



**Ngángá v Gloriosa Limited (Originating Summons E042 of 2022)
[2024] KEELC 1385 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1385 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ORIGINATING SUMMONS E042 OF 2022**

MD MWANGI, J

MARCH 12, 2024

**IN RESPECT OF THE PLAINTIFF'S APPLICATION DATED 15TH DECEMBER,
2023 SEEKING TO REINSTATE A SUIT AFTER A WITHDRAWAL**

BETWEEN

BERNAND MBUGUA NGÁNGÁ APPLICANT

AND

GLORIOSA LIMITED RESPONDENT

RULING

Background

1. A brief history of the proceedings in this case is necessary so as to put this Ruling into a proper perspective. This suit was commenced by way of an Originating Summons dated 19th August, 2022 filed in court on the 5th September, 2022. The Respondent, despite service by way of substituted service by way of an advertisement in the Standard Newspaper, did not enter appearance. Directions under Order 37 of the *Civil Procedure Rules* were subsequently issued that the Originating Summons be heard by way of *viva voce* evidence. The Applicant's Supporting Affidavit was to be treated as his Witness Statement.
2. On 23rd May, 2023, the matter came up for hearing. The Plaintiff/Applicant proceeded to testify as PW1. However, while testifying, the court noted that the Photographs produced had not been accompanied by a Certificate of Electronic Evidence and that they were copies and not originals. Further, the Title extract that the Applicant wished to produce as an exhibit too was not certified. Consequently, Counsel for the Applicant sought to have the witness stood down to enable him avail a certified extract of the title and the certificate of electronic evidence in regard to the photographs.
3. When the matter came up for hearing and in response to the questions from the court, PW 1 stated that he was working on the suit property as a Supervisor employed by the Respondent. He bought the



farm in the year 2004 after the management made an offer to him to purchase it as they were leaving Kenya. However, he could not recall the purchase price he had paid but he informed the court that he an agreement and a transfer signed in his favour by the Respondent but he did not have it in court. Counsel for the Applicant surprised by the answers by his client sought time to consult with his client. Shortly thereafter he orally made an application, in the presence of his client, the Applicant herein, to have the matter withdrawn with no orders as to costs. The court allowed the application and marked the matter as closed with no orders as to costs.

4. The Plaintiff/Applicant now seeks to reverse the withdrawal. He seeks the following orders;
 - a. That the Court be pleased to review and set aside the proceedings, withdrawal and any consequential orders of this court which occurred or were made on the 3rd July, 2023 and does forthwith re-instate the suit for hearing and determination on its merits.
 - b. That the costs of and incidental to this application be in the cause.
5. The application is premised on the grounds on the face of it and further supported by the Affidavit of the Plaintiff/Applicant, Bernard Mbugua Ng'ang'a deponed on the 15th December, 2023. The Applicant avers that on 3rd July, 2023, when the matter came up for hearing, his then Advocate purported to orally withdraw the entire suit without any instructions to do so from him. He contends that the withdrawal of the suit was done without reference to him and was completely erroneous and made on a misguided premise.
6. He argues that the unauthorized withdrawal of the suit is sufficient demonstration that the withdrawal was tainted by vitiating factors of mistake and/or fraud. He argues that the withdrawal defeats his interests in the land. He states that he has been in occupation of the land since 2004 and has put up a house thereon and other structures which are sustaining his family. He therefore has economical and emotional attachment to it.
7. He avers that withdrawal was untenable by virtue of Order 25 Rule 1 of the *Civil Procedure Rules* because he was in the middle of testifying. He therefore prays that the withdrawal be set aside and the court hears his case as provided in the *constitution*.

Issues for determination

8. Having looked at the Applicant's pleadings the sole issue for determination is whether the Plaintiff/Applicant's application is merited.

