



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO.18 OF 2013 (OS)**

**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT CHAPTER 281 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF: LR PORTION NO.20119-CR26151**

**LR PORTION NO. 2031-CR33295**

**LR PORTION NO.24845-CR33298**

**LR PORTION NO.24846-CR 33297**

**AND**

**IN THE MATTER OF: REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: PLOT NOS, NGOMENI/SQUATTERS SETTLEMENT SCHEME/1882, 892, 811, 893, 813, 986, 1025, 987, 1025, 987, 988, 787, 1887, 1888 AND 1373**

**AND**

**IN THE MATTER OF: THE SURVEY ACT CAPS 299 LAWS OF KENYA**

**BETWEEN**

**NGOMENI SWIMMERS LTD.....PLAINTIFF/APPLICANT**

**=VERSUS=**

- 1. THE COMMISSIONER OF LANDS**
- 2. THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT**
- 3. THE DIRECTOR OF SURVEY**
- 4. THE DISTRICT LAND REGISTRAR (KILIFI)**

**5. THE REGISTRAR OF TITLES (MOMBASA)**

**6. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS/RESPONDENTS**

**AND**

**7. ST. PATRICK'S HILL SCHOOL LTD**

**8. NDURYA MSANZU NDURYA**

**9. MORRIS SULUBU HARE**

**10. KADII TEZI TSUMA**

**11. SAMSON NGOWA**

**12. SWALEH AHMED SAID**

**13. NICHOLAS KABANDO MWANGI**

**14. FENYASAN CONSTRUCTION LIMITED**

**15. KARISA FUNDI BULUSHI**

**16. KAHINDI KAINGU GONDA**

**17. TABU TUVA KHONDE**

**18. THE ESTATE OF SAFARI KIMERI THUVA**

**19. THE ESTATE OF CHARO MWABAYU NDURYA**

**20. THE ESTATE OF KATANA MANGI MWANYIRO....INTERESTED  
PARTIES/RESPONDENTS**

**R U L I N G**

1. What is before me is the Application dated 26<sup>th</sup> March 2015 filed by the Plaintiff. In the Application, the Applicant is seeking for leave to withdraw its Application dated 24<sup>th</sup> November 2014.
2. The Application is premised on the grounds that it has come to the notice of the Applicant that its previous advocate on record filed the Application dated 24<sup>th</sup> November 2014 contrary to the Applicant's instructions; that there are serious and important issues of law and fact which were not addressed by the Applicant in the Application dated 24<sup>th</sup> November 2014 and that the former advocate for the Applicant appears to have acted in cahoots with the advocate for the interested parties so as to defeat the course of justice.
3. According to the Applicant, the mistakes or negligence of the advocate should not be visited upon the innocent and vulnerable litigant and that he is ready to pay the costs of the Application dated 24<sup>th</sup> November 2014 upon withdrawal.
4. The 1<sup>st</sup> Interested Party filed Grounds of Opposition and a Replying Affidavit in which it averred that the firm of Balala & Abed Advocates lacks locus to institute the current Motion; that the Motion of 24<sup>th</sup> November 2014 has been heard interpartes on merit and there is nothing left to withdraw and that the entire Application is scandalous, frivolous, vexatious and an abuse of the process of court.
5. The 1<sup>st</sup> Interested Party further averred that the court having heard all the parties in the Motion

