendance of the plaintiff as provided for under Order 12 Rule 1. If we follow the argument of Mr. Gichigo, then it means that even a suit so dismissed, cannot be reinstated, for there would be no suit upon which to base the application for reinstatement.

This example reveals the flaw in Mr. Gichigo's argument. If one claims that a suit has not been properly withdrawn, there is no other way of contesting it, other than filing an application within the same matter. To hold otherwise would mean that no application can ever be filed once a case is dismissed which is superfluous.

11. Having considered the matter, especially given the fact that the 1st respondent has not contested the averments of fact directed at him by the applicant, in my discretion I do allow this application. I proceed to strike out the Notices of Intention to Act in Person, and the Notice of Withdrawal of Suit filed on 30 November 2016. In essence this suit is still alive and the parties can proceed with it to its logical conclusion. I also reinstate the interlocutory orders of 29 February 2016, and those orders to remain in force until this case is concluded or until further orders of the court, as the case may be.

12. On this application, I make no orders as to costs.

13. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 16<sup>th</sup> day of May 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of: -**

Mr. Mwangi for the plaintiff/applicant.

Mr. Kairu holding brief for Mr. Gichigo for the 2<sup>nd</sup> defendant.

No appearance on the part of M/s Githui & Company Advocates for the 1<sup>st</sup> defendant.

No appearance for the State Law Office for the 3<sup>rd</sup> defendant.

Court Assistant : Nelima Janepher.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**