Determination

9. It is settled law that a Plaintiff has an absolute right to discontinue his suit at any stage of the proceedings before judgment. This right that has been given statutory recognition through Order 25 of the *Civil Procedure Rules*, 2010.
10. The Court of Appeal in the case of *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* {2015} eKLR stated that:

“As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *Abayomi Babatunde v pan Atlantic Shipping & Transport Agencies Ltd & others*, SC 154/2002 identified those circumstances to include where:



- i. a plaintiff realizes 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 could 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."

11. The Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* SC App. No. 16 of 2014 held that:

“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.”

12. It is useful to reproduce the provisions of Order 25 of the *Civil Procedure Rules*, 2010 which provides for withdrawal, discontinuance and adjustment of suits. It reads as follows: -

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.
 - (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.

13. In *Beijing Industrial Designing & Research Institute -vs- Lagoon Development Ltd* (*supra*) the court commenting on the above provision, elaborated the three circumstances contemplated under the above rule. It stated that: -

“The above provision presents three clear scenarios regarding discontinuance of suits 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 filling a written consent of all the 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 thereof. 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 as 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 suggests that it is not a mere formality". (my emphasis)

14. As acknowledged by the above cited decisions, the right provided under Order 25 Rules 1 & 2 (1) is not fettered by any conditions; it is an absolute right which a plaintiff can exercise at his will at any time before the judgment is delivered. In *Allah Baksh v Niamat Ali* (1892) All WN 53(1) the court described the right as "absolute" and capable of being exercised "without any permission from the court'." However, under the third scenario as explained above, withdrawal requires permission of the court.
15. In the instant suit, the Applicant's argument is that the suit was withdrawn by his Advocate without his consent and or authority. He therefore prays that the withdrawal be set aside.
16. In *Kinuthia Eston Maina & 3 Others v Coffee Board of Kenya* (2015) eKLR it was held that:

“a duly instructed advocates has an implied general authority to compromise and settle a suit. A client cannot avail himself of any limitation by him of the implied authority unless such limitation was brought to the notice of the other side.”
17. The Court of Appeal in *M & E. Consulting Engineers Limited v Lake Basin Development Authority & Another* (2015) eKLR held *inter alia* that:

“a duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side. The court also held that an advocate has general authority to compromise on behalf of his client, as long as he is acting bona fide and not contrary to express negative direction. In the absence of proof of any express negative direction, the order shall be binding.”
18. Justice Mativo J (as he then was) too while handling a similar matter and citing the above cases in the matter of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR stated that:

“.... an advocate in the course of conducting the cause is clothed with authority to compromise a suit in which he has been retained as counsel. Two, express authority is not needed for a counsel to enter into a compromise within the scope of the suit. Three, where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. Four, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, he has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client. Five, the authority to compromise is implicit in the appointment unless it is expressly countermanded, and that, whether there is express authority conferred by the power or not. From the above principles, it is my view that the argument that the advocate had no authority to withdraw the case is legally frail and unsustainable. In any event, it was an afterthought coming as it does after the Supreme Court reversed the Court of Appeal decision.”



19. It is also notable that the withdrawal in this case was done orally in court and in the presence of the Applicant. The Plaintiff/Applicant did not object the withdrawal.
20. From the foregoing, the Advocate for the Plaintiff had the general authority to withdraw and or compromise the suit by virtue of his appointment as the Advocate for the Plaintiff in the conduct of this matter. The withdrawal took effect immediately after the court permitted.
21. From my reading of Order 25 there is no provision permitting reinstatement of a suit once the withdrawal has taken effect. The Order instead contemplates the filing of a subsequent suit.
22. In view of my analysis of the facts and the law herein above, it is my finding that the Plaintiff/Applicant's application is not merited. It is hereby dismissed but with no orders as to costs. This suit stands withdrawn as per the orders made on 3rd July, 2023.
23. The Plaintiff is at liberty to file a subsequent suit. A withdrawal of a suit does not bar the filing of a subsequent suit based on the same cause of action.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF MARCH, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Lubulellah for the Plaintiff/Applicant

No Appearance for the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