- dated 24<sup>th</sup> November 2014 is duty bound to pronounce a Ruling on the Application by either allowing it or dismissing it.
6. The Advocate for twelve Interested Parties, Mr. Nicholas Sumba, deponed in his Affidavit that the Application that the Applicant is seeking to withdraw was argued interpartes and a ruling date fixed; that it is defamatory and scandalous on the part of the Plaintiff to suggest that he colluded with his previous advocate to defeat justice and that the Plaintiff is out to frustrate, evade and delay payment of costs by the filing of multiple applications both in this court and in the High Court.
  7. I have considered the submissions that were filed by the Applicant's Advocate and the Interested Parties' Advocates. I have also considered the authorities.
  8. It is not in dispute that upon delivery of the Judgment of this court dismissing the Applicant's suit with costs, the firm of Gicharu Kimani & Associates applied for leave to come on record for the Applicant vide an Application dated 17<sup>th</sup> February 2014. The said Application was allowed. Consequently, the firm of Balala & Abed which has now come on record in place of the firm of Gicharu Kimani & Associates did not require the leave of the court to come on record for the Applicant. The said firm has the locus to bring and prosecute the current Application.
  9. The Application that the Applicant is seeking to withdraw is dated 24<sup>th</sup> November 2014. The main prayer in the Application is for leave to issue to the Applicant to file a Reference out of time.
  10. In the same Application, the Applicant is seeking for an order that the matter be referred to another Taxing Officer for re-taxation of item number 1 of the Bill of Costs.
  11. The Application that the Applicant wants to withdraw was argued interpartes on 16<sup>th</sup> February 2015 and the Ruling was reserved for 27<sup>th</sup> March 2015. However, the Ruling could not be delivered the Applicant having filed the current Application on 26<sup>th</sup> March 2015. The court consequently stayed the delivery of the said Ruling pending the hearing and determination of the Application dated 26<sup>th</sup> March 2015.
  12. The only issue that I am supposed to determine is whether the Application dated 24<sup>th</sup> November 2014, having been argued, can be withdrawn by the Applicant.
  13. Order 25 Rule 1 of the Civil Procedure Rules provides that at any time before the setting down of the suit for hearing, the Plaintiff may by notice in writing wholly discontinue his suit against all or any of the Defendants.
  14. Order 25 Rule 2(3) on the other hand provides that where a suit has been set down for hearing the court may grant the Plaintiff leave to discontinue his claim upon such terms as to costs. The above provisions also apply to Application.
  15. It has been held in numerous authorities that a party is at liberty to withdraw his suit or application without any hindrance or condition save for an order of costs, where applicable.
  16. In the case of **Beijing Industrial Designing & Researching Institute Vs Lagoon Development Limited, Malindi Civil Appeal No. 1 of 2015**, the Court of Appeal held that as a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. The court quoted with approval the case of the Supreme Court of Nigeria in **Abayomi Baba Tunde Vs Pan Atlantic Shipping & Transport Agencies Ltd & Others, SC 154/2002** which identified circumstances when a Plaintiff may legitimately wish to discontinue his suit or withdraw his claim to include:

**(i) a Plaintiff realises the weakness of his claim in the light of the defence put up by the Defendant.**

**(ii) a Plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,**

**(iii) where by abandoning the prosecution of the case, the Plaintiff substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or**

**(iv) a Plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.**

17.Indeed, as was stated in the above case, the court cannot force an unwilling Applicant to continue with his action. In the case of **John Ochienda Vs Telkom Kenya Ltd, Sc App No. 25 of 2014, Ibrahim SCJ** held as follows:

**“ I do hold the view that a prospective Appellant is at liberty to withdraw a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly.....”**

18.The above position was followed by the Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat Vs IEBC & 7 others, SC App No. 16 of 2014** where it was held as follows:

**“A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate.”**

19.None of the authorities quoted above considered a scenario where a party wishes to withdraw his suit or application after arguments have been made and the pending thing is the delivery of Judgment or Ruling.

20.The reading of Order 25 Rule 1 and 2(3) in my view contemplates a situation where a party wishes to withdraw his suit or application where such a matter has not been heard.

21.The totality of the deposition of the Applicant in this matter is that after consulting the current advocate, he has been advised that the Application dated 24<sup>th</sup> November 2014 will not serve its interests; that its director signed the Affidavit in support of the Application without being aware of the contents and that the Application that was filed by his former advocate is defective.

22.The reasons for the withdrawal of the Application have been given after the Applicant's advocate heard and analysed the arguments that were before the court.

23.Having failed to withdraw the Application before the same was argued, the Applicant cannot purport to withdraw it on the basis that he has since learnt that the Application is defective. The Civil Procedure Rules do not allow the action, for the simple reason that such a withdrawal is prejudicial to the opposite parties and contravenes the overriding objective of the Civil Procedure Act.

24.Indeed, once a matter has been heard in conclusion, it stops being a matter that is capable of withdrawal. Such a matter can only be decided upon by the court one way or the other and not by the Plaintiff.

25.If the Applicant's complaint is that he has since learnt that the Application was not drafted in a professional manner, and that the same is unlikely to succeed, his recourse will be to seek for damages as against his advocate for negligence, and not to re-litigate the matter upon withdrawal.

26.For those reasons, I dismiss the Application dated 26<sup>th</sup> March 2015 with costs.

Dated and delivered in Malindi this **13<sup>th</sup>** day of **November** 2015.

**O. A. Angote**

**Judge**