



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT

AT NYERI

ELCA NO. 74 OF 2014

MARTIN MUCUTHI.....APPELLANT/RESPONDENT

-VERSUS-

PETER GATHUNGU GITHEHU.....1ST DEFENDANT/APPLICANT

MARGARET WANJA MUCUTHI.....2ND DEFENDANT/RESPONDENT

RULING

1. Peter Gathungu Gichehu (hereinafter referred to as the applicant) brought the motion dated **22nd September, 2016** seeking to dismiss or strike out the appeal herein (filed on 8th May, 2014) on the grounds that it is frivolous, vexatious, scandalous and an abuse of the process of the court.

2. In support of the application, it is pointed out that the suit in respect of which the appeal is premised was withdrawn/discontinued and contended that an appeal cannot lie against an order issued in a none existent suit.

3. The application is opposed on the grounds that the appeal raises serious issues that the appellant should be allowed to canvass; that the issues raised in the application cannot be determined at the interlocutory stage; that the application is frivolous, vexatious and that the application is premised on misapprehension of the law.

Analysis and determination

4. I have carefully considered the circumstances that led to the filing of the appeal herein to wit, the refusal of the lower court to grant the orders sought in the notice of motion by the appellant/respondent herein dated 9th October, 2013.

5. Vide that application, the appellant/respondent, *inter alia*, sought to reinstate the suit that he had discontinued and/or withdrawn.

6. In dismissing the application the lower court, *inter alia*, observed:

“the notice to withdraw the suit dated August 2011 is clear that the applicant withdrew and discontinued the suit against the defendants in the notice i.e Enock Mokoit Psenjen (the 1st defendant), Loise Chesikiken Psenjen (the 2nd defendant), Peter Gachungu Gichehu (the third defendant/respondent) and Nanyuki municipal council (the 4th defendant. It is therefore misleading for the applicant to argue that the suit was only withdrawn against the

1st and the 2nd defendants. In any case what the advocate wrote to the court was a notice informing the court that the plaintiff had withdrawn the suit against the defendants. Whether or not the court entered the withdrawal into the court's record, the suit stood withdrawn. The entry of the withdrawal into the court's record was only a formality. If the applicant's advocate acted contrary to the applicant's instructions by withdrawing the suit against the 3rd defendant/ respondent, that is a matter between him and his advocate.

It is clear that after the applicant withdrew the suit against the 3rd defendant he filed another suit at Nyeri High Court against the 3rd respondent over the same subject matter. Why then is the applicant coming back to this court when he has filed another case over the same subject matter at the High Court.

The applicant is seeking that the court reinstates the suit so that it can be transferred to the High Court. A lower court has no power to transfer a matter to the High Court. In its ruling dated 27/11/11 this court ruled that it has no jurisdiction to try the matter. It stated that the applicant had the option of applying to the High Court for the matter to be transferred to the High Court. They opted to withdraw the matter and file another case at the High Court. It is an abuse of the process of the court for the applicant to come back to this court and try to reinstate the suit when the court has already ruled that it has no jurisdiction to try the matter. The applicant should pursue his case at the High Court..."

7. It is the foregoing determination that precipitated the current appeal.

8. The appeal is premised on twelve grounds which can be summarised in to one to wit, the lower court erred by refusing to reinstate the suit.

9. I have read and considered the circumstances leading to dismissal of the appellant's application for reinstatement of the suit, the circumstances leading to filing the application for reinstatement of the suit; the law governing withdrawal of suits and the reasons offered by the lower court for refusal to reinstate the suit.

10. Whereas I entertain no doubt that the withdrawal of the suit did not meet the threshold set under **Order 25** of the Civil Procedure Rules, owing to the fact that the court had already determined that it lacked jurisdiction to hear and determine the dispute preferred before it, I entertain serious doubt whether the lower court can reasonably be faulted for having refused to reinstate the suit it had no jurisdiction to hear and determine in the first place.

11. Under **Order 25 Rule 3** of the Civil Procedure Rules, the court has power to grant costs in respect of a discontinued or withdrawn suit.

12. And whereas the court should be slow in denying parties to urge their cases and where need be, urge any appeal against the orders issued in the course of litigation, given the peculiar circumstances of this case, to wit the court had already determined that it had no jurisdiction to hear and determine the dispute preferred before it, I am not convinced that the intended appeal would serve any useful purpose.

13. Accordingly, in exercise of the powers donated to this court under **Section 79B** of the Civil Procedure Act, I summarily reject the appeal.

14. The 1st respondent/applicant shall have the costs of this application.

15. Orders accordingly.

Dated, signed and delivered in open court at Nyeri this 6th day of March, 2017

L N WAITHAKA

JUDGE

In the presence of:

Martin Mucuthi – appellant/applicant

N/A for 1st -3rd respondents

Court clerk – Esther